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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NOE HERNANDEZ, Defendant and Appellant.	B262261 (Los Angeles County Super. Ct. No. BA395711)

APPEAL from a judgment of the Superior Court of Los Angeles County. Henry J. Hall, Judge. Affirmed but remanded to the trial court for resentencing.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

This case involves a shooting with four victims. In an information filed by the Los Angeles County District Attorney's Office, defendant and appellant Noe Hernandez was charged with murder (Pen. Code, § 187, subd. (a); count 1)[1] and attempted willful, deliberate, and premeditated murder (§§ 664/187, subd. (a); counts 2-4).[2] As to all counts, it was further alleged that a principal personally used a firearm within the meaning of section 12022.53, subds. (b), (c), (d), and (e)(1), and that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).[3] A jury found appellant guilty on all four counts. In addition, it found true the gang allegation, the personal firearm allegations, and the allegations that the attempted murders were willful, deliberate, and premeditated. As to each of the counts, appellant was sentenced to 40 years to life in state prison.[4] At the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Codefendants Antonio Solis (Solis) and Fabian Limon (Limon) were charged with the same crimes. During voir dire, codefendant Solis's case was severed due to his counsel's illness. Codefendant Limon entered into a plea agreement with the prosecutor. The plea agreement provided, inter alia: (1) Limon would plead guilty to voluntary manslaughter, admit a gang allegation and be sentenced to 11 years in state prison; (2) Limon would testify truthfully in the trial in case number BA395711, or any successor trial based on the same facts; (3) if Limon did not satisfy his obligations under the agreement, the People could terminate the agreement; (4) "[t]he issue of whether or not [Limon] has in fact testified truthfully and completely will be decided by a judge of the California Superior Court;" and (5) in the event the People decide to terminate the agreement, any statements made by Limon, including to the proffer statement he gave on August 26, 2014, may be used against him.

[3] As against appellant, the prosecutor dismissed the allegation that a principal used and discharged a firearm causing great bodily injury. The prosecutor elected to proceed on the theory that appellant personally used and discharged a firearm causing great bodily injury.

[4] Appellant's sentence on each count was 15 years to life with an additional term of 25 years to life pursuant to section 12022.53, subdivision (d). Under the auspices of section 12022.53, subdivision (f), the trial court

sentencing hearing, the trial court did not orally specify whether the sentences were to run concurrent or consecutive. The minute order stated that the aggregate sentence was 115 years to life.[5]

On appeal, appellant argues: (1) the trial court abused its discretion when it barred a defense video expert from testifying about his comparison of two video images of the man believed to be the shooter with photos of appellant; (2) the trial court made a series of evidentiary errors that individually and cumulatively violated appellant's right to present a defense; (3) defense counsel's failure to make obvious evidentiary objections violated appellant's right to effective assistance of counsel; and (4) the trial court failed to specify whether the sentences for each offense were to run consecutively or concurrently, so they must be deemed to run concurrent.

We conclude that the matter must be remanded for resentencing so the trial court can determine whether the sentences should run concurrent or consecutive. In all other respects, we find no error and affirm.

FACTS

Prosecution Case-in-Chief

Events Leading Up to the Murder and Attempted Murders; the Murder and Attempted Murders

According to Limon, he went to a club called "The Mayan" with Solis and appellant on the night of January 27, 2012. On that date, appellant was "a little chubbier" and had shorter hair than at trial. When Solis introduced Limon to appellant, Solis referred to appellant as "Travi" or "Travieso," meaning "Trouble." While driving a Nissan Altima to The Mayan, appellant asked Limon if he was Listo's cousin, and Limon said yes. Listo was a Clarence Street gang member whom appellant said was a friend. Appellant parked the car at a parking lot on the northwest corner of Hill and Olympic. Inside the club, Limon, Solis, and appellant stayed together "the whole night." Surveillance videos from The Mayan were played for the jury. In the

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stayed the 20-year enhancement provided by section 12022.53, subdivision (c) and the 10-year enhancement provided by section 12022.53, subdivision (b).

