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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MACARIO MORENO,

Defendant and Appellant.

B226210

(Los Angeles County  
Super. Ct. No. GA059877)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Affirmed.

Mark David Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Macario Moreno appeals from the judgment entered following a jury trial in which he was convicted of first degree murder, with gang and personal firearm-use findings. Defendant contends the trial court committed evidentiary and instructional error. We affirm.

### **BACKGROUND**

Robert C., who was 12, and Maudiel Aranda, who was 15, were friends. Aranda was a member of the Villa Boys Gang. In November of 2004 (date references pertain to 2004) Robert was present when Aranda and defendant engaged in an angry confrontation at Villa Park in Pasadena. Aranda backed away when defendant lifted his arms, revealing a gun tucked into his waistband. On a subsequent occasion, Robert and Aranda were walking and saw defendant across the street. Aranda and defendant argued. Defendant lifted a revolver from his waistband, and Robert persuaded Aranda to leave.

On the night of December 17, Robert and Aranda were walking on Villa Street in Pasadena when defendant drove past them in a long, dark car. Defendant turned north onto Summit Avenue, and Robert and Aranda did the same. Defendant parked his car in the driveway of his home. As Robert and Aranda walked along the sidewalk in front of defendant's home, defendant got out of his car, walked around to its passenger side, and reached into the car. Robert and Aranda stopped in front of a townhouse complex next door to defendant's house because Aranda was going inside to visit his friends. Defendant approached Aranda and asked him where he was from. Aranda replied, "Villa, Villa Street." Defendant responded, "VPR," drew his gun, and shot Aranda three times—twice in the chest and once in the arm. Aranda ran toward the entrance to the townhomes, then collapsed and died. Defendant returned to his car and drove away. Robert did not see anyone else get out of the car. Robert testified that the gun defendant used to shoot Aranda appeared to be the same revolver Robert had previously seen in defendant's possession.

Robert identified defendant at trial, and he had selected defendant's photograph from a photographic array on the night of the shooting. He testified that defendant had

something on his arm and hand, like tape or a glove or cast. Robert also identified the car defendant drove on the night of the shooting from a photograph of a car registered to defendant. The car was eventually recovered from the yard of the house where Marcos “Maniac” Flores and his brothers, all long-time members of the VPR gang, lived. The house was considered a VPR hangout.

Diana MacPherson owned and lived in one of the townhouses next door to defendant’s house. She had seen defendant around his family home for many years. She went out for a walk on the night of December 17 and saw defendant drive into his driveway. Defendant and a passenger got out of the car and ran. Defendant held a gun in his hand. MacPherson heard gunshots, but did not look back because she feared being shot. At trial, MacPherson was shown a photograph of Marcos Flores and testified she had never seen him before.

Joseph Cachuex was a member of the Raymond Avenue Crips gang who was living in MacPherson’s townhouse. In November, Cachuex had a hostile confrontation with defendant in which defendant asked Cachuex where he was from. Defendant then told Cachuex he was from VPR and that he ran the block. The two men ended up fighting in the street. On December 17, Cachuex was inside MacPherson’s townhouse with Daniel Duarte and Daniel Couch when he heard five shots. He ran out and saw his friend, Aranda, lying on the sidewalk. Cynthia Navarro came up to him and told Cachuex that the neighbor, “Champ,” had shot Aranda.

Daniel Duarte was in custody on a parole violation at the time he testified. He was a member of the Villa Boys gang. He visited the townhouse complex almost every day to see his friend Daniel Couch, who lived with MacPherson. Duarte was also Aranda’s friend. Duarte introduced himself to defendant a couple of months before Aranda was shot, and almost all of his contacts with defendant were cordial. Although Duarte told defendant he was a member of the Villa Boys gang, defendant initially did not claim any gang membership. Duarte also introduced Aranda and Cachuex to defendant. Duarte saw defendant with a gun on several occasions. Once, while he and defendant were

talking in front of defendant's house, defendant pulled out his gun and fired it in the air. On another occasion, they were talking and defendant showed his gun and offered to back Duarte up if they went to check on who was in an unfamiliar car parked up the street. Two or three weeks before Aranda was shot, defendant confronted Duarte as he left the home of his friend Julio, which was a few doors up from the townhouse complex. Defendant asked Duarte what he was doing in the neighborhood. Duarte replied that he was in his own neighborhood. Defendant said, "Fuck you. This is VPR." Duarte and defendant then fought. Duarte was impeached with two prior felony convictions: a 2006 auto theft and a 2007 burglary.

