Filed 11/28/18 P. v. Morales CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROSIE LISA MORALES et al., Defendants and Appellants.	B281568 (Los Angeles County Super. Ct. No. MA057518)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed in part, vacated in part, and remanded.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant Rosie Lisa Morales.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Rudolfo Alcantar.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy

Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

In a joint trial before two separate juries, defendants and appellants Rudolfo Alcantar (Alcantar) and Rosie Lisa Morales (Morales) were convicted of murdering Christian Bojorquez (Bojorquez). The People's theory was that a representative of the Mexican Mafia directed defendants to kill Bojorquez because he was a snitch. Defendant Morales's defense was that even though she admittedly lured Bojorquez to a remote location, she did not harm him herself and she believed defendant Alcantar would do no more than beat him up. Defendant Alcantar's defense was that he did not participate in Bojorquez's killing at all. The Attorney General concedes some of the People's motive evidence was improperly admitted in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). We are asked to decide whether that asserted error and others—including the erroneous admission of related hearsay, the improper joinder of charges, the lack of sufficient evidence to support a special circumstance finding, and the dismissal of a juror on defendant Morales's jury—require reversal of defendants' convictions or aspects of the sentences imposed.

I. BACKGROUND

A. The Death of Bojorquez

On March 5, 2012, John Eldridge (Eldridge) was riding his motorcycle on desert trails in the Lake Los Angeles area when he came across 21-year-old Bojorquez "covered in blood" and "hollering for help." Eldridge called 911 and told the operator Bojorquez looked "like he['d] been shot in the face," could "barely talk," but was able to say that the people who shot him left in his car—a gray Toyota Camry—about thirty minutes earlier. When

Eldridge asked Bojorquez who shot him, he said it was two Mexican men.

Sheriff's deputies and emergency medical personnel arrived soon after Eldridge called 911. Bojorquez told a deputy that two Hispanic men shot him and took his car.

Bojorquez was transported to a hospital where medical personnel observed he had a gunshot wound to the side of his face and substantial lacerations to his scalp. Bojorquez suffered no injuries below his neck. The bullet broke Bojorquez's jaw and left fragments lodged near his esophagus. The largest of his head wounds was rectangular shaped, consistent with being hit with the butt of a gun.

Two days after Bojorquez was shot, a Los Angeles County deputy sheriff found Bojorquez's car, which had been set on fire. Nine days after Bojorquez was admitted to the hospital, medical staff were preparing him for a diagnostic procedure when he developed breathing problems, went into cardiac arrest, and died. The coroner attributed Bojorquez's cause of death to "gun sequela," that is, conditions attributable to a gunshot wound.

B. The Criminal Charges and the Evidence Presented at Trial

In an amended information, the Los Angeles County District Attorney charged defendants in count one with Bojorquez's murder (Pen. Code,[1] § 187, subd. (a)). In connection with that charge, the district attorney alleged two special

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

circumstances, that defendants killed Bojorquez while committing a carjacking (§ 190.2, subd. (a)(17)(L)) and by means of lying in wait (§ 190.2, subd. (a)(15)), and further alleged a principal in the murder (i.e., one of the two defendants) personally and intentionally discharged a firearm (§ 12022.53, subds. (b)-(e)). Count two of the information charged defendant Morales with arson (§ 451, subd. (d)) for burning Bojorquez's car. Each of counts three and four charged defendant Alcantar with being a felon in possession of a firearm (§ 29800, subd. (a)(1))—with count three predicated on firearm possession on March 5, 2012, (the day Bojorquez was shot) and count four alleging later possession of a firearm on August 5, 2012. Gang enhancements (§ 186.22, subd. (b)(1)) were alleged in connection with counts one through three.

The case against defendants was tried to two separate juries, one for each defendant, owing to the need to accommodate issues that would otherwise arise from a post-arrest statement defendant Morales made to investigators.

1. Testimony of defendant Morales's acquaintances

On the day Bojorquez was shot, defendants[2] drove to the home of Stephanie Potter (Potter), who had known defendant Morales for many years and considered her like family. Michael Wood (Wood) and Trisha Cook (Cook) were at Potter's home,

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[2] Defendants were in a romantic relationship at the time of Bojorquez's killing and defendant Morales became pregnant with defendant Alcantar's child around that time, i.e., in early 2012. Morales was 17 years old and Alcantar was in his mid-20s.

which was a hangout for methamphetamine users.[3] Potter had only seen defendant Alcantar once before, but she disapproved of him because he was considerably older than defendant Morales and because Potter had heard rumors he had beaten defendant Morales. When defendants arrived at Potter's home, defendant Alcantar was driving a gray sedan Potter had never seen before.

When defendant Morales entered Potter's home, she was "pale" and "shaking." She asked Potter for some water and took a gallon container out to the car. Potter saw defendant Alcantar use the water to clean what looked like a smear of blood off the driver's side door. Cook and Wood testified they saw defendant Alcantar pour gasoline from a gas can onto the car and wipe it down.

Defendant Morales told Potter she needed to talk. Potter asked if it had "anything to do with [defendant Alcantar]" and when defendant Morales said "yes," Potter said she didn't "want to hear it." Soon thereafter, defendants left in the gray car, and defendant Morales later told Potter she was staying with a woman named "Huera."

Defendant Morales returned alone to Potter's home several days after first arriving in the bloodstained car. Potter told

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[3] Potter, Wood, and Cook were all later arrested and spoke to detectives. They testified at defendants' trial pursuant to grants of use immunity. Wood and Cook were relocated and given cash payments. All admitted to using methamphetamine at the time Bojorquez was shot, with Cook and Wood further admitting to methamphetamine use when they spoke to detectives investigating the case. Cook testified her methamphetamine use caused memory problems and Wood testified he sometimes misremembered the order in which events occurred.

defendant Morales she had heard rumors "that the person . . . whose car [defendants] were driving was beat up, hit, and shot." Defendant Morales claimed she "didn't shoot anybody" but admitted she "was there." Defendant Morales told Potter an unspecified "they" had told defendant Alcantar to "take care of" Bojorquez because he was "messing with" a 15-year-old girl; defendant Morales volunteered to go with defendant Alcantar because he was her boyfriend. Defendant Morales told Potter she needed help, and Potter suggested she call Wood.

Wood and Cook drove defendant Morales to an area not far from Potter's home where Bojorquez's car had been stowed. When they got to the car, defendant Morales doused it with gasoline and lit it on fire.

Wood and Cook both testified to hearing defendant Morales talk about Bojorquez's shooting. The content of their testimony was generally consistent, but differed as to when defendant Morales talked about the incident.

Cook testified defendant Morales told her about the shooting after defendant Morales set Bojorquez's car on fire. According to Cook, defendant Morales said she planned the attack on Bojorquez because "he had messed around with one of her homegirl's little girls." As recounted by Cook, defendant Morales said she and defendant Alcantar took Bojorquez into the desert and shot him, but the gun jammed after the first shot. After the gun jammed, defendant Morales hit Bojorquez on the head more than 20 times with a crowbar, defendant Alcantar ran him over twice with Bojorquez's car, and both defendants thought he was dead.

Wood testified that after setting Bojorquez's car on fire, defendant Morales told him the car "belonged to someone that

she had killed, her and [defendant Alcantar]." Wood overheard defendant Morales call defendant Alcantar and tell him Wood and Cook were helping them out and not to "be mad." Wood testified he did not hear additional details about the incident until a few days later, when he heard defendant Morales talking to Cook at Potter's home. At that time, he overheard defendant Morales say that the gun jammed on the second shot, that she "beat [Bojorquez] over and over" with a "jack," and that defendant Alcantar ran Bojorquez over.[4] Wood also heard defendant Morales say she knew Bojorquez and lured him out "because [he] was trying to mess around with some younger girl." According to Wood, defendant Morales said defendant Alcantar had gotten involved in "tak[ing] care of" Bojorquez because he had been "green lighted" by his gang for dating defendant Morales, who was then a minor.[5]

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[4] Wood told police detectives that defendant Morales said she was the shooter and Wood thought defendant Morales was trying to come off as a "bad ass," i.e., as though she had executed the entire assault by herself.

[5] The People's gang expert, Los Angeles County Sheriff's Department Detective Daniel Welle, testified "green lights" were issued only by the Mexican Mafia, which had links to certain southern California gangs, and not by those gangs themselves. In placing a green light on someone, the Mexican Mafia authorized—but did not mandate—that the person be assaulted or killed by another gang member having knowledge of the green light. Occasionally, someone with a green light could buy or work their way out of that status.

2. Defendant Morales's statement to detectives (presented to her jury only)

Defendant Morales spoke with homicide detectives in an audio-recorded post-arrest interview. She initially denied any involvement in Bojorquez's killing, but she eventually told the detectives someone (she would not say who) told her to find a desert area and lure Bojorquez there under the pretense of helping defendant Morales participate in a drug deal. Defendant Morales said defendant Alcantar was only supposed to "beat up" or "check[ ]" Bojorquez without any carjacking or anything else. She said they targeted Bojorquez because he "tried going after" a five- or six-year-old girl "a few times" and, more importantly, because he "went after" the 15-year-old daughter of one of defendant Morales's friends.

Defendant Morales told the detectives that when she, defendant Alcantar, and Bojorquez arrived at the desert area, she and defendant Alcantar began talking to Bojorquez about the 15-year-old girl—"letting him know that we knew what he was trying to do and who he was going after wasn't the right person to go after and . . . for him to back off." She said Bojorquez "got riled up" and he and defendant Alcantar exited the vehicle and began fighting.

Defendant Morales got out of the car to try to break up the fight and saw defendant Alcantar had a gun in his pants. She went back to the car, heard a gunshot, and saw defendant Alcantar "pistol-whip[ping]" Bojorquez when the gun broke. Bojorquez managed to get into the car and begin driving, but defendant Morales held onto the steering wheel so they drove in circles and defendant Alcantar was able to pull Bojorquez out of

the vehicle. Defendant Morales claimed she never struck or beat Bojorquez, and she maintained he was not run over by the car.

Defendant Morales did admit she retrieved pieces of the broken gun that she saw on the ground and gave them to defendant Alcantar. She further admitted to burning Bojorquez's car along with the clothes and shoes she and defendant Alcantar had been wearing.