[5] The abstract of judgment indicates that the sentences are consecutive. If all the sentences are consecutive, the total sentence would be 160 years to life. It is unclear what the trial court intended.

first video, Limon identified himself, Solis, and appellant entering The Mayan and walking through a metal detector. Other video clips showed the men moving about the different areas inside the club. At some point, a group of women joined them. After one of the women vomited, a security guard told them to leave the club because the woman was intoxicated. Limon left with the women and walked them to their car.[6]

Sometime later, Limon and appellant were on the street and met two women Limon did not know. One of those women, Jimena Lopez (Jimena),[7] testified that she and her sister Olga met two men on the street and walked with them for a few minutes. The prosecutor played a video of the encounter for the jury. One of the men was holding a cell phone to his ear. Eventually, he spoke to Jimena. He stopped, pulled down his pants and showed her a thigh tattoo of a drawing done by his son. Also, the man lifted his shirt and exhibited other tattoos. The prosecutor showed People's exhibit 23 to Jimena, a photo of a crudely drawn skeleton tattoo with the word "DADDY" above it , and she identified it as the man's thigh tattoo. Subsequently, the prosecutor showed various videos of the encounter to Limon. He identified the two men as himself and appellant. As well, Limon identified appellant as the man holding the cell phone to his ear, and as the person who showed his thigh tattoo to Jimena and lifted up his shirt. According to Limon, he was wearing lighter colored pants and appellant was wearing darker colored pants. After the women left, appellant and Limon waited for Solis to come out of The Mayan.

About half an hour later, in the same location, Solis rejoined appellant and Limon. They went to a hotdog stand. Fernando Hernandez (Fernando)[8] bumped into Solis, and they got into an argument. Solis told Fernando to walk away, but he wanted to fight. Someone suggested that they go to a

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[6] It is unclear whether Solis and appellant went with Limon. From context, we presume appellant did and Solis did not.

[7] We refer to Jimena by her first name because there is another witness, Haroldo Lopez, who has the same last name.

[8] Because appellant and Fernando share the same last name, we refer to Fernando by his first name to avoid any confusion.

nearby parking lot, so they moved toward that parking lot. Appellant approached Fernando from behind and punched him in the side of the face. Fernando fell to the ground and got up again. He had blood around his mouth. Fernando argued with appellant, then said he would be back and walked away. Appellant went to the hotdog stand, leaving Limon and Solis in the parking lot. A couple of minutes later, Limon said to Solis he wanted to leave because "something's going to happen. That guy's going to come back[.]" They walked to a bus stop and waited for appellant. Solis told Limon that there was a gun in their car.

Jorge Perez (Perez) testified that in the early morning of January 28, 2012, he and his friend Martin left The Belasco, which is next to The Mayan. Perez had an iPhone. He and Martin went to a hotdog stand about half a block away. According to Perez, he saw Fernando and Solis squaring off and exchanging words in a tense manner. Then they started walking toward a parking lot. Perez saw a third man run up behind Fernando and swing at him with a closed fist and strike him in the side of the head. At trial, Perez identified appellant as that third person who hit Fernando. Per Perez, Solis and appellant stood over Fernando, and then Fernando got up. Fernando asked appellant what he was doing, and indicated that the altercation was between himself and Solis. As Fernando was leaving, he said, "I'll be back. I'll be back."

Fernando's friend, Daniel Quintanilla (Quintanilla), was unavailable for trial, so his prior testimony was read into the record. According to that testimony: On January 27, 2012, Quintanilla went to The Mayan with Fernando. Around 2:30 a.m. the next morning, Quintanilla left the club to walk to his car. Fernando remained inside the club. After going to his car, Quintanilla walked back toward The Mayan and saw Fernando, who was upset and had blood on his mouth. He said that he had been "jumped." Quintanilla followed Fernando across the intersection of Hill and Olympic and approached three people who were standing near the corner of those streets and a hotdog stand. Limon, who was one of those three people, hit Fernando.

