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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS CASTILLO, Defendant and Appellant.	B276773 Los Angeles County Super. Ct. No. VA121201

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed and remanded with instructions.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Shawn McGahey Webb, and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Jesus Castillo of two counts of attempted murder. The jury did not find the crimes to be willful, deliberate, and premeditated. The jury found true allegations that Castillo personally and intentionally discharged a firearm causing great bodily injury to victim Jose Lopez, that he personally and intentionally discharged a firearm in the attempted murder of victim Oscar Lopez, and that he committed the crimes for the benefit of or in association with a criminal street gang. Castillo challenges his conviction on a number of grounds. We find no error and therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

In July 2011, Jose Lopez was living with his parents on Violetta Avenue in Hawaiian Gardens. Jose has two brothers, Oscar and Eduardo.[1] Jose had known defendant Jesus Castillo for about five years. Castillo had lived across the street with his sister and her husband Manuel. About six months earlier, Castillo had moved to a residence behind the Lopez home. Once he moved to the house in back of the Lopez family's, Castillo jumped over the block wall separating the properties every day and walked through the Lopezes' yard to cross the street to his sister's house. Castillo's friend Roberto Estrada was often with him, as were other people. The Lopez family called the police several times about Castillo and Estrada cutting through their yard, and Jose spoke with Estrada about the problem, but to no avail.

On July 1, 2011, Jose and his brothers learned that Castillo and Estrada had thrown a bottle at their father. The three Lopez

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[1] For clarity, we refer to the Lopez brothers by their first names. We mean no disrespect.

brothers were in their garage drinking beer. Jose and Oscar decided to go across the street and speak with Manuel, Castillo's brother-in-law. Manuel was outside by his gate; Castillo and Estrada were behind him. A third man, Alexis Uribe, was with them. The Lopez brothers asked Manuel to talk to Castillo and Estrada about jumping the fence. Castillo, Estrada, and Uribe began to "mak[e] fun" of Jose and Oscar, calling them "faggots" and "paisas."[2] Jose had heard Castillo and Estrada claim the Hawaiian Gardens gang. Jose had seen Castillo and Estrada hanging out with gang members with shaved heads and tattoos.

Jose and Oscar left Manuel's house and returned to their garage. Castillo, Estrada, and Uribe left, then returned an hour or two later. The threesome continued to mock the Lopez brothers, making hand signs, calling them names, and laughing at them. The Lopez brothers got in their car to go to the liquor store. When they returned about 20 minutes later, Castillo and his companions were on the sidewalk in front of Manuel's house. The Lopez brothers parked and got out of the car. Again, Castillo, Estrada, and Uribe began to mock the Lopez brothers, calling them names, making hand signs, and claiming Hawaiian Gardens. Estrada began to challenge Oscar, saying, "Let's get down," and raising his fists in a fighting position. Estrada and Oscar walked toward each other in the street. Oscar hit Estrada in the face. Uribe moved from the sidewalk into the street, going toward Oscar with his fists up. Jose then ran toward Uribe and hit him. Neither Jose nor Oscar had any weapons. Oscar started

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[2] According to Jose, the word "paisa" is "an insult on the streets" that refers to a Mexican immigrant who does not speak English.

walking toward Castillo, who was approaching the Lopez brothers. Jose was behind Oscar. Oscar and Jose were "going after" Castillo, "to go fight with him." Castillo had not participated in the fighting up to that point. Oscar then shouted at Jose "they're shooting." Jose heard about six gunshots. Castillo fired from about five feet away. Jose lost feeling in his legs and fell to the ground. Castillo and his two companions ran off.

Sheriff's deputies arrived at the scene. Deputy Jeffrey Doke, one of the first to arrive, saw Jose lying in the street and Oscar "standing there yelling for help," "frantically yelling for help." To Doke, Oscar seemed "panicked," "scared," "real excited," "frantic," and "nervous." Oscar told Doke "that someone had shot at them." Oscar said he and his brother had fought with three Hispanic men and that he knew two of them. Oscar told Doke Castillo had yelled, "Varrio Hawaiian Gardens Ese," before firing his gun. Oscar showed Doke two bullet holes in his shirt.

Detective Kasey Woodruff also spoke with Oscar at the scene. To Woodruff, Oscar seemed "a little panicked." Once Oscar told Woodruff that he knew who the perpetrators were, Woodruff had Oscar taken to the station to be interviewed.

Paramedics arrived, treated Jose at the scene, then took him to the hospital. Jose stayed in the hospital about a month, then spent two months in a rehabilitation facility. At the time of trial nearly five years later, Jose still had no feeling in his left leg; he limps and needs a brace to walk.

After Jose and Eduardo identified Castillo and Estrada in photographic lineups, Woodruff's partner put the two into the wants system. Castillo and Estrada eventually were apprehended in Tulare County. While in Tulare County, Castillo

committed another crime. He was convicted and sentenced to life in prison in that case.