3. Physical evidence

Close to the spot where Bojorquez was discovered after the shooting, Los Angeles County Sheriff's Department deputies observed: tire tracks—some of which were in a "circular pattern"; three sets of shoe prints; pieces of a semi-automatic weapon—including parts of a magazine, the plastic grip of a gun handle, and a gun trigger; two rounds of ammunition—one live and one expended casing; and a water bottle that "seemed to be fairly new." One set of the footprints matched Bojorquez's shoes.

The water bottle and gun parts were tested for the presence of DNA and compared to samples taken from Bojorquez and defendants. Of the two DNA profiles recovered from the water bottle, defendant Alcantar's DNA was found to be the major contributor. The minor contributor did not match defendant Morales or Bojorquez. Analysis of one piece of the gun magazine revealed DNA consistent with Bojorquez's DNA and one other person, but there was not enough DNA from the second contributor to prepare a profile. DNA on the grip of the gun was a probabilistic match to Bojorquez and one other person, but both defendants were excluded as possible contributors.

4. Evidence of defendant Alcantar's possession of a firearm in August 2012, after Bojorquez's killing

On August 5, 2012, two Lancaster police officers were driving by a motel when they saw defendant Alcantar standing outside one of the rooms. Defendant Alcantar looked at the officers and then "turned, grabbing his waistband area," and fled into a room. The officers knocked on the door and ordered everyone to step outside.

Defendant Morales exited the room, as did another man.[6] The officers entered the room and found defendant Alcantar hiding in the bathtub. Directly outside the tub was a backpack containing a loaded semi-automatic firearm, defendant Alcantar's identification card, and a torn piece of paper with "A.V. Gang P-13 King" written on it.

5. The prosecution's motive evidence

The People's theory of the case on the murder charge against defendants was that they killed Bojorquez because he was thought to be a snitch. The evidence presented in support of that theory was as follows.

In November 2011, approximately four months before Bojorquez's death, detectives Edwards and Rose of the Los Angeles County Sheriff's Department gang detail came across two men, one Lopez and one Padilla, standing on a Palmdale road

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[6] Apart from the fact that defendant Morales was found in the same motel room (and not then arrested), police testimony describing this incident was presented only to defendant Alcantar's jury.

near a Honda and a BMW. The BMW was registered to Bojorquez, who was sitting in the vehicle's front passenger seat. The detectives saw Lopez walk over to the BMW and hand something to a man sitting in the backseat. That man, whose last name was Hyatt, unsuccessfully attempted to pass the object to Bojorquez. The detectives approached and found a loaded, semiautomatic firearm on the floorboard below Hyatt; they also found methamphetamine and a scale when searching Padilla.

The detectives arrested Padilla, Lopez, Hyatt, and Bojorquez—Padilla for selling narcotics and violating probation, Lopez for carrying a concealed weapon as a known gang member, and Hyatt and Bojorquez for carrying a loaded firearm. The detectives also detained and released at the scene another man who had been in the Honda.

The detectives interviewed all five men and memorialized their statements in a police report. Bojorquez said Lopez and the men in the Honda were gang members and Bojorquez had seen the gun Lopez was carrying at the house of one of Lopez's friends a couple weeks earlier. Bojorquez also told the police that Hyatt tried to get him to take the gun.[7] Lopez told the detectives he was a member of the Varrio San Vicente gang, he had obtained the gun earlier that day from a friend who owed him money, and he handed the gun to Hyatt when he saw the officers. Hyatt admitted Lopez handed him the gun and he tried to pass it to Bojorquez. The district attorney filed charges against Padilla, Lopez, and Hyatt—but not Bojorquez.

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[7] A police detective opined during defendants' trial that Bojorquez did not provide any information that might be considered "snitch information."

Detective Welle, the People's gang expert, was asked if he knew of a woman named "Huera" who was associated with, or a member of, the Bryant Street gang. Detective Welle answered affirmatively, asserting that Huera was a "seniora [*sic*] for the Mexican Mafia." The detective explained Huera and other "senioras" would serve as go-betweens, enabling imprisoned members of the Mexican Mafia to "get information to the streets . . . ."[8]

Heidi Honeycutt (Honeycutt) had been dating Bojorquez for six or seven months before his murder. After Bojorquez's November 2011 arrest with the other men near the BMW, Honeycutt and Bojorquez lived with Huera for a short period. Honeycutt testified that during this time she overheard Huera tell someone over the phone that Bojorquez "was a snitch and that he had to go," which Honeycutt understood to mean Huera "wanted him dead . . . ."[9] Honeycutt believed Huera was speaking to her boyfriend "Psycho," who was apparently in jail at the time. Honeycutt testified she immediately left Huera's home and told Bojorquez to "stay away from" Huera.

Honeycutt additionally testified she knew defendant Alcantar but not defendant Morales. Honeycutt never saw

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[8] The trial court overruled objections by defense counsel that this testimony violated *Sanchez*, *supra*, 63 Cal.4th 665, an issue we shall address *post*.

[9] Prior to the parties' opening statements, both defense attorneys moved to exclude Huera's statement—as related by Honeycutt—as hearsay. The court denied the motion and later overruled renewed objections to the testimony during trial. We likewise address this issue *post*.

defendant Alcantar at Huera's house or heard Huera mention defendant Alcantar until at some point after Bojorquez died. At that time, Huera spontaneously told Honeycutt that although "everyone" was saying "Drifter" (defendant Alcantar's moniker) killed Bojorquez, that "wasn't possible because Drifter was with her the whole time."

6. The gang evidence

Defendant Alcantar was an admitted member of the Palmas 13 Kings criminal street gang. He had tattoos that read "Palmas" and "13 K."

Detective Welle opined defendant Morales was certainly an associate of Palmas 13 Kings and maybe even an active member. He based his opinion on defendant Morales's relationship with defendant Alcantar, seeing a photo of them together in which defendant Alcantar was throwing a gang hand sign, seeing a photo in which defendant Morales and a female friend appeared to throw gang hand signs, and seeing a photo of a tattoo on defendant Morales's wrist that included an image the detective thought might signify the number 13.[10] There was no evidence defendant Morales had a gang moniker nor was there evidence of when she obtained the tattoo on her wrist.

Detective Welle testified Hispanic gangs in the Antelope Valley typically "operate[d] together" and "cooperate[d] with one another" in order to maintain their positions in "the narcotics

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[10] The tattoo depicted the name "Drifter" (defendant Alcantar's gang moniker) with a crown sitting atop the "D" and three dots above three points of the crown. Defendant Morales referred to defendant Alcantar as her "king."

trade" without violence that would "draw[ ] attention from law enforcement . . . ." Detective Welle testified Palmas 13 Kings was a "Sureños" gang, which meant it was associated with the Mexican Mafia. The detective further testified Bryant Street, Vincent Town, San Fer, and Los Compadres Varrio Tres were also Sureños gangs. (These were the gangs linked to Huera, her boyfriend "Psycho," and the two men Bojorquez was with at the time of his November 2011 arrest.)

Detective Welle testified Sureños gang members were bound by certain rules of conduct, with some "primary examples" being they could not "skim tax money that goes to the [Mexican] Mafia," "sexually assault children," or "be a snitch."[11] Violating these rules could result in a green light or in more lenient discipline, referred to as "getting checked" or being "regulat[ed]." When asked about Bojorquez specifically, Detective Welle testified "to [his] knowledge . . . there was [never] an officially sanctioned green light from the [Mexican] Mafia" on Bojorquez or even an "attempt to get a green light placed on him for any alleged violation."

Before defendant Morales's jury only, Detective Welle was presented with the following hypothetical: a Bryant Street gang member associated with the Mexican Mafia (i.e., Huera) "deemed" someone (i.e., Bojorquez) to be a "snitch" who needed to be killed; the Mexican Mafia associate tells a 17-year-old woman (i.e., defendant Morales) who is dating a 26-year-old Palmas 13

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[11] The detective testified that having a relationship with a minor—even if not a child—was "still frowned upon depending on the age gap and looked at in . . . a similar light, if not the same light" as child molestation.

Kings gang member (i.e., defendant Alcantar) that the target is a "child molester" who "need[s] to be dealt with"; the Palmas 13 Kings gang member agrees to "tak[e] care of it" and his girlfriend agrees to help by setting up the victim; the Palmas 13 Kings gang member and his girlfriend shoot the victim, beat him up, leave him for dead in the desert, and drive away in his car; the girlfriend burns the car and the clothing they were wearing; the girlfriend brags about the incident to friends; and the girlfriend then begins living with the Mexican Mafia associate who wanted the victim killed.

Detective Welle opined, based on these hypothetical facts, that the killing and the burning of the victim's vehicle were both performed at the direction of the Bryant Street gang and the Mexican Mafia, and both acts were committed for the benefit of and in association with Palmas 13 Kings. Detective Welle also theorized the gang member (i.e., defendant Alcantar) agreed to kill the alleged child molester as a way of removing a green light for being in an "inappropriate relationship" with a minor (i.e., defendant Morales).

The prosecution presented Detective Welle with a similar hypothetical in front of defendant Alcantar's jury. The detective was asked to assume that a Palmas 13 Kings gang member had a green light on him because he was dating a minor who was herself "at least an associate" of the same gang; a member of the Bryant Street gang who was connected to the Mexican Mafia believed someone was a snitch after that person was arrested with three other gang members but was the only one not charged; the Bryant Street gang member wanted the snitch killed and told the Palmas 13 Kings gang member and his girlfriend that the snitch was a child molester; the Palmas 13 Kings gang member

and his girlfriend agreed to take care of the target and killed him; and after the murder, the girlfriend began living with the Bryant Street gang member and the Bryant Street gang member "tried to provide an alibi" for the Palmas 13 King member. Based on those hypothetical facts, Detective Welle opined the killing was done at the direction of the Bryant Street gang and for the benefit of and in association with Bryant Street, Palmas 13 Kings, and the Mexican Mafia.

C. The Guilty Verdicts and Sentencing

Defendant Alcantar's jury found him guilty of first degree murder and both alleged felon in possession of a firearm offenses. The jury found both alleged special circumstances true, as well as all the alleged sentencing enhancements—including the section 186.22, subdivision (b)(1)(C) gang enhancement and the section 12022.53, subdivision (d) firearm enhancement. Defendant Morales's jury found her guilty of second degree murder and arson. The jury also found the firearm and gang enhancements alleged against her to be true.