Per Limon, when he was approached by Fernando, Fernando screamed "Culver City Gang," and said, "What's up now? What's up now?" as though

ready to fight. Fernando "got [into Limon's] face." According to Limon, he punched Fernando, who then backed up.

In his testimony, Perez confirmed that Fernando and a friend had a confrontation with Solis, Limon and appellant close to the intersection of Olympic and Hill near a hotdog stand. According to Perez, the five men moved into a parking lot. In the middle of the parking lot, they started to fight. Then a security guard drove up in a vehicle. When he turned on his lights and siren, the five men who were fighting dispersed. Solis, Limon and appellant returned to the sidewalk, and Fernando and his friend proceeded to the north end of the parking lot. Appellant's group encountered a man leaning against an Escalade, and the man and appellant started "talking trash" to each other. Appellant lifted up his shirt and showed a green tattoo with block letters across his stomach. The letters went from his belly button to just below his chest. At that point, the two men went toward each other, squared off like boxers and began a fist fight. Three other men exited the Escalade and began fighting with Solis and Limon, at which point Fernando and Quintanilla joined the fight.

According to Quintanilla, the person who lifted his shirt and revealed a tattoo that said, "Clarence Street."

Everyone stopped fighting when they saw a security guard and a patrol car. Perez and Martin walked across Hill at the intersection of Hill and Olympic. Solis and Limon started crossing the street, too. Fernando's group, which included people from the Escalade, crossed the intersection diagonally and confronted Solis and Limon. At that point, Perez began filming the confrontation with his iPhone. He heard Limon yell, "Get the cuete," meaning, "Get the gun." According to Limon, when he took a fighting stance, someone in Fernando's group said, "Oh, yeah? Let's get these motherfuckers. Get the strap." Someone also screamed, "Barrio Van Nuys." Appellant came from Limon's left and began shooting. Perez heard a ringing in his ears and saw appellant pointing a pistol at Fernando's group. Appellant fired five or six shots and hit Fernando in the head. He fell to the ground. Quintanilla was shot in the leg while standing on one of the corners of the intersection. Jose Garcia (Garcia), one of Fernando's allies in the fight, was shot in the left

hip. Juan Munoz, another one of Fernando's allies, was shot in his bicep and thigh area.

Perez's iPhone video was played to the jury. Perez identified Limon, Solis, Fernando, and appellant from the iPhone video. When the prosecutor played the iPhone video for Limon, he was able to identify, inter alia, himself, Solis, Fernando, and appellant.

After the shooting, Limon went to the car with appellant and Solis. The motor was already running. Appellant got into the driver's seat. Moments later, Limon and Solis entered the car. As they drove off, Limon and/or Solis said, "There was no need for this." Appellant, who had the gun between his legs, replied, "If those motherfuckers want to play, let's play." They drove to Limon's house.

Various bystanders witnessed the shooting. Haroldo Lopez (Haroldo)[9] testified that he and his cousin Christian saw seven people "who wanted to fight" in the area of Hill and Olympic. Someone in the group yelled, "Go to the cuete." One man in a group of three men ran to the parking lot on the corner. He returned with a gun and began shooting. He shot three people, one of whom fell to the ground in the middle of the intersection. The shooter's group returned to the parking lot. According to Haroldo, the group got into a gray Nissan and drove away north on Hill. Natalia Balestra (Balestra) testified that while she and her friend were stopped in a car at the intersection of Olympic and Hill, they saw two groups of men confronting each other. Balestra and her friend heard gunshots and ducked. When Balestra looked out the window, she saw people scatter and a person on the ground.