The case proceeded to trial in May 2016. Los Angeles County Sheriff's Department Detective Esteban Soliz testified as the prosecution's gang expert. Soliz testified Castillo has Hawaiian Gardens gang tattoos, including "H" and "G" tattoos on his cheeks. Castillo also has an "H" and a "G" on his abdomen and a Green Bay Packers insignia with a "G," used by the Hawaiian Gardens gang, on the back of his forearm. Based on these tattoos, Soliz said in his opinion Castillo was "an active gang member with Hawaiian Gardens." Soliz also testified that Estrada has gang tattoos and, in his opinion, is a Hawaiian Gardens gang member.

Castillo testified on his own behalf. He admitted he fired a nine-millimeter at Oscar and Jose on July 1, 2011. When asked why, he answered, "Scared." Castillo said he had been at his sister's house that day, in the garage with Estrada and Uribe "getting high" on methamphetamine. Castillo said the three were on their way to his house "when we ran across Oscar and Jose, who decided to confront us about jumping over the gate." Castillo testified, "We said, 'Okay. It's fine.' They were upset. We were not so upset. . . . When we turned away and decided to walk away, by the time I turned around [Jose was] already punching on Uribe." Castillo said Uribe did not fight back. Then Oscar and Jose "walked towards me. At that time is when I did feel scared at the time, so I reacted, pulled out the gun, fired four shots. And I ran home." Castillo testified he never saw Oscar hit Estrada.

Castillo said he had the gun "for protection . . . [against] enemies," "rival gangs," but he had never fired it before that day.

Castillo testified he was a member of the Hawaiian Gardens gang at the time with the moniker "Chuey" but by 2016 was "a dropout." Castillo said he had thrown gang signs "in the past" at rival gang members, but he did not throw gang signs at Oscar and Jose that day. Castillo denied having called Oscar and Jose names.

On cross-examination, Castillo admitted he had told detectives that he was only coming out of his sister's house, that he was high on meth, that he did not have a gun, and that only Oscar was coming at him while Jose was still fighting Uribe. Castillo admitted he never told police, "[L]ook, two guys attempted to attack me." Castillo also admitted that neither Oscar nor Jose had a weapon. When asked by the prosecutor, "You, yourself, . . . elevated the level of force?" Castillo answered, "Yes."

The jury found Castillo guilty of the attempted murder of Jose and Oscar. The jury found the allegation that the attempted murders were committed willfully, deliberately, and with premeditation to be not true. The jury found the gang allegation true as to both counts. It also found true allegations that Castillo personally and intentionally discharged a firearm causing great bodily injury to Jose, and personally and intentionally discharged a firearm in the attempted murder of Oscar.

The court sentenced Castillo to 40 years to life in the state prison, to be served concurrently with his life sentence in his Tulare County case.

CASTILLO'S CONTENTIONS

Castillo raises a number of issues on appeal. First, he contends the trial court should have modified CALCRIM No. 3472 on self-defense and that, in any event, the jury's rejection of

Castillo's self-defense claim is not supported by substantial evidence. Second, he argues the trial court should have modified CALCRIM No. 625 to permit the jury to consider Castillo's methamphetamine intoxication on the issue of imperfect self-defense. Third, he asserts the admission of Oscar's statements to Deputy Doke just after the shooting violated his confrontation clause rights. Fourth, he contends the trial court should have dismissed two jurors who heard another juror make comments about the evidence. Fifth, he asks us independently to review in camera proceedings to determine if Castillo's statutory and *Brady*[3] rights to discovery were violated. Sixth, he argues cumulative error requires reversal of his conviction. Finally, Castillo requests a limited remand under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) so he can make a record of mitigating factors for a future youth offender parole hearing. We address each contention in turn.

DISCUSSION

1. The trial court did not err in instructing the jury on contrived self-defense, and substantial evidence supports the jury's determination that Castillo did not act in actual or imperfect self-defense

a. *The instructions and closing arguments*

As noted, Castillo admitted shooting at the Lopez brothers but, he said, he acted in self-defense. At its jury instruction conference with counsel, the trial court stated it would give CALCRIM Nos. 3470, 3472, and 3474. The court also said it would give CALCRIM No. 604, "Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included

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[3] *Brady v. Maryland* (1963) 373 U.S. 83.

Offense." Castillo's trial counsel did not object to any of these nor did he request any additional instructions. The court read those four instructions to the jury, along with all of the other applicable instructions, including CALCRIM No. 200. That instruction tells jurors that some instructions may not apply depending on their factual findings, that the court is not suggesting anything about the facts, and that jurors should follow the instructions that apply to the facts as the jurors find them.