The prosecution's expert on Latino gangs in Pasadena, Pasadena Police Officer Andrea Perez, testified that the Villa Boys and VPR gangs were such mortal enemies that their members would assault or attempt to kill each other on sight. Perez knew that Aranda was a Villa Boys gang member, and she opined that defendant was a VPR gang member with a moniker of Champ. Defendant's home was in an area claimed by the Villa Boys gang as its territory. In response to a hypothetical question based on the prosecution's evidence at trial, Perez opined that the shooting of Aranda was committed for the benefit of the VPR gang. She testified that a VPR gang member would deem the presence of a member of a rival gang near the VPR member's home as a sign of disrespect and might assault or even kill the rival gang member.

Jail personnel recorded visits between defendant and his mother in 2005, and portions of three such recordings were translated into English and read at trial. During one visit, defendant's mother talked about her plan to locate "that little boy" by following him home from school. But she cautioned defendant that contact with the boy might go against defendant. Defendant responded, "Well, it's necessary to speak to him clearly." Defendant also suggested his mother speak to Jorge to see if anyone knew the boy's friends.

When defendant was arrested on December 20, he was wearing an elastic bandage wrapped around his right arm and hand. Defendant testified he had injured his hand at

work on December 15. Testimony by the custodian of records of a clinic that treated defendant and a radiologist employed by the Los Angeles County jail showed that defendant had fractured the pinky finger on his right hand. Defendant testified it hurt to bend his fingers, and the clinic placed a splint and elastic bandage on him that extended from the tips of his fingers to the middle of his forearm.

Defendant testified that he sold marijuana and cocaine, and on the night of December 17 he delivered marijuana to the home of Marcos Flores, then remained to hang out and drink with Flores. At some point they left in defendant's car, picked up Soldier and Gangster, and went to a liquor store. They then went to defendant's house to get more marijuana. Defendant parked in the driveway and got out. Flores and Soldier got out of the passenger side and ran up to Aranda in the street. Flores shot Aranda. Defendant did not see MacPherson, Robert, or anyone else around. Defendant left his car in Flores's yard, where the police eventually found it.

Defendant testified that he was not sure whether he was an actual member of the VPR gang. Flores and a VPR member called Bandit beat up defendant in November, but defendant did not know whether this meant he had been jumped into the gang or merely beaten. Defendant denied telling anyone he was a VPR member until after he was in jail. He admitted that he was called Champ before December 17. Defendant admitted he illegally owned a gun and had fired it in Duarte's presence. Defendant had met Aranda, but did not know he was a member of the Villa Boys gang. Defendant denied having any confrontations with Aranda, but admitted getting into a fight with Duarte. Defendant explained that he saw Duarte emerging from Julio's house and asked Julio why he had a Villa Boys gang member in his house, which was across the street from that of defendant's friend, Silent, who was a VPR gang member. Defendant admitted that if a member of the Villa Boys gang walked near the home of a VPR gang member, the VPR member might murder the Villa Boys member.

Cindy Navarro denied seeing the shooting and telling Cachuex that Champ shot Aranda. She heard arguing and gunshots and saw someone she could not recognize run away. She had never seen defendant before and did not know his moniker.

The investigating officer, Detective Broghamer, testified that he first heard of defendant's claim that Flores shot Aranda when defendant testified at his first trial (which resulted in a hung jury and a mistrial). Broghamer attempted to interview Flores, Gangster, and Soldier, but was unable to do so.