Investigation; Arrest of Appellant

Los Angeles Police Officer John Padilla responded to the scene of the shooting and found Fernando dead in the middle of the intersection of Olympic and Hill. Officer Padilla recovered six .25-caliber shell casings from the area. An autopsy revealed that Fernando died as a result of a gunshot

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[9] We refer to Haroldo by his first name because there is another witness, Jimena, who has the same last name.

wound to his right eye. A bullet was recovered from Fernando's skull. In the autopsy report, the bullet was described consistent with it being a .25-caliber.

Los Angeles Police Detective Brian Putnam testified that Fernando was a documented member of the Culver City Boys gang. In an interview with Quintanilla, Detective Putnam listened to a recording on Quintanilla's phone. In that recording, which captured a portion of the altercation that occurred prior to Fernando being shot, men could be heard arguing and calling out Clarence Street and Culver City. Consequently, Detective Putnam assumed he was seeking suspects from the Clarence Street gang.

Detective Putnam showed Perez six stills from The Mayan surveillance video. One of the stills, People's Exhibit 8 (Exhibit 8) depicts two men in dark shirts—one with light pants, one with dark pants—and two women on the street. Perez labeled one of the men as the shooter and the other man as "Guy in the brown pants." At trial, Perez testified that the person he identified as the shooter was appellant, and the person he identified as the guy in the brown pants was Limon. In Exhibit 8, the person identified by Perez as the shooter is holding a cell phone to his right ear.[10]

The detective showed Exhibit 8 to other witnesses. Quintanilla identified the man in "the far left-hand side of the photograph" as the person who hit Fernando, and the man "with the phone up to his ear" as being similar to the "chunky guy" with the stomach tattoo that "started with a C." Garcia identified the person "on the far left-hand side of the photo" as "one of the guys [we] fought with." Balestra identified the man with a phone to his ear as the shooter.[11] After Haroldo was shown Exhibit 8, he wrote in the

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[10] As noted by appellant, Perez testified that when he first gave a description of the shooter to the police, he could not remember the shooter's face. Apparently this was before he saw a picture of appellant. Perez identified appellant as the shooter at the preliminary hearing.

[11] In his reply brief, appellant contends that the People misrepresented that Balestra identified the man with the phone as the shooter. After reviewing People's Exhibits 8 and 28, and after reviewing the trial transcript, we disagree with appellant's attack on the People's brief.

Limon identified himself as the man on the far left in Exhibit 8. Balestra circled the man second from the left. He is holding a cell phone to

photo identification report that the man on the far left "is the guy I saw involved in the fight," and that the man second from the left "looks like the guy who ran to the car, and then started shooting." At trial, Haroldo did not identify appellant as the shooter because the shooter was facing away from Haroldo. As a consequence, Haroldo did not "get a chance to see [the shooter's] face well because it all happened very fast."

Weeks later, Detective Putnam released a video clip from The Mayan surveillance to the media and offered a reward for assistance identifying the two men in the clip walking with the two women. A woman named Mona Lisa called the police, identified one man in the clip as "Fabian," and said where he could be found. Jimena also called the police and identified herself in the clip as the "female in the middle."

On March 29, 2012, Detective Putnam detained Limon. After Limon spoke with his lawyer, he agreed to help the police identify "the other people involved." Limon identified the shooter as "Travieso" and "the other person" as Solis, and disclosed that a long time ago "Travieso" had been arrested with Limon's cousin, Listo. Using department resources, Detective Putnam discovered that Travieso was appellant. The detective printed a photograph of appellant and showed it to Limon. Limon confirmed that appellant was Travieso. The next day, Detective Putnam showed Limon a photo of Solis. Limon confirmed Solis was the person depicted.

Appellant was arrested on April 5, 2012.

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his ear. In People's exhibit 27, the photo identification report, Balestra wrote: "The man in the photo that I had chosen fits the full description that I had given. The shooter was indeed wearing a black collar shirt along with dark pants. He had short dark hair and no facial hair. He appeared to be between 5'4"-5'6". He had a [stocky], thick build. The man I had circled in photograph #4 is the shooter I had seen."