The trial court sentenced defendant Alcantar on the special circumstance first degree murder conviction to life without the possibility of parole, plus 25 years to life for the section 12022.53, subdivision (d) discharge of a firearm finding. The court additionally imposed an eight-year sentence for one of the felon in possession of a firearm convictions while staying imposition of sentence on the other felon in possession charge pursuant to section 654.

The court sentenced defendant Morales to 15 years to life for her second degree murder conviction, plus 25 years to life for the section 12022.53, subdivision (d) firearm discharge true

finding. The court additionally imposed a consecutive eight-year prison term for the arson conviction, a term that included an enhancement in light of the jury's true finding on the gang allegation.

II. DISCUSSION

Defendants contend multiple errors require reversal of their murder convictions and, failing that, at least certain associated sentencing enhancement findings. They present a convincing case that the trial court erred in admitting hearsay testimony from Honeycutt and Detective Welle that linked "Huera" to a motive for Bojorquez's murder. But given the low persuasive value of that motive evidence and the strength of other evidence establishing each defendant's guilt of the substantive crimes, the evidentiary errors do not require reversal of defendants' convictions. The errors do, however, require reversal of the juries' gang enhancement findings, as well as the firearm enhancement findings that, as argued, were predicated on the truth of the gang enhancement findings.

Defendant Alcantar's separate challenge to the trial court's decision to allow the August 2012 felon in possession of a firearm charge to be joined for trial with the murder charge, plus his attack on the carjacking special circumstance, both lack merit.[12] The trial court appropriately found that the evidence in support of the felon in possession charge would not have a significant spillover effect on trial of the murder charge and that any possibility of prejudice was outweighed by the benefits of joinder.

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[12] He does not challenge the other lying in wait special circumstance the jury found true.

With respect to the carjacking special circumstance, the evidence relating to the planning and execution of the attack on Bojorquez supports a reasonable inference that the carjacking was concurrently—and therefore independently—intended, and that defeats defendant Alcantar's contention that insufficient evidence supports the special circumstance finding. Further, not only was the evidence sufficient on that score, but statements to the jury by the prosecution and the court regarding the carjacking allegation were not improper and did not prejudice defendant Alcantar.

Defendant Morales's separate claim that the trial court erroneously discharged a juror during deliberations is, frankly, an argument with some force. As prior decisions have observed, a trial judge conducting a juror misconduct inquiry faces a "delicate" task (*People v. Cleveland* (2001) 25 Cal.4th 466, 484 (*Cleveland*)), and despite the trial judge's efforts here, aspects of the cold appellate record renders the judge vulnerable to the criticism that he too quickly discharged a holdout juror who simply had a good faith disagreement with his colleagues. But our close review of the transcript of the court's inquiry reveals the discharged juror ultimately could not provide assurances he would follow the law as given by the trial judge rather than be guided by his pre-existing views of the criminal justice system—and we are convinced for that reason that the discharge of the juror was not an abuse of discretion.

Finally, while all parties agree the matter should be remanded in order for the trial court to exercise discretion in striking the firearm enhancements levied against both defendants, our finding that the firearm findings must be vacated for hearsay error renders any need for a remand moot.

Defendant Alcantar and the Attorney General separately agree certain minor mistakes were made in the imposition of defendant Alcantar's sentence; we agree and trust these mistakes will be rectified upon resentencing.

A. Improper Admission of Testimony Regarding "Huera" Requires Vacatur of the Gang and Firearm Enhancements

Defendants contend the following testimony regarding "Huera" was erroneously admitted and prejudicial: the statement overheard by Honeycutt about Bojorquez being a snitch who "had to go" and testimony by Detective Welle about Huera's role as a "seniora" for the Mexican Mafia. The Attorney General concedes Detective Welle's testimony linking Huera to the Mexican Mafia was federal constitutional error under *Sanchez*, *supra*, 63 Cal.4th 665, but argues the error was harmless beyond a reasonable doubt. We conclude the erroneous admission of hearsay testimony from Detective Welle and Honeycutt requires reversal of the gang enhancement findings, as well as the firearm enhancement findings that were alleged and argued in a manner that depended on the truth of the gang findings.

1. Honeycutt's testimony about the "snitch" statement

Before trial began, defendants moved to exclude under the hearsay rule Huera's statement—as overheard by Honeycutt—that Bojorquez was a snitch who "had to go." The prosecution admitted it was offering the statement for its truth but contended the testimony was admissible as the statement of a co-conspirator (Evid. Code, § 1223), namely Huera.

In ruling on the motion to exclude, the trial court opined the statement was admissible because it was not being offered for the truth of the matter asserted but rather to show Huera's state of mind. The court believed the statement was non-hearsay because what was relevant was not whether Bojorquez was actually a snitch but "simply their belief [he was a snitch], and this was the motive for the crime." The court additionally (and alternatively) ruled the statement was admissible under Evidence Code section 1223, finding "a reasonable inference at some point there was conspiracy regarding the harm and murder to [Bojorquez]."

"We review the trial court's conclusions regarding foundational facts for substantial evidence and its decision to admit or exclude a hearsay statement for abuse of discretion." (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 774, citing *People v. DeHoyos* (2013) 57 Cal.4th 79, 132.) We take up the co-conspirator issue first.

Statements made by co-conspirators are not subject to the hearsay rule if they meet the requirements of Evidence Code section 1223. To admit a co-conspirator statement against a defendant, the People must present ""'independent evidence to establish prima facie the existence of . . . [a] conspiracy.'" [Citation.]" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1108 (*Thompson*); *People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10 (*Leach*) [independent evidence requirement derives from Evidence Code section 1223, subdivision (c)].) The evidence presented must ""'support[ ] an inference that the parties positively or tacitly came to a mutual understanding to commit a crime,'" and such an inference ""'may be inferred from the conduct, relationship, interests, and activities of the alleged

conspirators before and during the alleged conspiracy.'"'" (*People v. Clark* (2016) 63 Cal.4th 522, 562, citations omitted (*Clark*).)

A statement that is offered under the co-conspirator exception to the hearsay rule cannot itself be used to establish the prima facie existence of a conspiracy. (*Leach*, *supra*, 15 Cal.3d at p. 430, fn. 10; see also *People v. Herrera* (2000) 83 Cal.App.4th 46, 65 ["California courts require that the existence of the conspiracy be established by evidence independent of the proffered declaration"].) Nor can statements or conduct that occurred after the alleged conspiracy ended serve as the requisite independent proof. (*Clark*, *supra*, 63 Cal.4th at p. 562 [independent proof of conspiracy must be based on evidence of acts before or during the conspiracy].)

Once there is independent evidence of a conspiracy, the proponent of the evidence must additionally establish: '"'"(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration[,] the party against whom the evidence is offered was participating or would later participate in the conspiracy.'" [Citation.]" (*Thompson*, *supra*, 1 Cal.5th at p. 1108; Evid. Code, § 1223, subds. (a)-(b).)

The Honeycutt testimony was not admissible as a co-conspirator statement because the prosecution did not adduce independent evidence of a conspiracy between Huera, defendant Alcantar, and defendant Morales to kill Bojorquez. There was certainly evidence of a conspiracy between defendants, but there was insufficient evidence connecting Huera to that conspiracy while it was operative. As to defendant Alcantar, no evidence linked him to Huera prior to or during the conspiracy. Rather,

the only connection between the two is inferable from Honeycutt's testimony that Huera—*after* Bojorquez's death and the burning of his vehicle—purported to provide an alibi for defendant Alcantar ("Drifter"). That post-conspiracy evidence is not cognizable independent proof of the conspiracy. (*Clark*, *supra*, 63 Cal.4th at p. 562.) As to defendant Morales, the sole piece of evidence connecting her to Huera—that defendant Morales was living with Huera at some point after the shooting—is unclear as to precisely when that occurred. Theoretically, it could have taken place while the alleged conspiracy was operative if defendant Morales stayed with Huera in the two days between the shooting and the arson. But even if that were the case, that single piece of evidence—that defendant Morales knew and stayed with Huera soon after the shooting—is not enough to show the existence of a conspiracy between defendants and Huera to kill Bojorquez.[13]

In addition, Huera's overheard statement was not admissible as nonhearsay. The court correctly reasoned that whether or not Bojorquez was actually a snitch was beside the point. But the statement in question included the declaration that Bojorquez "had to go" because Huera believed him to be a snitch, and the full statement was relevant only because of its truth, i.e., that Huera wanted Bojorquez dead. A statement by a nonwitness "that is offered to prove the truth of the matter

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[13] Because we conclude Huera's "snitch who had to go" statement was not admissible as the statement of a co-conspirator, we do not address the parties' contentions about the trial court's failure to provide a jury instruction regarding co-conspirator statements.

stated" is generally inadmissible under the hearsay rule. (Evid. Code, § 1200.) To be admissible, statements by nonwitnesses must either not be offered to prove the truth of the assertion or must be subject to an exception to the hearsay rule. Huera's statement that Bojorquez "had to go" satisfies neither condition.

Insofar as the court admitted the statement as evidence of Huera's existing belief or state of mind, that too was erroneous. Evidence Code 1250, subdivision (a) provides that "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) [t]he evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) [t]he evidence is offered to prove or explain acts or conduct of the declarant." Huera's statement was not admissible under Evidence Code section 1250, subdivision (a) because her state of mind was never "itself an issue in the action" and her statement was not "offered to prove or explain" her own conduct. (See *People v. Ruiz* (1988) 44 Cal.3d 589, 607-608 [victims' statements that they feared the defendant were not admissible under Evidence Code section 1250 because victims' fear was not at issue] (*Ruiz*).) The prosecution's purpose in offering Huera's statement was not to prove anything about Huera but rather to explain the state of mind and conduct of defendants—which is presumably why the prosecution (incorrectly) argued the statement should be admitted as a co-conspirator declaration and not to show Huera's personal beliefs.

The Attorney General further argues Honeycutt's testimony about Huera's out-of-court statement was admissible because it was proof of motive for Bojorquez's murder. But the fact that a statement may demonstrate motive does not render the hearsay rule inapplicable. Huera's statement that Bojorquez "had to go" would be admissible as motive evidence only if there were evidence the defendants knew of the statement and had reason to act on it without regard for its truth. (See, e.g., *People v. Sandoval* (2015) 62 Cal.4th 394, 427-428 [gang leader's statement that the gang was not killing enough people was admissible to show defendant's state of mind in shooting two detectives shortly thereafter because there was evidence defendant attended the meeting; whether or not the gang was actually killing enough people was irrelevant]; *People v. Cleveland* (2004) 32 Cal.4th 704, 728 [out-of-court statement accusing defendant of being weak was admissible to show defendant acted to prove he was not weak; whether or not defendant was actually weak was irrelevant].) That evidence, however, was lacking. The scant evidence suggesting defendants were acquainted with Huera after Bojorquez's shooting is insufficient to show they knew or believed Huera wanted Bojorquez killed, and relying on evidence that defendants actually killed Bojorquez to show a link with Huera would be improper bootstrapping.