In his closing argument, the prosecutor—after discussing the elements of the crime and the respective credibility of the Lopez witnesses and Castillo—noted Castillo and his companions were "provoking, insulting, trying to instigate something with these individuals." The prosecutor argued Castillo was backing up Estrada, his fellow gang member. The prosecutor continued, "And so the question is, is he doing it because of self-defense or did he do it because he was engaging in this provocation early on? And so I will submit to you he was in it from the get-go. Whatever happens, he's there to back up his homeys and he's there to inflict damage, especially when one of your homeys has been hit in the face."

The district attorney turned to the jury instructions, quoting from CALCRIM No. 3470: "The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense." The prosecutor argued Castillo, by "pull[ing] out the ultimate weapon, a firearm," at a fistfight, "elevated the force" and then became the aggressor. The prosecutor then moved on to CALCRIM No. 3472, arguing that because Castillo, Estrada, and Uribe were "seeking to fight,"

"hurling the insults," and "issuing this challenge with these gang signs," "they were engaged in provocation" and accordingly could not "later say self-defense."

Castillo's counsel, in closing, did not discuss CALCRIM No. 3472. He played part of the recording of Jose's interview by detectives in which Jose said he and Oscar went after Castillo: "We tried to go grab Jesus because I don't know what he was doing. He was like folding a bandana or whatever." Defense counsel reminded the jurors the People had to prove beyond a reasonable doubt that Castillo "didn't have any reason to be afraid for his safety." Counsel said, "Oscar . . . started the whole thing," and Castillo could see "two of his friends [were] down" and Oscar and Jose "coming at him." Castillo's attorney noted Castillo was high on methamphetamine. Referring again to Oscar and Jose, counsel said, "And then they're out at him. . . . And he pulls [his gun] out and shoots, yes, to protect himself."

In rebuttal, the prosecutor repeated his argument that "if you provoke this from the get-go, you can't claim [self-defense]."

b. ***The trial court did not err in giving CALCRIM No. 3472 as written***

Castillo contends the trial court was required to modify CALCRIM No. 3472, the "contrived self-defense" instruction. The instruction, as given, stated, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Castillo does not explain how the court should have modified the instruction. Our Supreme Court has held that the instruction's predecessor, CALJIC No. 5.55, correctly stated the law. (*People v. Enraca* (2012) 53 Cal.4th 735, 761 ["the doctrines of perfect and imperfect self-defense cannot be invoked by a defendant whose own

wrongful conduct created the circumstances in which the adversary's attack was legally justified"]; see also *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1332-1334 (*Eulian*) [CALCRIM No. 3472 "is a correct statement of law"].)

Castillo relies on *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*). There, two justices of the Fourth District Court of Appeal concluded CALCRIM No. 3472 misstated the law under the facts of that case. In *Ramirez*, three gang members decided to go and confront rival gang members who had been harassing them, driving by their house and shooting at it. At trial, some witnesses testified a rival gang member threw the first punch; others said the three defendants "confronted the [rival] group aggressively," issuing verbal challenges. (*Ramirez*, at p. 944.) One defendant, Armando, testified his companions were "each double-teamed by [rival gang] assailants" and it " 'looked like' " the victim, Rivera, a rival gang member, " 'had something black in his hand' " that, as he raised it, " 'looked like a gun.' " Armando pulled out his gun and shot Rivera. "Armando claimed he reacted in self-defense and to defend his companions." (*Id.* at p. 945.)

The appellate court concluded CALCRIM No. 3472, coupled with the prosecutor's "repeated misstatement of the law" in his closing arguments, misled the jury into believing that Armando had no right to self-defense even after his adversary, Rivera, "sudden[ly] escalat[ed] [the confrontation] to deadly violence." (*Ramirez*, *supra*, 233 Cal.App.4th at p. 945.) The third justice on the *Ramirez* panel dissented. In his view, the trial court properly instructed the jury and substantial evidence showed Armando "not only provoked the fistfight with the rival gang members[;] he specifically intended, through the provoked fistfight, to have the

contrived opportunity to use further force in the ensuing fracas." (*Id*. at p. 956.)

Our colleagues in Division Five of this court considered the meaning and scope of *Ramirez* in *Eulian*. There, a shouting match between the defendant and the victim escalated. The victim slapped the defendant, raised her leg to kick him, and threw cat food at him. The defendant then grabbed the victim, yanked her from her car, threw her to the ground, and punched her several times. (*Eulian*, *supra*, 247 Cal.App.4th at pp. 1327-1328.) The jury convicted Eulian of battery with serious bodily injury. (*Id*. at pp. 1325-1326.) On appeal, Eulian argued "it was prejudicial error to instruct the jury [with] CALCRIM No. 3472," citing *Ramirez*. (*Eulian*, at p. 1326.) The Court of Appeal rejected that contention and affirmed Eulian's conviction.