On the witness stand, Balestra was asked if she wrote the statement in the photo identification report, including the statement that the man she circled was the shooter she had seen. Balestra testified that she wrote the statement. She was then asked if it was truthful. She responded, "Yes."

As is apparent from People's Exhibits 8 and 28, and from her trial testimony, Balestra identified the shooter in the still photograph.

Additional Evidence

One day while Limon and appellant were in custody, appellant simulated a gun with his fingers, pointed it at Limon, and moved his thumb down as if he were firing it. Limon considered it a threat. Limon told the mother of his children to stay quiet. She told Limon to save himself first.

On April 24, 2014, the police took photographs of appellant, Solis, and Limon. Solis had "CSL" and "pride" tattooed on his right arm. Limon had a tattoo around his collarbone. Solis and Limon did not have tattoos on their stomachs. Appellant had "Clarenciero" tattooed across his stomach, and "Clarencia" and "13" tattooed above his right ankle. He also had tattoos on his right arm, legs, and back.

The police converted images from The Mayan surveillance video to stills. In the stills taken from video inside The Mayan—People's Exhibits 46 to 53—Limon circled an individual inside the club. Appellant's booking photograph was superimposed on five of those stills, and the person in the stills appeared to match the person in appellant's booking photograph. In People's exhibit 54—which is a still containing the same image as in Exhibit 8—the man with the cell phone is circled in red and appears to be the same person as in appellant's superimposed booking photograph. Other still photographs, which depicted the areas outside The Mayan, show a person inside a red circle; he is showing two women the tattoos on his right arm, right thigh, stomach, and back. Photographs of appellant's various tattoos were superimposed on the stills in which the circled man displays his tattoos. In Peoples exhibit 56, which is the still that depicts the circled man showing a thigh tattoo to two women, there is a partial view of what appears to be the same tattoo of the superimposed picture of appellant's tattoo of his son's crude drawing of a skeleton.

On April 18, 2013, Los Angeles County Deputy Sheriff Elsie Medina, who was working at a correctional facility where appellant was housed, asked appellant where he was from. Appellant replied, "Clarence Street." When she asked "what they called him in the streets," appellant said, "Travieso." According to Deputy Medina, appellant had "Licencio or something like that" tattooed on his stomach. Appellant was housed in the general population module, and most of the people in that module were gang members.

Testimony of the Prosecution Gang Expert

While Los Angeles Police Officer Alejandro Diaz was assigned to the Hollenbeck Gang Unit, he specialized in various gangs, including the Clarence Street gang. In 2012, the Clarence Street gang had about 55 active members and associates. Their symbols include "CSL" for Clarence Street Locos and the letter C. They refer to themselves, inter alia, as Clarence, Clarencia, Clarencio, or "C with the X." They also have a hand sign. The primary activities of the Clarence Street gang include robberies, assaults with deadly weapons, shootings, carjackings, and murder. One Clarence Street gang member had been convicted of robbery, and another convicted of attempted carjacking.

Officer Diaz opined that Solis and appellant were Clarence Street gang members based on their admissions and tattoos.

Using the facts of the case as a hypothetical scenario, the prosecutor asked Officer Diaz if the shooting was committed in association with and for the benefit of the Clarence Street gang. Officer Diaz said it was.

Appellant's Physical Appearance

When Detective Putnam first saw appellant at the preliminary hearing on October 24, 2012, appellant's appearance had changed; his hair and goatee were "much longer" than when he was arrested. At the time of Detective Putnam's trial testimony, appellant was "in much better shape."

Defense Case

Alibi testimony

Sandra Hernandez (Sandra) was married to appellant for seven years before they divorced. According to Sandra, appellant was not in a gang and did not associate with gang members while they were still married. Appellant was active in church and helped troubled youths in the neighborhood. In March 2003, Sandra and appellant had a son named Gustavo. Appellant had numerous tattoos, including "Clarence" on his stomach and a little skeleton drawn by Gustavo on his thigh.