Having reviewed and rejected the proffered grounds for admissibility, the conclusion is inescapable that Huera's statement was offered for its truth and was erroneously admitted. (*People v. Jurado* (2006) 38 Cal.4th 72, 117 [out-of-court statement that declarant "had a problem that she needed to take care of" was hearsay improperly admitted to show

defendant's motive; see also *Ruiz*, *supra*, 44 Cal.3d at pp. 608-609 [statements of victims' fear were inadmissible to show defendant's motive to kill because admitting the statements for that purpose required believing the statements of fear "were justified, and that defendant in fact killed them"].)

2. Expert testimony linking Huera to the Mexican Mafia

In *Sanchez*, *supra*, 63 Cal.4th 665, our Supreme Court held: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id.* at p. 686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.) If case-specific hearsay is testimonial in nature (such as a statement "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony") and given under circumstances showing some measure of formality, the statement is generally inadmissible unless a historical exception applies. (*Id*. at pp. 686, 689.)

Detective Welle testified Huera was a "seniora for the Mexican Mafia" who worked as a go-between for imprisoned Mexican Mafia members. When asked, he revealed the basis for his testimony was out-of-court statements made by paid informants, other law enforcement officers, and other gang members. The Attorney General concedes "Detective Welle's testimony that Huera was a seniora for the Mexican Mafia was testimonial[, case-specific] hearsay" and we accept the concession. (*People v. Martinez* (2018) 19 Cal.App.5th 853, 859 [Attorney

General conceded, and the Court of Appeal agreed, a gang expert's testimony, without personal knowledge, about the gang membership of an uncharged party who was with the defendant at the time of the crime violated *Sanchez*].) We therefore turn to the dispositive question of whether admission of the hearsay testimony of Honeycutt and Detective Welle requires reversal of any jury determinations.

3. Prejudice

The erroneous admission of evidence does not warrant reversal unless the error is prejudicial. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b).) To establish prejudice arising from evidence improperly admitted under state evidentiary rules, a defendant must show, considering the record as a whole, "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see also *People v. Benavides* (2005) 35 Cal.4th 69, 91 [*Watson* standard ordinarily governs review of errors in applying state evidentiary rules].) Where the erroneous admission of evidence amounts to federal constitutional error, reversal is required unless the reviewing court is convinced the error was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); see also *Sanchez*, *supra*, 63 Cal.4th at pp. 671, 698-699 [applying harmless beyond a reasonable doubt standard to admission of case-specific testimonial hearsay].)

a. defendants' convictions

The erroneous admission of Detective Welle's and Honeycutt's testimony regarding Huera does not require

reversing the homicide-related convictions (counts one and three) no matter whether we apply the *Chapman* or *Watson* standard for prejudice. The prosecution offered the testimony regarding Huera in order to show the defendants' motive to kill Bojorquez, which is not an element of proving murder. (*People v. Solomon* (2010) 49 Cal.4th 792, 816.) As the trial court correctly instructed jurors in this case, pursuant to CALCRIM No. 370, "[t]he People [were] not required to prove that the defendant had a motive to commit any of the crimes charged," although jurors could consider motive evidence—or the lack thereof—in determining whether each defendant was or was not guilty. Considering the strong evidence of defendants' guilt and the weak persuasive value of the prosecution's motive evidence, we are confident the hearsay evidence did not contribute to the jury's verdict on the substantive criminal charges. We elaborate as to each defendant separately, taking defendant Morales first.

The evidence establishing her guilt was quite strong. Defendant Morales confessed to police detectives that she lured Bojorquez into the desert under false pretenses, was present when defendant Alcantar shot Bojorquez, prevented Bojorquez from getting away, and later burned his vehicle and other evidence that would have incriminated her and defendant Alcantar. Although defendant Morales denied some greater involvement in the crime when speaking with the detectives, she provided specific details about the murder that were consistent with and corroborative of other evidence in the case: defendant Morales's description of grabbing the steering wheel when Bojorquez got back into the car explained the "circular" tire patterns and the smear of blood Potter saw on the driver's side door; defendant Morales's admission to picking up parts of the

broken gun explained why only a few pieces were found at the scene; and defendant Morales's account of the attack was consistent with Bojorquez's injuries. Defendant Morales also told both Cook and Wood that she and defendant Alcantar shot and beat Bojorquez, and that the gun jammed on either the first or second shot—which would explain the ammunition (one live round and one expended casing) found at the scene.

By contrast, the Huera motive evidence for the shooting added little, if anything, to proving defendant Morales's guilt. Defendant Morales repeatedly told others that she and defendant Alcantar targeted Bojorquez not because he was a snitch who had to go but because he was preying on underage girls. The prosecution argued that explanation lacked supporting evidence and made little sense considering defendant Morales's own relationship with defendant Alcantar, but the prosecution's theory of motive was no better from an evidentiary perspective. The prosecution adduced no evidence that Bojorquez actually was a snitch, and one of the testifying law enforcement witnesses stated Bojorquez did not provide any incriminating information against the others who were arrested with him near the BMW. Gang expert Welle testified he had no evidence the Mexican Mafia placed or attempted to place a green light on Bojorquez. And the evidence of a green light on defendant Alcantar—the supposed reason why defendant Alcantar agreed to kill Bojorquez—was neither corroborated nor compelling.[14]

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[14] The only evidence suggesting a green light had issued to harm or kill defendant Alcantar was Wood's testimony that he heard defendant Morales say defendant Alcantar's gang green lighted him—which was inconsistent with Detective Welle's

The prejudice analysis as to defendant Alcantar's convictions leads to the same conclusion. Even though he did not confess involvement in Bojorquez's killing to law enforcement, as did defendant Morales, the evidence of his guilt was still strong. Defendant Alcantar's jury had evidence that (1) his DNA was found at the remote scene of the crime; (2) Potter, Wood, and Cook all saw defendant Alcantar driving and cleaning Bojorquez's car shortly after the shooting; (3) defendant Morales told both Wood and Cook that she and defendant Alcantar had beat and shot Bojorquez; and defendant Alcantar (while in custody) threatened to kill Wood if he testified against defendant Alcantar.

Defendant Alcantar resists the strength of the evidence, emphasizing that after Bojorquez was shot, he (Bojorquez) told first responders that two Hispanic men were the culprits, not defendants (a man and a woman). Considering defendant Alcantar is a Hispanic man, however, that evidence would only really serve to assist defendant Morales's defense, not defendant Alcantar's (especially with his DNA found at the scene). Defendant Alcantar also attacks the reliability of Wood and Cook's testimony, pointing to their drug use, Wood's criminal history, and perceived inconsistencies or implausibilities in their accounts. But the testimony of Wood and Cook was consistent where it counted. Inconsistencies with respect to who heard what when, and evidence that defendant Morales may have embellished the extent of the assault on Bojorquez, do not meaningfully detract from the bottom line conclusion that

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testimony that green lights could only be placed by the Mexican Mafia.

defendant Alcantar was a full participant in killing Bojorquez. Defendant Alcantar additionally seeks to wave away the DNA evidence, arguing it "did not conclusively establish [his] guilt." Correct though that may be, it was strong evidence placing defendant Alcantar in the desert where Bojorquez was shot, which, when combined with the other incriminating evidence, made for a formidable case of his guilt.

Defendant Alcantar further protests the prosecution's motive argument was "relatively dubious." We do not disagree, which is in significant part why we are confident the admission of the motive evidence did not impact the juries' verdicts except as to the jury's gang enhancement finding (and the firearm enhancement finding that depended on it)—as we next explain.

b. the gang and firearm sentencing enhancements

Although we are convinced the motive hearsay evidence did not contribute to the guilty verdicts obtained, we are far less sanguine about whether the inadmissible evidence influenced the jury's gang enhancement true findings. The *Watson* standard applies to our assessment of the impact of Honeycutt's testimony and the *Chapman* standard to our review of Detective Welle's testimony. Applying those standards, the hearsay testimony was not harmless when it comes to the gang enhancement, and because the gang findings fall, the jury's firearm findings must fall with them.

A defendant is subject to an additional prison term if "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal

conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) For section 186.22, subdivision (b)(1) to apply, the prosecution must also prove that the "criminal street gang" referred to in that provision "'(1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' [Citations.]" (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) Section 186.22, subdivision (b)(1) does not require proof that the defendant be a member of the gang in question, or of any gang for that matter, although evidence of gang membership may help show the defendant "acted with intent to benefit his gang . . . ." (*Id*. at pp. 698-699.)

Focusing on the *Chapman* inquiry for Detective Welle's hearsay testimony, we cannot say we are convinced beyond a reasonable doubt that the jury would have returned true findings on the gang sentence enhancements absent that testimony. Detective Welle's opinion that defendants participated in Bojorquez's killing for the benefit of Palmas 13 Kings was chiefly predicated on the hypothetical facts that a liaison to the Mexican Mafia directed defendants to kill Bojorquez because he was a snitch.[15] Before defendant Morales's jury, for instance, Detective

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[15] Because the evidence at trial identifies the pertinent "criminal street gang" for purposes of applying section 186.22, subdivision (b)(1) as the Palmas 13 Kings, we consider the basis of Detective Welle's opinion with respect to that gang only.

Welle testified the killing benefited the Palmas 13 Kings because (1) getting rid of defendant Alcantar's green light would "reflect[ ] well on the gang" because if a member of Palmas 13 Kings did not remove the green light, "another gang would," making Palmas 13 Kings appear weaker; (2) defendant Morales "add[ed] to the gang's infamy" by telling other people about the killing; and (3) by "carrying [out] the orders of the [Mexican] Mafia," defendant Morales's acts "definitely increase[d] the status of Palmas 13 Kings not only in the local community but in the overall community, especially with the Mexican Mafia." And before defendant Alcantar's jury, Detective Welle testified that getting rid of the asserted green light on defendant Alcantar benefited his gang because "if the gang is seen as essentially harboring a member [who is in an inappropriate relationship with a minor], they lose respect in the overall gang community" and will be treated more poorly by the Mexican Mafia. The detective further testified, as he had regarding defendant Morales, that "handling the snitch" for the Mexican Mafia would benefit the Palmas 13 Kings.