Justice Kriegler wrote, "Although '[t]he instruction misstates the law' according to *Ramirez*, [citation], we believe the opposite is true. CALCRIM No. 3472 is generally a correct statement of law, which might require modification in the rare case in which a defendant intended to provoke only a nondeadly confrontation and the victim responds with deadly force." (*Eulian*, *supra*, 247 Cal.App.4th at p. 1334.)[4]

This is not that rare case. Here, the People presented substantial evidence that Castillo and his fellow gang members mocked the Lopez brothers (who were not gang members), provoking a fistfight, initially between Estrada and Oscar.

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[4] The Bench Notes for CALCRIM No. 3472 now instruct trial courts in precisely this language, citing both *Eulian* and *Ramirez*. (Judicial Council of Cal. Crim. Jury Instns. (2018) Bench Notes (Bench Notes) to CALCRIM No. 3472, p. 1007.)

Castillo was not fighting anyone. According to his own testimony, when Oscar and Jose began to approach him, he pulled out his gun and fired at least four shots. This is not a case in which the *victims* resorted to deadly force, and Castillo then used deadly force in response. The trial court properly instructed the jury with CALCRIM No. 3470; that instruction told the jurors Castillo was allowed to use no more force than necessary and that, if he used more force than was reasonable, he did not act in lawful self-defense. The prosecutor argued this point in his closing:

> "You are going to get the self-defense instructions. And the judge—you will see what is required for self-defense. . . . But where those instructions fall flat, ladies and gentlemen, are in the following two slides [apparently referring to a PowerPoint presentation]: 1., the judge instructs you 'the defendant is only entitled to use the amount of force that a reasonable person would believe is necessary in that same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense.' What does that mean? Here, you have fisticuffs because that's what it was. Jose—Oscar Lopez going to Roberto Estrada and throwing one punch. Roberto Estrada is not completely knocked out per Jose Lopez. He's kind of shocked. He's not completely disabled, right? Mr. Uribe gets a quick one-two to himself. Again, fisticuffs. . . . So even then you still have three gang members on two, but again we are talking about fists. And Mr. Castillo has just pulled out the ultimate weapon, a firearm. Fists can't compete with firearms, ladies and gentlemen. He has elevated the force. And because of that,

because he has elevated the force, you don't get self-defense because now you are the aggressor."

The prosecutor's argument harkened back to his cross-examination of Castillo in which Castillo admitted his devotion to his gang and conceded he had brought a gun to a fistfight. The questioning included this exchange:

"[THE PROSECUTOR]: You are using a weapon, a firearm, on two guys who have no weapons?

"[CASTILLO]: Yes.

"[THE PROSECUTOR]: You, yourself, have elevated the level of force?

"[CASTILLO]: Yes.

"[THE PROSECUTOR]: Right? Because you are now bringing a gun to what has been a fistfight?

"[CASTILLO]: Yes."

While the prosecutor did argue in his closing that Castillo was not entitled to claim self-defense because he, Estrada, and Uribe provoked the fistfight by mocking the Lopez brothers, we conclude the trial court properly instructed the jury in light of the specific facts and circumstances of this case.[5] While the Lopez

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[5] Castillo also contends the trial court's failure to give CALCRIM No. 3471 "exacerbated" the court's "error." That instruction addresses situations in which the defendant engaged in mutual combat or was the initial aggressor who started the fight. Neither the prosecutor nor Castillo's defense attorney asked the court to give that instruction. The court nevertheless has a sua sponte duty to give the instruction "if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case." (Bench Notes, *supra*, to CALCRIM No. 3471, p. 1005.) While, again, the evidence showed and the prosecutor

brothers may have been approaching Castillo to fight with him, they did not initiate the use of deadly force, and substantial evidence supports the jury's verdict that Castillo, by escalating the level of force beyond what was reasonable and necessary, did not act in lawful self-defense.

c. ***Substantial evidence supports the jury's rejection of Castillo's claim of self-defense***

Castillo also contends no reasonable jury could have concluded he did not act in complete ("perfect") or imperfect self-defense. When determining whether the evidence was sufficient to sustain a conviction, we " ' "review the whole record in the light most favorable to the judgment below to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations]." ' " (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence in support of the judgment. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " ' "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

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argued that the threesome's verbal taunts of the Lopez brothers, and Estrada's invitation to Oscar to "get down," provoked the fistfight, there was no evidence that Castillo hit anyone or that he engaged in mutual combat. Instead, the evidence was that, as the Lopezes began to approach him to fight him, he pulled out his gun and fired.

As we have discussed, substantial evidence supports the jury's verdict. In finding Castillo guilty of attempted murder, the jury implicitly rejected Castillo's claims of both complete and imperfect self-defense. The jury listened to Castillo's testimony, on direct and cross-examination, and judged his credibility. It was undisputed that neither of the Lopez brothers had a weapon of any kind. Castillo fired his nine-millimeter at the brothers from about five feet away. The jury reasonably could find an intent to kill from these facts. The jury also reasonably could find that Castillo escalated the level of force beyond what was reasonable in a fistfight and that he did not sincerely believe in the need to defend himself when he shot at the Lopez brothers at close range.