On one occasion in 2010, appellant questioned Sandra about how much money she had been spending. He took her cell phone. Using a different phone, Sandra called the police. She lied and said appellant had guns and that she was afraid of him. In fact, the only guns in the house belonged to

Sandra, and they were not in appellant's possession. The police seized the guns, which were not registered. On another occasion, Sandra called the police when appellant took her purse out of her hands. She wanted to get him in trouble.

In January 2012, Sandra lived in San Marcos, California. During that time, appellant's hair was "[k]ind of sticking up" and shorter than it was at the time of trial. Also, he was about 10 pounds heavier in 2012. Sandra was shown Exhibit 8. She testified that appellant did not look like the man in Exhibit 8 who was holding a cell phone to his ear.

On January 27, 2012, appellant picked up Gustavo from school on Friday. According to Gustavo they went to the house of appellant's friend, and Gustavo eventually fell asleep on a couch. Later, appellant woke Gustavo up and took him to appellant's trailer. Gustavo fell asleep and woke up the next day.

Erin Nelson (Nelson) knew appellant through her fiancé's brother, Jerry Jasso (Jasso). At about 8:00 a.m. on Saturday, January 28, 2012, Nelson and her fiancée Danny Martinez picked up Jasso from the airport and drove to a 99 Cent Store in Vista in San Diego County to meet appellant. Appellant was with Gustavo. After appellant shopped, everyone went to appellant's trailer. Nelson and her fiancée left around 4:00 p.m. She recalled the date because she kept a notebook of her appointments, Jasso had a plane ticket dated January 28, 2012, and she was seven months pregnant at the time. On cross-examination, Nelson admitted that when she spoke with the defense on August 21, 2014, she did not mention a notebook or Jasso's plane ticket. She told the defense she picked up Jasso from his uncle's house. Nelson had a prior conviction for disorderly conduct and receiving stolen property. Previously, she associated with "friends" who were Eastside gang members.

Testimony Related to Whether Appellant is in a Gang

Scott Taylor (Taylor) is a chaplain in Twin Towers Correctional Facility and Men's Central Jail. He testified that he first met appellant in August 2012 when appellant went to one of Taylor's classes. Appellant told Taylor he used to be a Clarence Street gang member but that he left the gang when he

moved to San Diego County two and a half years earlier. Taylor never heard anyone call appellant by a gang moniker.

According to Bill Sanders (Sanders), a professor of criminal justice at California State University, Los Angeles and a gang expert, an "overwhelming majority" of juvenile offenders do not become adult offenders. He was asked to opine whether a hypothetical person was in a gang if that person was a 36-year-old who joined a gang when young but then moved away as an adult and started a family, became involved in his church, did not align himself with a gang while in custody, and attended Bible study in jail. Sanders opined that the person was no longer a gang member. According to Sanders, the Clarence Street gang is not a rival of the Culver City gang or the Barrio Van Nuys gang. Based on a hypothetical comprised of the facts of this case, Sanders opined that the shooting was not committed for the benefit of the Clarence Street gang because the fight was due to people bumping into each other, and no gang names were mentioned until after the altercation had already commenced.

Memory and Witness Identification Expert

According to Dr. Mitchell Eisen, a psychologist with expertise in eyewitness memory and suggestibility, memory often fades as time passes. He explained that human memory is malleable and sometimes new information can get mixed up with memories. Based on research, he explained that when witnesses are given an identification test such as a six-pack photograph array, the witnesses will assume the "bad guy" is present unless law enforcement admonishes them not to make that assumption. Without an admonishment, the witnesses are more likely to make false identifications. If only one picture is shown to a witness, and there is no admonishment, a witness is likely to assume that the bad guy must be the one in the photograph.

Appellant's testimony

Appellant testified that in 1994, he moved to Escondido in San Diego County because his mother wanted him to "get away from the gang area." After Escondido, he lived in Ventura County as well as other cities in San Diego County. Appellant sometimes visited his friends and family in

Los Angeles. Appellant, who was 35 years old, earned money by doing tattoo art, working on cars, and changing tires.