If the inadmissible evidence regarding Huera and the Mexican Mafia is removed from Detective Welle's analysis, this is the gist of what is left: a 26-year-old Palmas 13 Kings gang member and his 17-year-old girlfriend killed someone who was not proven to be a gang member in order to remove a green light allegedly placed on the Palmas 13 Kings member because he was dating a woman under 18.[16] Without foundational evidence as to

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[16] Because Huera's overheard statement that Bojorquez "had to go" was also inadmissible, a hypothetical that defendants were acting upon the personal direction of Huera (who was not a

why killing Bojorquez might remove the green light defendant Alcantar was supposedly facing, and given the tenuousness of the green light evidence in the first place,[17] Detective Welle's opinion is insubstantial evidence of a gang-related murder.[18] The section 186.22, subdivision (b)(1) true finding must therefore be vacated.

The trial juries returned firearm use/discharge true findings under section 12022.53 in connection with their guilty verdicts on the murder charges. A true finding under that statute normally requires proof that the defendant in question "personally and intentionally" used or discharged a firearm. (§ 12022.53, subds. (b)-(d).) As alleged against defendants, however, the section 12022.53 firearm enhancements were predicated on subdivision (e) of the statute that dispenses with the need for proof of personal use of a firearm when gang-related crimes are at issue. (§ 12022.53, subd. (e)(1) ["The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following

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member of the Palmas 13 Kings) would also be prejudicial error under the *Watson* standard of prejudice.

[17] Without admissible evidence as to why the Mexican Mafia might want Bojorquez killed—or why defendants would believe that to be the case—there would be no basis for jurors to conclude defendants killed Bojorquez as some sort of penance to the Mexican Mafia.

[18] There was no substantial evidence defendants "came together *as gang members*" (*People v. Albillar* (2010) 51 Cal.4th 47, 62) to kill Bojorquez, which would be necessary for a finding that the murder was committed in association with the Palmas 13 Kings gang.

are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [the gang enhancement statute]. [¶] (B) *Any principal in the offense* committed any act specified in subdivision (b), (c), or (d)"], italics added.)

There was conflicting evidence at trial as to which of the two defendants used the gun and shot Bojorquez. But the way the firearm use enhancement was alleged, the prosecution did not need to take a position on who the actual shooter was because both defendants were principals in the crime and both would therefore be subject to the enhancement if the jury found the murder was gang-related. The prosecution told the juries just that in closing argument, explaining that the question of whether the firearm enhancement should be found true was therefore "straightforward."[19]

We have found it necessary to vacate the gang enhancement findings for evidentiary error, and because the gang findings are invalid, there is no basis to affirm firearm findings that depended on the truth of those findings to dispense

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[19] Before defendant Alcantar's jury, the prosecution stated: "In this case, . . . you may all agree that [defendant Alcantar] pulled the trigger, and that he was the principal, and he pulled that trigger. . . . [¶] [But] even if you think that [defendant Morales] is the one or you don't know, you know it's one of them, but you don't know who, it doesn't matter as long as you believe that [defendants] are both principals and one of them shot." The prosecution similarly told defendant Morales's jury: "[I]f you find that it's the two of them and . . . Bojorquez was shot, one of them shot him. And one of them is a principal that personally discharged that firearm leaving this bullet jacket in . . . Bojorquez's head."

with the need for the prosecution to prove which of the defendants personally used or discharged the firearm. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1203.) We must therefore vacate the firearm findings as well.

B. Joinder of the August 2012 Felon in Possession Charge Against Defendant Alcantar Was Proper

The district attorney initially filed the August 2012 felon in possession of a firearm charge against defendant Alcantar (count four) as a separate case. Over defendant Alcantar's objection, the trial court granted the People's request to jointly try that charge with those arising from Bojorquez's killing several months earlier in March 2012. Defendant Alcantar contends the court's decision was erroneous and requires reversal of his convictions on counts one (murder) and three (the other felon in possession charge).

Under section 954, a single accusatory pleading may contain "two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses . . . ." The trial court has discretion, however, to order that charges properly joined under the statute be tried separately "in the interests of justice and for good cause shown . . . ." (§ 954.)

There is no dispute that count four was properly joined under section 954 because it alleged a violation of the same statute as count three. (*People v. Soper* (2009) 45 Cal.4th 759, 771 [charges alleging violation of identical statute are "of the same class"] (*Soper*).) Where the statutory requirements for joinder are satisfied, a trial court's decision denying a defendant's request to sever charges is reviewed for abuse of discretion, which requires the defendant to "make a '"clear showing of prejudice."'"

(*People v. Armstrong* (2016) 1 Cal.5th 432, 455-456 (*Armstrong*), citation omitted.) We consider the record before the trial court at the time it ruled. (*Soper*, *supra*, at p. 774.)

In undertaking our analysis, we first consider whether evidence of the charges proposed to be severed would be cross-admissible in separate trials. (*Soper*, *supra*, 45 Cal.4th at p. 774.) A showing of cross-admissibility is typically "sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Id.* at p. 775.) If cross-admissibility is not established, "we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citations.]" (*Ibid.*) This cost-benefit analysis requires us to consider three factors: "(1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case." (*Ibid.*) After considering these factors, we "balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state." (*Ibid.*)

Here, the prosecution asserted count four should be jointly tried with the Bojorquez murder charge because evidence underlying the August 2012 incident was cross-admissible to show defendant Alcantar was guilty of the March 2012 offenses. Specifically, the prosecution contended that evidence defendant Alcantar was found in August 2012 to be armed and "hiding or

laying low" with defendant Morales connected him to Bojorquez's shooting five months earlier. Defendant Alcantar disputed the cross-admissibility of evidence and asserted that joining count four would prejudice him because the evidence in support of his guilt on that charge was quite strong compared to the evidence connecting him to Bojorquez's killing. Defendant Alcantar believed he could present a strong defense in the murder case because the evidence implicating him was DNA found on a transportable water bottle at the scene (which also contained the DNA of at least one other person), statements made by defendant Morales to third parties whose credibility was suspect, and evidence those same third parties saw defendant Alcantar cleaning Bojorquez's car after the shooting. Defendant Alcantar additionally contended the evidence of the count four August 2012 incident—which established his gang membership and suggested he regularly carried a gun—would unduly inflame the jury against him with respect to counts one and three.

The trial court granted the People's request to jointly try count four with the charges against defendant Alcantar arising from Bojorquez's killing. The court reasoned that after "carefully weigh[ing] and consider[ing] the prejudicial effect of the joinder in light of the Legislature and the court's preference towards joinder, . . . the court [did] not find that the prejudicial effect substantially outweigh[ed] the preference towards joinder." The court did not "believe that the homicide case [was] sufficiently weak that the adding of [count four would] cause a jury to overlook any weaknesses in the case and convict [defendant Alcantar] of a homicide because he had a gun five months later, especially a different gun." As we shall explain, that determination was not an abuse of the court's discretion.

The prosecution's argument on cross-admissibility was weak and the trial court appropriately looked to the other relevant factors. None of the charges subjected defendant Alcantar to capital punishment,[20] leaving only two factors to assess—whether one or both of the joined cases were weak and whether joinder was likely to inflame the jury.

The trial court was right to reject the contention that the prosecution's homicide case appeared weak (recall we evaluate the exercise of discretion at the time the trial court ruled, i.e., before trial). Although the evidence of defendant Alcantar's involvement was circumstantial, it was strong. DNA evidence strongly suggested defendant Alcantar was at the scene of the crime and multiple witnesses were expected to testify they either saw defendant Alcantar concealing evidence of the crime or were told by defendant Morales that defendant Alcantar shot Bojorquez. The fact that evidence of Bojorquez's killing might have appeared, at the time of the court's ruling, to be not quite as strong as the evidence of guilt on count four carries little weight because "the proffered evidence was sufficiently strong in both cases." (*Soper*, *supra*, 45 Cal.4th at p. 781; see also *ibid*. ["as between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other," yet "[a] mere imbalance in the evidence . . . will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges"].)

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[20] Although special circumstances were alleged, the prosecution did not seek the death penalty.

Nor did the court err in rejecting defendant Alcantar's argument that count four was likely to inflame the jury. Neither the offense of being a felon in possession of a firearm, in itself, or the particular evidence underlying that charge in this case was inflammatory. (See, e.g., *People v. Landry* (2016) 2 Cal.5th 52, 78 [evidence of attack and weapon possession unlikely to inflame jurors with respect to separate homicide charge because "[t]he fact that evidence of two violent crimes might lead a jury to infer that a defendant is violent does not establish that any of the charges were unusually likely to inflame the jury"] (*Landry*); *People v. Gomez* (1994) 24 Cal.App.4th 22, 29 [felon in possession of a firearm charge not inherently inflammatory].) The concern with inflammatory evidence is that "'"'strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime.'" [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 124 (*Simon*).) Here, the evidence underlying count four was not inflammatory, and the evidence in support of the murder case was not weak.

Section 954's joinder rules reflect the importance to our Legislature of judicial efficiency. (*Landry*, *supra*, 2 Cal.5th at p. 75; *Soper*, *supra*, 45 Cal.4th at p. 782 ["Whenever properly joined charges are severed, the burden on the public court system of processing the charges is substantially increased"].) Because the trial court reasonably found that count four was not likely to inflame the jury and the homicide case was not weak, it did not abuse its discretion in determining the benefits of joinder outweighed the potential for prejudice to defendant Alcantar. "[T]he benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction

compared with his or her chances were the charges to be separately tried." (*Soper*, *supra*, at p. 781.)

Even though we have determined the trial court did not abuse its discretion in denying severance based on the record at the time of its ruling, we still must consider whether the actual joinder of charges "'resulted in gross unfairness depriving the defendant of due process of law'" during trial. (*Soper*, *supra*, 45 Cal.4th at p. 783.) No gross unfairness is apparent. "The evidence offered to prove [defendant Alcantar's] guilt of the various charges arising from the two incidents was 'relatively straightforward and distinct,' while the evidence relating to each charge was 'independently ample' to support [defendant Alcantar's] conviction on that charge." (*People v. Elliott* (2012) 53 Cal.4th 535, 553.) If charges arising from the March 2012 incident and the August 2012 incident had been separately tried, strong evidence of guilt in each case would have warranted defendant Alcantar's conviction on all charges. (*Simon*, *supra*, 1 Cal.5th at p. 130.)