2. **Evidence of Castillo's voluntary intoxication was not admissible on the issue of imperfect self-defense**

As noted, Castillo testified he was high on meth when he shot at the Lopez brothers. The trial court instructed the jury with CALCRIM No. 625, "Voluntary Intoxication: Effects on Homicide Crimes." Castillo contends this instruction—which barred jurors from considering Castillo's intoxication on the issue of imperfect self defense—was error. Castillo relies on the Sixth District Court of Appeal's decision in *People v. Soto* (2016) 248 Cal.App.4th 884 (*Soto*). However, as Castillo acknowledges in a letter submitted on May 4, 2018, on April 30, 2018, our Supreme Court reversed the Court of Appeal's decision in *Soto*. (4 Cal.5th 968.)

In that case, the defendant Soto killed the victim in a knife fight. Soto testified he had been smoking methamphetamine all day. The trial court instructed the jury with CALCRIM No. 625. On appeal, Soto argued the instruction "erroneously prohibited

the jury from considering evidence of voluntary intoxication on the question of whether he believed he needed to act in self-defense," permitting the jury to consider his intoxication only on the issue "of whether [he] intended to kill." (*Soto*, *supra*, 4 Cal.5th at pp. 970, 973.) The Supreme Court rejected that contention. The court noted that Penal Code section 29.4 "prohibits evidence of voluntary intoxication to prove that defendant did not harbor implied malice . . . because he actually but unreasonably believed in the need to act in self-defense." (*Soto*, at p. 978.) The court concluded, "The Legislature has decided, for policy reasons, that evidence of voluntary intoxication is irrelevant to proof of certain mental states. The Legislature may validly make that policy decision." (*Id.* at p. 981.) For those reasons, the court held, the trial court in *Soto* "correctly instructed the jury [with CALCRIM No. 625] on how it could consider defendant's evidence of voluntary intoxication." (*Ibid.*)

Accordingly, the trial court here did not err by giving CALCRIM No. 625 as written.

3. **The admission of Deputy Doke's testimony about Oscar's statements just after the shooting did not violate Castillo's Confrontation Clause rights**

Sometime between the shooting in July 2011 and the trial in May 2016, Oscar Lopez moved to Mexico. Accordingly, he did not testify at Castillo's preliminary hearing or trial.[6] As noted,

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[6] Castillo states that although "[Oscar] was in Mexico, there was no showing he was actually unavailable." Castillo's trial counsel objected to Deputy Doke's testimony on hearsay grounds generally, but he never asserted that Oscar was available, nor did he ask for a "due diligence" hearing under Evidence Code section

the trial court permitted first responder Deputy Doke to testify about Oscar's demeanor and his statements to the deputy.

Doke testified he spoke with Oscar first as, or just after, Oscar was yelling for help while standing over his brother, who was lying on the ground, and then again "within just a few minutes," "real quick, one, two minutes, couple of minutes" later. Doke said Oscar was "absolutely" still in an excited state and panicked during the second conversation. In response to defense counsel's repeated hearsay objections, the court spoke with counsel at sidebar. The court noted Oscar's statements were "within minutes of when [Doke] first sees him and it's still at the scene. And it's when his brother has just been shot. And he actually based on the circumstances says it looks like he's been shot as well . . . . That's based on all the testimony. He was there. He was ahead of his brother, who was shot, and he just saw his brother and he's at the time he was yelling for help. So based on that, it appears to me it's a spontaneous contemporaneous statement close in time."

Castillo implicitly concedes that Oscar's frantic, frightened statements to Doke qualified as spontaneous declarations under Evidence Code section 1240. But he argues Doke's testimony as to Oscar's statements violated his Sixth Amendment rights under *Crawford v. Washington* (2004) 541 U.S. 36. Castillo contends Doke was not asking Oscar what happened "during the shooting

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240 before or during trial. In any event, the evidence that Oscar had left California for Mexico was uncontroverted; thus he was beyond the court's power to compel his attendance. (See Evid. Code, § 240, subd. (a)(4).)

to address an ongoing emergency" within the meaning of *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*). We disagree.[7]

Doke was not specifically asked—nor did he specifically testify—whether he asked Oscar "what happened?" or whether Oscar, on his own, began to tell him. For our purposes, it does not matter. An assailant, accompanied by two other men, had shot the victim a number of times, then had run away. Accordingly, Doke faced a very real "ongoing emergency" of three possible assailants on the loose with a nine-millimeter semiautomatic weapon.[8] Asking Oscar if he knew any of the assailants or if they said anything—if that is what Doke did—plainly could help Doke and his fellow officers identify and therefore apprehend the shooter.