At defendant's retrial, the jury convicted defendant of first degree murder and returned true findings on allegations that defendant personally fired a gun, causing death or great bodily injury (Pen. Code, § 12022.53, subd. (d)) and the offense was committed 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 gang members. The court sentenced defendant to prison for 60 years to life.

## **DISCUSSION**

### **1. Stricken testimony by gang expert**

Officer Perez testified that she formed her opinion that defendant was a member of the VPR gang known as Champ based upon the statements of confidential reliable informants. In addition, witnesses Cachuex and Duarte had told her about incidents in which they had heard defendant admit he was a member of VPR. Perez refused to identify the confidential informants, but stated that one was a VPR gang member and the other was a Villa Boys gang associate.

Defendant asked the court to order Perez to disclose the identity of the confidential informants, but the court declined to do so.

On redirect, Perez testified that additional factors supporting her opinion that defendant was a member of the VPR gang included defendant leaving his car at a VPR gang hangout; proclaiming "VPR" before shooting or challenging a rival gang member to a fight; and attempting to intimidate witnesses against him.

A few days later, at defendant's request, the court agreed to strike Perez's testimony about the confidential informants. When Perez resumed testifying, the court informed and admonished the jury: "Earlier when Officer Perez testified she gave an opinion based upon information she received from a confidential reliable informant. That testimony, all of the testimony surrounding the use of the confidential reliable informant as it relates to her opinion as to defendant's gang membership is being stricken by the court. You may not consider that portion of her opinion for any purpose. However, you may evaluate and you must evaluate the remainder of her opinion and the basis therefor as part of your job as jurors."

Defendant contends that "Perez was merely a conduit for hearsay that, so long as the prosecution insisted on the confidentiality of the informant, violated the Confrontation Clause of the Sixth Amendment." He acknowledges that the court ultimately struck the testimony, but contends the prejudice of its admission endured and requires reversal of the judgment.

The confrontation clause does not restrict the introduction of out-of-court statements for nonhearsay purposes. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 [124 S.Ct. 1354]; *People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6.) Thus, no confrontation violation occurs where, as here, an expert witness refers to out-of-court statements upon which he or she relied in forming an opinion. (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153–154; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.)

In addition, the trial court struck Perez's testimony to the extent it was based upon statements of confidential reliable informants, specifically directed the jury to disregard "all of the testimony surrounding the use of the confidential reliable informant as it relates to her opinion as to defendant's gang membership," and instructed in the charge that the jury must disregard stricken testimony "and must not consider that testimony for any purpose." (CALCRIM No. 222.) We must presume that the jury followed these instructions. (*People v. Williams* (2010) 49 Cal.4th 405, 469.) Given the steps taken by

the court, the several other bases for Perez's opinion that defendant was a member of VPR, and the testimony of Cachuex and Duarte about incidents in which defendant proclaimed his membership in VPR, we would conclude defendant had not been prejudiced even if Perez's testimony regarding statements of confidential reliable informants were error.

## **2. Instruction with CALCRIM No. 362**

Over defendant's objection, the trial court instructed the jury as follows: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." (CALCRIM No. 362.)

Citing *People v. Beyah* (2009) 170 Cal.App.4th 1241 (*Beyah*) and a 2009 revision to CALCRIM No. 362, defendant contends the trial court erred by giving this instruction because it applies only when a defendant's pretrial statement is introduced. He argues that because no evidence of such a pretrial statement was admitted, the jury would have applied this instruction to his trial testimony, and it thereby "burdened [defendant's] right to testify, and significantly vitiated the meaningful opportunity to present a defense that relies on his own testimony."

The court gave the same instruction in *Beyah* as given to defendant's jury. (*Beyah, supra*, 170 Cal.App.4th at pp. 1247–1248.) Although the court in *Beyah* concluded that CALCRIM No. 362 was probably not "intended to be used when the basis for an inference of consciousness of guilt is disbelief of a defendant's trial testimony" (*Beyah*, at p. 1248) and declined to "endorse" its use in that context (*id.* at p. 1251), it rejected contentions identical to those raised by defendant herein. The court noted that "California law makes clear that a defendant's false trial testimony may, in proper circumstances, be considered as evidence of consciousness of guilt." (*Id.* at p. 1249.)