C. Substantial Evidence Supports the Carjacking Special Circumstance, and Statements to the Jury on How to Apply the Special Circumstance Do Not Warrant Reversal

Defendant Alcantar contends the carjacking special circumstance must be reversed because there was insufficient evidence to support a true finding on that allegation, because the prosecution misstated the applicable law during closing argument, and because the trial court improperly responded to a jury question regarding how to apply that law. Each of these contentions is unconvincing.

1. Evidence supporting the jury finding

A defendant convicted of first degree murder may be sentenced to life in prison without the possibility of parole if the jury finds true one or more of the special circumstances enumerated in section 190.2, subdivision (a). Defendant Alcantar's jury found true two special circumstances subjecting him to that sentence: he intentionally killed Bojorquez by means of lying in wait (§ 190.2, subd. (a)(15)) and he killed Bojorquez during the commission of a carjacking (§ 190.2, subd. (a)(17)(L)). We consider a claim that insufficient evidence supports a special circumstance finding by reviewing the record in the light most favorable to the true finding "'to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the [special circumstance true] beyond a reasonable doubt.' [Citation.]" (*People v. Hardy* (2018) 5 Cal.5th 56, 89 (*Hardy*).)

A defendant commits a carjacking if he "felonious[ly] tak[es] . . . a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) For the carjacking special circumstance to apply, the jury must find the carjacking was not "'"merely incidental to the killing."' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 992 (*Johnson*).) A carjacking is not incidental to a murder if the defendant "'had a "purpose for the [carjacking] apart from murder."' [Citation.]" (*Hardy*, *supra*, 5 Cal.5th at p. 89.) In other words, the carjacking must have been the defendant's "'primary—or at least concurrent—motivation . . . .'" (*Johnson*,

supra, at p. 992, citation omitted; see also *Hardy*, *supra*, at p. 90 ["'even if a defendant harbored the intent to kill at the outset, a concurrent intent to commit an eligible felony will support the special circumstance allegation'"].)[21] If the only reasonable inference from the evidence is that defendant Alcantar carjacked Bojorquez "for the sole purpose of effectuating the killing," the special circumstance does not apply. (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 81; see also *Hardy*, *supra*, at p. 89 [referring to rule established in *People v. Green* (1980) 27 Cal.3d 1, 61 that an independent-felony special circumstance will not apply if the felony's "'*sole* object is to facilitate or conceal the primary crime'"].)

Substantial evidence supports the jury's finding that defendant Alcantar independently intended to carjack Bojorquez. Pursuant to defendant Morales's plan, she and defendant Alcantar drove out into the desert in Bojorquez's car. The jury could reasonably infer defendant Alcantar had the intention to take Bojorquez's vehicle before contemplating murder—for example, if defendants initially planned to leave Bojorquez in the desert after merely beating him up.[22] There was no evidence

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[21] The court instructed defendant Alcantar's jury in this case with CALCRIM No. 730, which provides that "in order for [the carjacking] special circumstance to be true, the People must prove that the defendant intended to commit carjacking independent of the killing" and the jury should find the special circumstance not true if it finds that "the defendant only intended to commit murder" and the carjacking "was merely part of or incidental to the commission of that murder . . . ."

[22] The trial juries need not have been convinced defendants planned to kill Bojorquez before ever setting out for the remote

defendant Alcantar decided to carjack Bojorquez "merely to obtain a reminder or token of the incident" or "to give a false impression about his actual motive for the murder . . . ." (*People v. Bolden* (2002) 29 Cal.4th 515, 554.) Nor were jurors compelled to conclude defendant Alcantar carjacked Bojorquez solely "to facilitate or conceal the killing [citation]." (*Ibid.*) Even though the carjacking had the practical effect of helping to conceal the identities of the killers, jurors could reasonably conclude the carjacking was not committed solely for that purpose. (See *Johnson*, *supra*, 60 Cal.4th at pp. 971, 989 [jury could have concluded the defendant independently intended to steal victim's car in addition to killing her because he lacked a vehicle after crashing his own car while being chased by police]; see also *id.* at p. 988 ["When one kills and then takes substantial property from the victim, a reasonable jury can ordinarily find the killing was for the purpose of taking the property"].)

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desert location (indeed, defendant Morales's jury appears to have rejected that theory). Instead, defendant Alcantar's jury could have properly found he formed a premeditated and deliberate intent to kill on the way to, or perhaps even after arriving in, the desert—and independent of a plan to commit a carjacking. (*People v. Cage* (2015) 62 Cal.4th 256, 275-276 [although first degree murder requites a deliberate and premeditated intent to kill """[t]he process of premeditation and deliberation does not require any extended period of time""" because """[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . ."""].)

2. Statements by the prosecution and the trial court

During closing argument, the prosecution told the jury that if it found defendant Alcantar committed first degree murder, the jury then needed "to decide whether or not during the commission of this murder [he] intended and [he] did commit a carjacking." The prosecution stated that in order to find the carjacking special circumstance true, jurors needed "to find that not only did [defendant Alcantar] intend the murder, but that [he] separately also intended the carjacking." In other words, "it can't just be that [the defendants] committed the murder and then something happened, and although it wasn't planned, that they ended up committing a carjacking. . . . [I]t's okay, though, if it's both that they intended to commit the murder and intended to commit the carjacking as part of that plan, but it's not okay if they only intended the murder but never intended the carjacking, and then it just happened or [was] accidental." The prosecution argued that because defendants went out with Bojorquez in only one car, leaving "only one way for them to get away," they must have intended to take Bojorquez's car as "part of the plan." Bojorquez's car would "be their get away vehicle, and a way for them to also remove a large piece of evidence at that scene and just leave his body." Defense counsel did not object to any of these statements.

During deliberations, defendant Alcantar's jury requested "clarification regarding what would constitute 'independent'" in applying the court's instruction that the People needed to prove the carjacking was committed "'independent of the killing.'" The trial court responded in a note that jurors should "refer to CALCRIM 200 which states, 'Words and phrases not specifically

defined in these instruction[s] are to be applied using their ordinary, everyday meaning.'" The court wrote further: "The word, 'independent,' does not have a specific legal meaning; therefore, [jurors] may use the word's ordinary, everyday meaning."[23]

Defendant Alcantar argues the prosecution misstated the law during closing argument by (1) stating the special circumstance would apply if jurors found the carjacking was committed during the murder rather than the other way around; (2) implying that the truth of the special circumstance was established by the fact that defendants and Bojorquez all went out in Bojorquez's car; and (3) failing to mention that the special circumstance would not apply if the carjacking were merely incidental to the murder. Defendant Alcantar contends the trial court compounded the prosecution's error by failing to adequately respond to the jury's request for clarification.

Failing to object to a prosecutor's statements during closing argument or to a court's response to a jury question typically forfeits an appellate challenge to either. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 828 [a defendant forfeits a claim that the prosecutor misstated the law during closing argument by failing to object and request an admonition]; *People v. Dykes* (2009) 46 Cal.4th 731, 798-799 [a defendant forfeits a claim that the court gave an erroneous response to a jury question where the defendant's counsel approved the response given].) Defendant

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[23] A minute order indicates counsel for both sides were contacted when the court received the jury question, but the record contains no discussion of the question among the court and counsel before the court responded.

Alcantar's contentions are therefore forfeited by the absence of an objection, and they lack merit in any event.[24]

a. the prosecution's remarks

A prosecutor's statements to the jury violate the federal Constitution when they "infect[ ] the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.
Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*).)

While the prosecution's statements in this case may have lacked some of the nuance of carjacking special circumstance law, no outright misstatements were made. Evidence a defendant concurrently intended to commit both a carjacking and a murder is sufficient to support a carjacking special circumstance finding and the prosecution's statements were consistent with a concurrent intent theory. Put more concretely, telling the jury it must decide whether a carjacking was intended and committed during the commission of the murder is consistent with a concurrent intent finding, as is the statement that the special

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[24] Because we opt to address the claims on the merits, we have no need to discuss defendant Alcantar's assertion that his trial attorney was constitutionally ineffective for failing to object.

circumstance would apply if defendant Alcantar intended to carjack Bojorquez as "part of the plan." The prosecution's argument that defendant Alcantar intended to use Bojorquez's vehicle as a getaway car prior to the killing was just that—an argument—and it did not prevent the jury from finding that defendant Alcantar decided to take Bojorquez's car only after the attack or that defendant Alcantar formed a premeditated intent to kill only after getting in the car with Bojorquez and intending to carjack him. The prosecution made that clear by stating the special circumstance would not apply if taking Bojorquez's car "just happened" or was "accidental." And the prosecution was not obligated to use the term "incidental" in characterizing the law.

Insofar as the prosecution's statements did not fully reflect the complexity of the law, however, we do not see "such unfairness as to make the conviction a denial of due process" (*Morales*, *supra*, 25 Cal.4th at p. 44). Nor did the prosecution employ "deceptive or reprehensible methods" (*ibid.*) in arguing to the jury.

Furthermore, even assuming the prosecution's statement was inaccurate at the margins, "we presume that the jury relied on the instructions, not the arguments, in convicting [defendant Alcantar]." (*Morales*, *supra*, 25 Cal.4th at p. 47.) The court here instructed the jurors that if they "believe[d] that the attorneys' comments on the law conflict[ed] with [the court's] instructions," they were to "follow [the court's] instructions." The court correctly instructed the jurors they could only find the carjacking special circumstance true if they found defendant Alcantar "intended to commit carjacking independent of the killing" and the jurors must not find the special circumstance true if they found Alcantar "only intended to commit murder and the

commission of carjacking was merely part of [or] incidental to the commission of that murder . . . ." Under the circumstances, defendant Alcantar has not shown "a reasonable likelihood that the jury construed or applied any of the [prosecution's] complained-of remarks in an objectionable fashion" (*id.* at p. 44).

b. the court's response to the jury question

Section 1138 requires the trial court to respond to jury questions during deliberations on relevant "point[s] of law . . . ." A claim the court erred in responding to a jury question is reviewed for abuse of discretion. (*People v. Tate* (2010) 49 Cal.4th 635, 707.)