Our facts are similar to those in *Michigan v. Bryant* (2011) 562 U.S. 344. There, officers were called to the scene of a shooting. Police found the wounded victim lying on the ground. They asked him what had happened and who had shot him. (*Id.* at p. 349.) The victim answered that " 'Rick' " (defendant Bryant) had shot him, and he described the shooting. The conversation lasted five to 10 minutes. The Supreme Court held the " 'primary purpose' " of officers' interrogation of the victim was " 'to enable

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[7] Castillo also contends Oscar was the sole witness who said he yelled "Varrio Hawaiian Gardens Ese" before he shot at the Lopez brothers. However, Jose—who testified at trial and was subject to cross-examination—testified that Castillo and Estrada had claimed Hawaiian Gardens in the past and that they threw hand signs and claimed their gang on the afternoon and evening in question.

[8] Deputy Gary Goodban testified he found four 9-millimeter bullet casings at the scene.

police assistance to meet an ongoing emergency' " under *Davis*. (*Bryant*, at p. 349.) Justice Sotomayor noted, when police arrived and found the wounded victim, they did not know where the perpetrator was or whether he was still armed. (*Id*. at p. 372.) Justice Sotomayor also observed that the officers' conversation with the victim occurred in a public place, in an informal setting, "at or near the scene of the crime versus at a police station." (*Id.* at p. 360.) (See also *People v. Chism* (2014) 58 Cal.4th 1266, 1288-1289 [witness's statements to first responder describing suspects and relating events shortly after shooting were not testimonial; conversation took place outside store where shooting had just happened; reasonable for officer "to believe the suspects, one of whom presumably was still armed with a gun, remained at large and posed an immediate threat to officers responding to the shooting and to the public"]; *People v. Romero* (2008) 44 Cal.4th 386, 420-422 [statements by "agitated victim" of ax attack were not testimonial, as they "provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators"; "same is true of the statements pertaining to identification"]; *People v. Nelson* (2010) 190 Cal.App.4th 1453, 1467 [shooting victim's description of events to officers answering 911 call and identification to firefighter of defendant as assailant were not testimonial; though shooting victim "was no longer in immediate danger from the shooter, there was still a possibility that the unidentified shooter could pose an immediate threat to other persons"].)

In short, Oscar's statements to Deputy Doke were not testimonial and therefore their admission at trial did not violate Castillo's confrontation clause rights.

4. **The trial court did not violate Castillo's fair trial rights by declining to discharge two jurors or declare a mistrial**

a. ***Two jurors report overheard remarks and the trial court investigates***

The court tried this case with dual juries, the "red jury" for Castillo and the "blue jury" for Estrada. During the defense case, after Castillo began testifying, two "blue" jurors returned from the lunch recess and told the judge they had heard three white, male, elderly jurors talking about the case in the hallway. The court questioned the two reporting jurors separately. Blue Juror No. 2 told the court, "The three gentlemen out there were talking about the case, about the tattoos, mention[ed] Hawaiian Gardens. They were discussing they had preconceived notions." When asked exactly what the men had said, Blue Juror No. 2 replied, "Something about 'you know he's not out of the gang.' " The juror continued, "[T]hey were discussing it amongst the three of them." The juror said one man made that statement and the other two "kind of both agree[ed]. I don't know. I think they were nodding under their breath." Blue Juror No. 11 told the court, "The three of them were having a discussion amongst themselves and they were talking about the case." The juror said she believed the conversing jurors had made up their minds based on Castillo's appearance. (As noted, Castillo has gang tattoos on his face.) The juror continued, "One of them . . . in particular he was just saying how he shouldn't have got the tattoos and talking about Hawaiian Gardens gang. . . . I felt he already came to a

conclusion." Blue Juror No. 11 told the court the offending juror had *not* said that Castillo was guilty. Blue Juror No. 11 said she was upset because her son has tattoos "and he's judged all the time based on how he looks and he's not a gang member." The court permitted counsel to ask questions of Blue Jurors Nos. 2 and 11. Based on further questioning, the court determined the juror who had been making these statements in the hallway was Red Juror No. 12.

The court then questioned Red Juror No. 12. He denied having spoken with other jurors about the case. Juror No. 12 said, "We were talking about the stock market and things like that." The juror denied having talked about tattoos or the Hawaiian Gardens gang. Next, the judge questioned Blue Jury Alternate No. 2. When asked if the three jurors had talked about the facts of the case, the juror responded, "Not real facts about it. Just kind of complaining about the case. . . . Just ['cause] it's going to take so long." Blue Jury Alternate No. 2 said there had been no mention of tattoos or the Hawaiian Gardens gang. The judge asked, "So no one mentioned anything about tattoos or about whether they believe Mr. Castillo had been in a gang anymore?" The juror answered, "Not that I recall, no."