The court stated, “As applied to this case, CALCRIM No. 362 did nothing more than state this principle, i.e., that if the jury concluded that defendant intentionally gave false or misleading testimony, it *may* infer that defendant is aware of his guilt and *may* consider that inference—along with other evidence—in determining defendant’s guilt. And although it might be said that the instruction singles out a defendant’s testimony as subject to heightened scrutiny compared to other witnesses, that is true only because the principle involved is uniquely applicable to the defendant. That is not, however, a legitimate ground for concluding that the instruction unconstitutionally burdened defendant’s choice to testify or resulted in any improper inference of guilt based on the jury’s evaluation of his testimony.” (*Id.* at p. 1250, fn. omitted.)

We reject defendant’s contention for the reasons stated in *Beyah*. The language of CALCRIM No. 362 is permissive, not mandatory, and it was permissible for the jury to infer consciousness of guilt if it found that defendant testified falsely. The final sentence of the instruction prohibited the jury from basing a guilty verdict solely on false testimony by defendant.

### **3. Instruction with CALCRIM No. 373**

Without objection, the trial court instructed, “The evidence shows that other persons may have been involved in the commission of the crime charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether those other persons have been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime charged.” (CALCRIM No. 373.)

Defendant contends that giving this instruction undermined his defense, which he defines as “third-party culpability evidence . . . augmented with an impeachment of the investigation in order to show *why* the unjoined perpetrator is not being prosecuted.”

To determine whether the instruction interfered with the jury’s consideration of the evidence, we must determine what a reasonable juror would have understood it to

mean. (*People v. Cox* (1991) 53 Cal.3d 618, 667, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) While the initial focus is on the particular instruction, we must also review the instructions as a whole to see if the entire charge delivered a correct statement of the law. (*Cox*, at p. 667.)

As defendant acknowledges, it is settled that an instruction on unjoined perpetrators does not interfere with a third party culpability defense, especially in the form given at defendant's trial. (*People v. Farmer* (1989) 47 Cal.3d 888, 918–919, disapproved on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) Defendant's claim that his defense was somehow different because he introduced evidence tending to show that the police focused their investigation on him, not upon the third parties defendant claimed were culpable, is unavailing. The extent of police efforts to investigate Flores and Soldier with respect to Aranda's murder had no independent relevance. It was merely an aspect of defendant's third party culpability defense. CALCRIM No. 373 did not impair that defense because it did not tell the jury to disregard evidence that someone else, not defendant, committed the crime; it merely told the jury not to "speculate about whether those other persons have been or will be prosecuted" and reminded the jury that its duty was "to decide whether the defendant on trial here committed the crime charged."

#### **4. Instruction with CALCRIM No. 337**

Without objection, the trial court instructed, "When Daniel Duarte testified, he was physically restrained. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations. Evaluate the witness's testimony according to the instructions I have given you. [¶] Further, when Daniel Duarte testified, he was in custody. The fact that a witness is in custody does not by itself make a witness more or less believable. Again, evaluate the witness's testimony according to the instructions I have given you." (CALCRIM No. 337.)

Defendant contends that the trial court should not have so instructed the jury because Duarte was a prosecution witness and the instruction prevented the jury from inferring that Duarte's custodial status provided him with "a bias in favor of the party that exercises such power over him." Assuming the trial court erred, we conclude defendant suffered no prejudice. The inferences defendant wanted the jury to draw were expressly described and permitted by CALCRIM No. 226.<sup>1</sup> CALCRIM No. 337 directed the jury to evaluate the credibility of Duarte's testimony under the remaining instructions, which

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<sup>1</sup> CALCRIM No. 226 provides: "You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] Has the witness been convicted of a felony? [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

included CALCRIM No. 226. No reasonable juror would have misconstrued CALCRIM No. 337 as prohibiting or discouraging an inference that Duarte's custodial status provided him with a reason to testify falsely in favor of the prosecution.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.