Defendant Alcantar does not assert that the trial court's response to the jury's question was erroneous—rather, he argues the court should have gone further by providing more clarification of what "independent" means for purposes of applying the carjacking special circumstance instruction. Defendant Alcantar suggests the court could have (and should have) instructed the jury by quoting from decisions of our Supreme Court in this area—stating, for example, that the special circumstance applies if the jury finds "the murder occur[red] during the commission of the [carjacking], not when the [carjacking] occur[red] during the commission of a murder" (*People v. Mendoza* (2000) 24 Cal.4th 130, 182 (*Mendoza*)) or if the jury finds the "defendant's intent to take the car was his 'primary—or at least concurrent—motivation'" (*Johnson*, *supra*, 60 Cal.4th at p. 992, citation omitted).

We doubt that the quoted statement from *Mendoza* should be deemed to be a gloss on "independent" that would have proved useful to the jury, and we are skeptical it could have been

delivered to the jury in non-argumentative fashion on the facts here. But even if we set these doubts aside, the court's response still was not an abuse of discretion.

The court's "duty to help the jury understand the legal principles it is asked to apply" does not require it to "always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

The trial court did not abuse its discretion by taking a conservative approach to the jury's inquiry. This is not a case where the court merely repeated the special circumstance instruction, even though that may have been an appropriate response. (See *People v. Noguera* (1992) 4 Cal.4th 599, 642.) Instead, the court reasonably decided to inform the jury that "independent" had no specific legal definition and could, therefore, be given its ordinary meaning. If jurors remained confused after receiving that response, they could have submitted another question.[25] (See, e.g., *People v. McLain* (1988) 46 Cal.3d

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[25] We also find no reasonable probability that further clarification would have resulted in a more favorable outcome to defendant Alcantar. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1017 [section 1138 error is subject to review for *Watson* prejudice].) The evidence permitted the jury to find the carjacking was pre-planned or was a concurrent motivation for the killing and the jury was instructed not to find the special circumstance true if it found the carjacking "was merely part of

97, 117 & fn. 4 [after jury asked for definition of terms and was told to give them their ordinary meaning, the jury asked for—and received—the dictionary meaning of those terms]; *People v. Lua*, *supra*, 10 Cal.App.5th at p. 1017 ["the court need not give the jury more information than it asks for"].)

D. The Trial Court Did Not Abuse Its Discretion When It Discharged a Juror on Defendant Morales's Jury

1. Background

After defendant Morales's jury had been deliberating for approximately two hours, the foreperson (Juror No. 6—a White man) apprised the court of potential juror misconduct. The foreperson said Juror No. 2 (a 70-year-old Black man) was "not willing to be reasonable in discussions or it's complete bias. It's all about what's been done to his people in the past. Everything has been rigged." The foreperson said all the other jurors could "come to a conclusion of either guilty or not guilty, but [Juror No. 2 would] not be reasonable."

When asked to elaborate, the foreperson said Juror No. 2's assessment of the case was "not related to the evidence" but was based on a "point of view," i.e., "related to what's been done to [his] people in the past, how all of this is rigged . . . ." By way of example, the foreperson said Juror No. 2 would not give a "yes or no" answer during discussions about whether there was "intent or not" in defendant Morales's case, and Juror No. 2 separately theorized, during discussions of defendant Morales's incriminating post-arrest statement, that the statement could

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or incidental to" Bojorquez's killing. That instruction helped to further direct the jury's application of "independent."

have been orchestrated by the police turning the recorder off, telling defendant Morales what to say, and then turning the recording back on and having defendant Morales say it. The foreperson added that Juror No. 2 said "[his] people have been enslaved for hundreds of years, and most of them are in prison today for things they've never done," and the foreperson revealed Juror No. 2 brought up a "personal issue" in which a relative "was set up by the police, and even though he was totally innocent, still spent time in prison." The foreperson told the court that "several of the jurors have asked that [Juror No. 2] be removed and an alternate be put in his place."

After hearing from the foreperson, the trial judge remarked that "[a]t this point I think I have no choice but to conduct an inquiry." The judge then examined several of the other jurors, starting with Juror No. 1 and proceeding sequentially—including Juror No. 2—to inquire whether there were concerns with the deliberation process.

Juror No. 1 (a Hispanic female) revealed the jurors took a vote and were all in agreement except for one juror who "agree[d] with everything that was presented in the courtroom, but [felt] that there were things that he—that the juror doesn't trust . . . like the unknown or reading between the lines or assumption." The trial judge inquired whether Juror No. 2 appeared to be basing his views on the evidence or something "that may have taken place outside of court." Juror No. 1 responded "neither," explaining that Juror No. 2's articulated views were based on "his personal beliefs and experiences" without regard to the evidence or the jury instructions. Juror No. 1 said she believed Juror No. 2 was "basically making a decision on an emotional and moral ground, not as we were instructed."

The trial judge next engaged in a lengthy colloquy with the juror in question, Juror No. 2.[26] When the court asked him whether there was an issue regarding deliberations, Juror No. 2 said "[w]ell, correct me if I'm wrong, but the defendant is innocent until proven guilty." Juror No. 2 added that he had "read" and "stud[ied] things" and "underst[oo]d pretty much how these things work." The trial judge said he simply wanted Juror No. 2 "to follow the law," to which the juror replied, "[t]hat's what I'm trying to do." Juror No. 2 said he believed the jury should "go through all the facts one by one and have a discussion about it" before coming to a decision, but that was "not being done" and he disagreed with the other jurors' "rush to judgment . . . ."

The trial judge asked Juror No. 2 what he was referring to when he talked "about how things are done or what [he] read in the newspaper." The juror said he did not "know what you want me to do" and he was "a man of principle" who would either "do the right thing or . . . shouldn't be doing anything at all." The trial judge said he was unsure why Juror No. 2 was being "evasive" and again asked him to explain what he meant by his earlier statements. The juror said he did not "think [he could] explain it to" the court because he did not think the court would be "receptive" to the explanation. Juror No. 2 added: "This is all hypothetical. But in my personal opinion, we are supposed to go

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[26] In the course of examining Juror No. 2, the trial judge explained the "careful balance" in what he was "trying to do with all the jurors that I'm speaking with, because I don't want to go into too much detail about it, I'm just trying to determine whether or not everyone is keeping an open mind or if there's other issues that are coming into play regarding deliberations with any of the jurors."

through all the facts one by one and have a discussion about it, and then hopefully we can come to a decision and reference [*sic*]. That's not being done. It's a rush to judgment, and I disagree with it."

Continuing the examination, the trial judge asked Juror No. 2 if his evaluation of the case was being influenced by "things outside of the evidence . . . ." Juror No. 2 said he had read nothing about this particular case and was "just here as a citizen . . . trying to do the right thing." The court asked Juror No. 2 if he could "disregard anything [he had] read in the newspaper about the criminal justice system or anything else and decide this case based upon . . . evidence that [he had] heard . . . and just generally based upon [his] own life experiences . . . ." Juror No. 2's response was to ask the trial judge to excuse him from the jury. Juror No. 2 said he felt as though he were being asked to "meet [a] standard" he could not adhere to and thought the court wanted him "to commit to something without having any reference or having any understanding of [his] own personal self in the process."

The trial judge then asked Juror No. 2 if he had any family members who had been arrested. The juror said one of his sons was arrested and went to jail for a period of time for having a gun in his car even though the gun belonged to someone else who was also in the car. The juror said he believed law enforcement treated his son fairly and he had disclosed both the arrest and his view of his son's treatment by law enforcement during voir dire.[27]

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[27] The prosecution confirmed Juror No. 2 disclosed during voir dire the fact of his son's arrest and his belief the son received fair treatment.

The judge re-read to Juror No. 2 some instructions on deliberating, and the juror said he understood them "perfectly" and believed he was following them. The court again asked what Juror No. 2 had read in the newspaper. The juror responded he never said he had read anything in the newspaper or heard anything on the news; he was referring earlier, rather, to having read "encyclopedia books . . . [and] law books" after his son was arrested in order "to have a better understanding of what was taking place." Juror No. 2 said he felt as a juror he "should weigh everything," "take the time to really look at the facts and really get an understanding," and "find the truth" rather than "take one side or the other." He said if he were "not appreciated in that regard," he would have "no problem" being let off the case.

When the trial judge asked if Juror No. 2 could apply the law as instructed even if he disagreed with it, the juror said he had "a problem understanding" what the court was asking and was getting "a little confused." The judge asked whether Juror No. 2 could apply the law as the court instructed and disregard anything he had read. Juror No. 2 again asked to be excused. The trial judge then put the question to Juror No. 2 once more, asking "for the fourth time now . . . whether or not you can disregard what you had read about real issues when you were researching stuff on your son's matter and follow the law that I give you in this case." Juror No. 2's response was, "I don't know whether I can, sir."

Juror No. 2 went on to explain he did not know if he could "erase things that [were] already in [his] head" and he stated he thought he had understood the law as instructed but now was "confused." Juror No. 2 said "[t]his [has] all become very

uncomfortable for me now" and stated he felt as if he were "being asked to do something that [went] against [his] grain."

After this colloquy, the trial judge permitted defendant Morales's attorney to question Juror No. 2. Defendant Morales's attorney asked the juror if he was "willing to deliberate," if he had "an open mind," and if he wanted all of the jurors "to talk about the facts." Juror No. 2 responded affirmatively. Defense counsel asked if Juror No. 2 believed all the jurors were "[fleshing] out all the facts of this case before" making a decision, to which the juror answered "[n]o." Defense counsel additionally asked if Juror No. 2 would follow the law, and the juror said he believed "that's what [he] was doing."

The court then heard from three additional jurors. Juror No. 3 (a White woman) said Juror No. 2 was applying "bias," "sympathy," and "prejudice" to this case based on past experiences. Juror No. 4 (a Hispanic man) said Juror No. 2 made two comments indicating he was biased: his son was wrongfully jailed and "many people of his color [were] put in jail for no reason." Juror No. 5 (a White woman) believed Juror No. 2 had "a vendetta" based on his son's experience and a belief that "all [his] people have been wrongly imprisoned . . . ."

After hearing from Juror No. 5, the trial judge decided to remove Juror No. 2 on the grounds he was "not following the court's instructions" and was "allowing extrinsic matters to affect his deliberation." The judge stated he believed Juror No. 2 "consistently and repeatedly refused to answer the court's questions" about what he "had read and whether or not [he] could set aside that information and simply follow the instructions the court ha[d] given." The judge further found that despite Juror No. 2's claim that he believed his son was treated fairly by law

enforcement, statements by the other jurors indicated Juror No. 2 had "a hostility towards law enforcement and the criminal justice system."