The court next questioned Red Juror No. 11. He said there had been no talk about the facts of the case, tattoos, the Hawaiian Gardens gang, or the credibility of Castillo's testimony that he had left the gang. The court asked, "So . . . what was the talk about when you were talking out there?" Red Juror No. 11 responded, "I don't remember talking to who? Who was I supposed to talk to?" The court said, "No. 12 here on the same jury." Juror No. 11 responded, "I just talk about old times where they used to have cars, stuff like that mostly." He said he did not

recall talking to Blue Jury Alternate No. 2 about anything. The court asked, "So no one talked to you about the facts of the case?" The juror answered, "I didn't hear anybody talk about it, no."

After discussing the proposed process with counsel, the court then questioned each remaining juror and alternate juror individually.[9] Red Jurors Nos. 1, 2, 3, 4, 5, 7, 8, 9, and 10 and Alternate Jurors Nos. 1 and 2 said they had not heard anyone talking about the facts of the case, tattoos, or Hawaiian Gardens, nor had they heard anyone imply that he already had made up his mind. Three jurors said they heard the men talking about cars. Several jurors said they had been down the hall or listening to a podcast.

Red Juror No. 6, when asked if he had heard any jurors talking about the facts of the case, answered, "Not really, no." The court asked what that meant. The juror said, "We were just—one guy. We were talking, wondered if it's going to get over today, but nothing as far as any of the facts or any of that kind of stuff. Just what's going to happen, you know." Apparently referring to Red Juror No. 12, Juror No. 6 continued, "He was just, you know, we were kind of wondering if it's going to go today or if it's going to go tomorrow. And we are all kind of questioning the two-jury thing. Don't know anything about it and you wonder what that's all about. And no one really seems to know anything." The court responded, "You are not supposed to know anything about that, so that's probably why." The court asked if

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[9] The court questioned each of the Blue Jury jurors individually as well. Blue Jurors Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, and 12 and Alternate Juror No. 1 all confirmed they did not hear anyone talking about the case.

No. 12 had said anything about Hawaiian Gardens, tattoos, or not believing Castillo's testimony. Juror No. 6 said no. When asked who was talking about cars, Juror No. 6 said he had talked about his 1964 Chevelle, then the other juror (again, apparently, No. 12) had talked about a 1969 Ford pickup. When the court again asked if Juror No. 12 had said anything about tattoos, Juror No. 6 answered, "He says, 'I wonder how come if he is not in a gang anymore why—you know you can get tattoos taken off. If he is in that neutral whatever where he's at now[10], why doesn't he—why don't they take their gang signs off' or something like that. I don't know if they do that in prison or not. And how come—wonder why he got tattoos in 2013. 'I think if he's in jail how come he's getting Hawaiian Gardens tattoos later.' " When asked if any other jurors commented, Juror No. 6 said, "[T]here was another gentleman there, but he was just kind of sitting on the same bench with us." Juror No. 6 then said his son-in-law had a good friend who was a bailiff in Downey and the juror had asked his son-in-law if he had ever heard of a two-jury trial. The juror continued, "And he says, 'Yeah, Bob mentioned they have those once in a while,' but he didn't know why or elaborate on it or anything. . . . But that was the end of the conversation."

The court admonished Juror No. 6 and instructed him not to "ask any more questions of anyone regarding the dual jury or to speculate as to why . . . ." Both defense attorneys told the judge they had no questions for Juror No. 6.

After questioning all of the jurors, the court told counsel it was inclined to dismiss Juror No. 12 because he had violated a

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10 Castillo testified he was "in protective custody" in state prison.

court order and was "not being honest" in denying having made statements. The court continued, "My feeling is to excuse him, not excuse the jurors who were with him because I think they for the most part were talking about other things and never contributed to that. Even by Juror [No.] 11's response, they didn't make any comments to his comments, just sort of nodding, but . . . I think that's a sort of polite [response] even if you hear some things you are not supposed to hear, it's almost as if they want to disassociate themselves, but they didn't say anything, so I don't think they were engaging in misconduct. . . . And the entire, almost the entire jury did not hear that. I think Juror No. 6 was the only one that heard that. Jurors [No.] 6, [Blue Jury Alternate No.] 2, and [No.] 11 were the only ones who heard those kinds of comments. I think the rest of the jury, including . . . [Red] Juror No. 6 . . . appear to be able to be fair and impartial to both sides." Castillo's counsel expressed a concern about Juror No. 11. The court listed the four jurors in question: Red Jurors Nos. 6, 11, and 12 and Blue Jury Alternate No. 2. Counsel said, "Right. So at the very least, I think they should also be dismissed for violating a court order." The court responded, "For listening?" Counsel said he was "concerned about the contamination" and he requested a mistrial. The court denied the motion. The court then replaced Red Juror No. 12 with an alternate and the trial proceeded.