Appellant had numerous tattoos. He was about 10 or 11 years old when he was pressured into getting his first tattoo, which referenced his mother. When he was 17 years old, he had his last name tattooed on his back. When he was 18 years old, he obtained a stomach tattoo with his gang's name. His other gang tattoos were on the back of his arms, his fingers, the web of his hand, legs, shin, and calf. His nongang tattoos included the skeleton Gustavo drew and what appellant called "culture work" or "Aztec work."

When appellant was 13 years old, he joined the Clarence Street gang out of peer pressure. He was "jumped" into the gang when he joined, and he was also jumped into a gang clique called the Cutdowns.[12] At the time, appellant associated with people who were between 15 to 22 years old. When appellant was 14 years old in 1993, he was "at the wrong place at the wrong time" with two other people who were "up to no good," and was convicted of robbery. When appellant was 15 years old in 1994, he was convicted of carjacking. During the crime, he was with two older people, one of whom had a gun.

Listo was one of appellant's gang friends. At one point, appellant met Limon, Listo's cousin. Listo's family, including Limon, associated with the Clarence Street gang. In 1997, appellant and Listo were pulled over while driving a stolen car. After hearing Listo say he was a "second striker," appellant decided to drive away from the police officer. Appellant crashed; both he and Listo were apprehended and arrested. Because appellant did not want Listo to get sentenced to life in prison, appellant took the blame and was convicted of evading a police officer. The case against Listo was dismissed but he was nonetheless found in violation of his parole and eventually deported. While appellant was in prison for his conviction, he claimed to be a Clarence Street gang member.

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[12] The process of appellant being jumped in on those two occasions involved three people beating him.

Appellant was released from prison after two years and moved to Escondido and worked as a foreman for a demolition company. He no longer associated with the Clarence Street gang. When he informed his gang of his intent to leave the gang in 2002, Clarence Street gang members retaliated by stabbing appellant 11 times while he was in a convenience store. Appellant told the police he was in a car accident because he did not want to be a snitch. Thereafter, he returned to prison for a year due to a parole violation. In 2003, the retaliation against him continued when he was chased by a car full of people and shot in the face and foot. Appellant went to Mexico for treatment and did not report the incident to the police.

Upon leaving the gang, appellant went through the process of removing any tattoo that could be seen if he was wearing a T-shirt. He wanted to show his son a different type of lifestyle, and to be more employable. When a gang member gets a tattoo removed, it is a form of disrespect. In Escondido, appellant and Sandra attended church together. He volunteered to work with troubled youths to keep them from drugs and gangs.

On January 27, 2012, appellant's friend Jasso arrived at the airport in Los Angeles, but appellant was unable to pick him up because he had to pick up Gustavo from school. Jasso went to his uncle's house. After appellant picked up Gustavo from school, they returned to appellant's trailer in Vista. At about 8:30 p.m., appellant and Gustavo went to the home of appellant's friend, Anthony Marinelli. Gustavo fell asleep there. Around 1:00 or 2:00 a.m., appellant and Gustavo returned to appellant's trailer. After they woke up in the morning, they went to a 99 Cent Store in Vista and met Jasso, who was with Nelson and Danny. Everyone returned to appellant's trailer. After dark, Jasso, appellant, and Gustavo picked up Jasso's daughter Jayden from Jayden's mother's house and went to Chuck E. Cheese. Around 10:30 or 11:00 p.m., they dropped Jayden back at her mother's house and returned to appellant's trailer. That night, appellant was driving a gray, four-door Mercedes.

On April 5, 2012, appellant was arrested at a sports bar in San Marcos. He was with his mother and Sandra. While in custody, appellant was "run[ning] [C]hristian" and therefore did not affiliate with a gang even though that would have provided him with protection.