The court selected an alternate juror at random to replace Juror No. 2. The court instructed the jury that deliberations were to commence "from the beginning," enabling the replacement juror to "participate fully in the deliberations that lead to any verdict." Defendant Morales's jury as reconstituted deliberated for approximately two-and-a-half hours before returning with its verdicts.

2. Analysis

A trial court may discharge a juror at any time if the court finds the juror is "unable to perform his or her duty . . . ." (§ 1089.) Once the court is made aware "there may be grounds to discharge a juror during deliberations, it must conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist. [Citation.]" (*Cleveland*, *supra*, 25 Cal.4th at p. 480.)

While we apply an abuse of discretion standard to our review of a juror's discharge, that standard is "'heightened'" in this context to "'more fully reflect[ ] an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.'" (*Armstrong*, *supra*, 1 Cal.5th at p. 450, citations omitted.) Under this heightened standard, "the juror's 'inability to perform' his or her duty 'must appear in the record as a demonstrable reality.' [Citations.]" (*Ibid.*) "'[T]he reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied,'" and the reviewing

court must arrive at that determination by considering not only "'the evidence itself, but also the record of reasons the court provides.' [Citation.]"[28] (*Id*. at p. 451.)

Defendant Morales contends the trial court abused its discretion both in its discharge of Juror No. 2 and the manner in which it questioned him. The question on the former score is a close one under the governing standard of review, but we believe the trial judge's action remained within the bounds of his discretion. The trial court determined Juror No. 2 could not perform his duties because he could not follow the court's instructions or evaluate the case without regard to extrinsic considerations. The record shows these findings were a demonstrable reality.

Juror No. 2 said he could not "erase things that [were] already in [his] head," he felt the court was asking him to comply with a standard he could not meet because it would require him to disregard his "personal self," and the court was asking him to go "against [his] grain." Testimony from the other jurors, which the trial judge properly considered (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051-1053; *People v. Homick* (2012) 55 Cal.4th 816, 898), confirmed Juror No. 2's reference to his "personal self" and the "things . . . already in [his] head" were not merely life experiences through which he was evaluating specific items of trial evidence (compare *People v. Allen and Johnson* (2011) 53

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[28] The typical—i.e., not heightened—abuse of discretion standard applies to claims regarding "[t]he *manner* in which the trial court conducted its inquiry"—e.g., by being inordinately coercive or intrusive. (*People v. Fuiava* (2012) 53 Cal.4th 622, 712 (*Fuiava*).)

Cal.4th 60, 78 & fn. 13) but pre-existing views about the justice system that prevented him from agreeing he could apply the law as instructed by the court.

There are, to be sure, elements of the colloquy between the trial judge and Juror No. 2 that leave open the possibility that the juror was simply approaching his duties in conscientious fashion and his dismissal was attributable to, as the juror himself remarked at one point during the exchange with the court, something getting "[l]ost in translation" between the two of them. But the bottom line is that when asked the straightforward question of whether he could follow the law as given by trial court, Juror No. 2 gave an equally straightforward answer: "I don't know whether I can, sir." That is dispositive in our view—establishing Juror No. 2's dismissal was not an abuse of discretion. (*Fuiava*, *supra*, 53 Cal.4th at p. 713 ["It is beyond dispute that a juror who cannot follow the court's instructions because of a personal bias should be discharged under section 1089"]; see also *People v. Williams* (2001) 25 Cal.4th 441, 448 ["A juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of . . . section 1089"].)

In addition to challenging the trial court's ultimate decision to discharge Juror No. 2, defendant Morales also challenges the manner in which the court conducted its inquiry. Specifically, defendant Morales contends the trial court's "aggressive questioning" of Juror No. 2 was coercive, especially because the court knew all the other jurors were in agreement that defendant Morales was guilty. Assuming the issue is cognizable notwithstanding our conclusion that there was no error in dismissing the juror, we still reject the contention because the

court's questioning did not place pressure on Juror No. 2 to agree with his fellow jurors or reach any particular verdict.

"Coercion exists where, given the totality of the circumstances, the court's instructions or remarks displace[ ] the independent judgment of [a juror] "'in favor of considerations of compromise and expediency.'" [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 769.) In this case, Juror No. 1—unsolicited by the court—indicated the jury agreed 11-to-1 in favor of Morales's guilt on at least one of the charges. The record does not show, however, that the court's questioning of Juror No. 2 was influenced by its knowledge that Juror No. 2 was the lone dissenting vote.

The trial judge "did not exert pressure on or in any way encourage [Juror No. 2] to abandon [his] independent judgment and acquiesce in a verdict simply because the majority had reached a verdict." (*People v. Valdez* (2012) 55 Cal.4th 82, 164.) Rather, the court was focused on determining whether Juror No. 2 was relying on extrinsic information or disregarding the law in his assessment of the evidence.[29] In our view of the record, the court sought assurances from Juror No. 2 that he would apply the

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[29] For example, when Juror No. 2 initially asked to be excused he explained he could not "follow this" because he felt he was "being asked to do something—" The court interrupted him, saying, "No, no. Stop right there. I'm not going to go down that road. I'm not asking [you to] do anything. How you choose to vote based upon evaluating the evidence is up to you." The court emphasized its concern was "whether or not [Juror No. 2 could] disregard what [he had] read before and follow the law that [the court] gave to [him]." How the juror chose "to apply that law to the facts [was] up to [him]."

law as instructed to the evidence presented, without regard for whether Juror No. 2 ultimately reached the same conclusions as his fellow jurors. That is not coercion. (*People v. Russell* (2010) 50 Cal.4th 1228, 1252 [no coercion where the court "did not constrain [the juror suspected of misconduct] or the jury except to require that the jury abide by the instructions given"] (*Russell*).)

In the same vein, we do not believe the trial court's questioning of Juror No. 2 was unduly aggressive under the circumstances. The fact that the court's colloquy was lengthy and often repetitive derived not from any ostensible intent to pressure Juror No. 2 but from several instances in which the juror did not give direct answers to the court's questions and from some apparent misunderstandings or misinterpretations on the part of both the court and Juror No. 2 regarding what each was saying. The record shows that the court's manner of questioning Juror No. 2 was intended only to determine whether the juror could perform his duty and not for any improper purpose. (*Russell*, *supra*, 50 Cal.4th at p. 1252 [court's instruction to juror "that she could not permit her feelings of pity and sympathy for [the] defendant to influence her deliberative process" did not suggest that the court "favored any particular verdict"].)

Nor do we conclude that the trial court's removal of Juror No. 2 signaled to the remaining jurors that the court believed defendant Morales was guilty or coerced the replacement juror to agree with the other members of the jury. (See, e.g., *People v. Carter* (1968) 68 Cal.2d 810, 816.) As defendant Morales points out, her jury had not been deliberating for long when Juror No. 2 was replaced. Nothing in the record suggests the jury failed to follow the "court's instructions to begin the deliberations anew" (*Fuiava*, *supra*, 53 Cal.4th at p. 716; see also *People v. Thomas*

(1990) 218 Cal.App.3d 1477, 1487) or that the replacement juror "did not deliberate properly" (*People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333).

E. Cumulative Error

Defendants contend that even if the errors at their trial were not individually prejudicial, the cumulative effect of those errors denied them a fair trial. Because of the overlap between the two evidentiary errors we have identified in this case—both pertaining to inadmissible hearsay linking "Huera" to the motive for Bojorquez's killing—our analysis necessarily considered their collective prejudicial effect and found no justification for reversal apart from the gang and firearm sentencing enhancements. Because defendants have established no further errors that would necessitate cumulative analysis, we reject the cumulative error claim. (*People v. Woods* (2015) 241 Cal.App.4th 461, 489.)

F. Undisputed Sentencing Issues

1. Newly-conferred firearm sentencing discretion

Each of defendants' sentences included a consecutive 25-years-to-life prison term for the jury's firearm discharge findings under section 12022.53, subdivisions (d) and (e). At the time of sentencing, those prison terms were mandatory.

After defendants' sentencing, Senate Bill No. 620 took effect. (Sen. Bill No. 620 (2017-2018 Reg. Sess.) [effective January 1, 2018].) Senate Bill 620 amended section 12022.53 to give trial courts discretion, in the interest of justice, to strike a firearm enhancement finding made under the statute. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2 ["The court may, in the interest of justice pursuant to Section

1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section"].)

For reasons already described, we shall vacate the true findings on the section 12022.53 enhancements imposed on defendants and remand for a new trial on those enhancments if the People so elect. The issue of whether a remand is necessary under the newly added subdivision (h) of section 12022.53 is therefore moot.

2. Defendant Alcantar's parole revocation fine

The trial court imposed a $10,000 restitution fine (§ 1202.4, subd. (b)) on defendant Alcantar, as well as a "parole revocation restitution fine in the same amount" (§ 1202.45, subd. (a)). As defendant Alcantar correctly asserts, the parole revocation restitution fine was improper because he received a life sentence without the possibility of parole. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) It will be necessary to resentence both defendants, and the new judgment of conviction entered for defendant Alcantar shall not include a parole revocation restitution fine.[30]

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[30] By way of an apparent clerical error evident in the minute order, the abstract of judgment describes this fine as a *probation* revocation restitution fine under section 1202.44. The new abstract of judgment that must issue should reflect the imposition of a single restitution fine—that imposed pursuant to section 1202.4, subdivision (b).

3. Defendant Alcantar's count four conviction

Defendant Alcantar's abstract of judgment characterizes the felon in possession conviction on count four as a serious felony. Count four was not alleged or proved to be a serious felony. At resentencing, the error must be corrected.

DISPOSITION

Defendants' convictions are affirmed. As to defendant Alcantar, the jury's carjacking special circumstance finding associated with the murder charge is affirmed. The gang-related findings (§ 186.22, (b)(1)(C)) and firearm discharge true findings (§ 12022.53, subds. (d), (e)) against both defendants are vacated and remanded for retrial. If, after issuance of the remittitur, the People elect not to retry these enhancements as to either defendant, or both, within the time limit set forth in section 1382, subdivision (a)(2), the trial court shall resentence that defendant, or defendants, without imposition of these enhancements and thereafter deliver corrected abstracts of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

KIM, J. SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.