b. ***Analysis***

" 'Misconduct by a juror . . . usually raises a rebuttable "presumption" of prejudice.' " (*People v. Loker* (2008) 44 Cal.4th 691, 746-747 (*Loker*), quoting *People v. Danks* (2004) 32 Cal.4th 269, 302 (*Danks*).) " 'If we conclude there was misconduct, we then consider whether the misconduct was prejudicial.' " (*Loker*,

at p. 747, quoting *Danks* at p. 303.) "The verdict will only be set aside if there appears to be a substantial likelihood of juror bias." (*Loker*, at p. 747.) "Whether prejudice arose from juror misconduct is a mixed question of law and fact. We review legal issues independently, and accept the trial court's factual findings if they are supported by substantial evidence." (*Ibid.*)

Before opening statements, the trial court instructed the jury, "[D]o not communicate about this case with anyone. Do not talk about this case with anyone, including your close loved ones, including each other and anyone that is outside in the hallway. If anyone tries to speak with you while you are out there waiting or downstairs or leaving the building or coming to the building, please do not talk to them about the facts of the case. Do not let them talk to you either. And let us know if someone does try to talk to you." By talking to two other jurors about Castillo's tattoos and gang membership, Red Juror No. 12 plainly violated the court's order. The court properly removed him. The court then conducted an extensive inquiry, questioning each member of both juries separately, even permitting counsel to question the jurors directly.[11] The trial court looked at, listened to, and judged the credibility of each of the jurors. While Red Juror No. 6 was not immediately forthcoming about what Juror No. 12 had said, he eventually gave the court a full account. Neither Juror No. 6 nor Juror No. 11 said anything in response to Juror No. 12's comments, nor did either of them express any views of their own about the tattoos or gang evidence. Having reviewed the entire

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[11] A court has no obligation to permit counsel to question jurors during an investigation of possible misconduct. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.)

record, and exercising our "independent judgment to determine whether any misconduct was prejudicial" (*People v. Dykes* (2009) 46 Cal.4th 731, 809), we conclude the trial court did not err in finding no substantial likelihood of juror bias. (Cf. *Loker*, *supra*, 44 Cal.4th at pp. 748-749 [jurors committed misconduct by discussing defendant's failure to testify; presumption of prejudice was rebutted by court's determination there was no substantial likelihood that defendant suffered actual harm].)

5. **Our independent review of the in camera hearing reveals no *Brady* or discovery violation**

On May 6, 2016, as jury selection was beginning, the trial court conducted an in camera proceeding (in two parts) with the deputy district attorney. The court ordered the transcript of the proceeding sealed. Castillo's appellate counsel—who has read the transcripts of the in camera—asserts "the information disclosed in the hearing was relevant and material to the defense." Castillo asks us independently to review the proceedings to determine if the trial court's decision not ordering disclosure violated Castillo's constitutional or statutory rights. We have done so. We conclude Castillo was not entitled to the information the prosecutor presented to the court during the in camera proceeding.

6. **We reject Castillo's cumulative error contention**

Castillo argues that the cumulative effect of all the errors he claims requires reversal. As discussed above, we have found no error in Castillo's trial. The "litmus test [in a cumulative error analysis] is whether the defendant received due process and a fair trial. Accordingly, we review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant

in their absence." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) We have done so, and conclude Castillo received a trial that was fair and comported with due process.

7. **Limited remand for *Franklin* hearing**

Castillo was 19 years old when he committed these crimes. The jury returned its verdicts on May 19, 2016, and the court sentenced Castillo on August 4, 2016. In the interim, on May 26, 2016, the California Supreme Court decided *Franklin, supra,* 63 Cal.4th 261. There, the court held that a youth offender, as defined in Penal Code section 3051, should be "given an adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth" for an eventual youth offender parole hearing. (*Franklin,* at p. 269.) The Attorney General argues here that Castillo had a sufficient opportunity to make a record for his parole hearing 25 years hence. The Attorney General notes Castillo's counsel mentioned his age and his methamphetamine use in asking for a concurrent sentence. But, as Castillo points out, Castillo's trial lawyer did not submit a sentencing memorandum or any documents or testimony regarding Castillo's character and circumstances. The record does not reflect whether the court received or considered a presentence report from the probation department. Given that *Franklin* had been decided only two months earlier and it is unclear whether Castillo's trial lawyer was aware of his right to present information relevant to an eventual youth offender parole hearing, we remand this case for the limited purpose of allowing Castillo "to put on the record the kinds of information [the statutes] deem relevant in a youth offender parole hearing." (*Id.* at p. 284.)

DISPOSITION

We affirm Castillo's conviction and sentence. We remand the case for the limited purpose of a *Franklin* hearing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.