On April 18, 2013, Deputy Medina asked appellant what his stomach tattoo said. She did not ask him where he was from, and he did not tell her he was in a gang.

According to appellant, he went to The Mayan in 2011 after his divorce but denied going there on January 27, 2012. Since the time appellant first met Limon in the 1990's, appellant did not see Limon again until after being arrested. According to appellant, he did not know Solis. Appellant believed Solis was in the Clarence Street gang based on his tattoos and other information that was presented during the trial.

Prosecution's Rebuttal

On December 18, 2010, Escondido Police Officer Huy Quach spoke with Sandra, who came to the police station to talk about appellant. Sandra said appellant had been arrested for domestic violence and that she wanted an emergency protective order because she was afraid. Sandra said that appellant was an active Clarence Street gang member and kept firearms at the house. After obtaining an emergency protective order, Officer Quach accompanied Sandra back to her home at her request. Sandra was worried that appellant would be at the house since he had bailed out. When they arrived at the house, the house was empty. Sandra showed Officer Quach where appellant kept his guns—a locked black gun case in a dresser drawer filled with men's clothing, and a locked tool chest in the garage. In the tool chest, Officer Quach found two revolvers, some ammunition, and a belt with slots for ammunition. Also inside the tool chest, Officer Quach found pill bottles that had appellant's name on the labels.

DISCUSSION

I. Framing of the Overriding Issue.

Appellant raises a variety of issues. But other than the particulars of the gang enhancement and sentencing, the overriding issue boils down to this:

If the trial court erred or defense counsel provided ineffective assistance of counsel, can it be said under the applicable state or federal standard that in the absence of that error or ineffective assistance, the jury would have accepted appellant's alibi defense? In other words, must we reverse because there is a sufficient likelihood the jury would have concluded

that appellant was in San Diego County on the night of January 27, 2012, and early morning of January 28, 2012, rather than present at The Mayan and during the subsequent shooting of Fernando?

II. Exclusion of Testimony from the Defense Video Expert.

Prior to trial, the trial court excluded that testimony of defense video expert Ron Guzek (Guzek) regarding facial comparison of a frontal photo and profile photo taken of appellant just prior to trial with, respectively, Exhibit 8 and a still taken from Perez's iPhone video of the shooter. Appellant contends that the trial court abused its discretion under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*). The People contend the trial court properly barred Guzek's testimony under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) because it was based on a new scientific technique that was unreliable.

Upon review, we conclude Guzek's proffered comparisons were based on matter of a type on which an expert may not reasonably rely, and they were speculative. The trial court acted well within its authority as a gatekeeper in essentially determining that Guzek was not employing the same level of intellectual rigor of an expert in the relevant field. Notably, the theories relied upon by Guzek were new to science as well as the law, and he did not establish that his theories had gained general acceptance in the relevant scientific community or were reliable.

A. Relevant Law; Standard of Review.

Expert testimony is allowed if it pertains to a subject that is sufficiently beyond common experience such that the opinion of the expert would assist the trier of fact, and if it is "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates[.]" (Evid. Code, § 801.) Unless otherwise precluded by law, an expert witness may state the reasons for his or her opinion and the matter on which it is based. (Evid. Code, § 802.)

Our Supreme Court urges caution when excluding expert testimony. Trial courts should not choose between competing expert opinions. Thus,

they "must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. [Instead], it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' [Citation.] The goal of the trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion. [Citation.] In short, the gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' [Citation.]" (*Sargon*, *supra*, 55 Cal.4th at p. 772.)

When a trial court is confronted with an expert opinion based on the application of a new scientific technique, there is a two-step process: "(1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." (*Kelly*, *supra*, 17 Cal.3d at p. 30.) This process applies only "'to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law.' [Citation.]" (*People v. Leahy* (1994) 8 Cal.4th 587, 605, italics in original.) The proponent must establish that "the reliability of the new technique has gained general acceptance in the relevant scientific community." (*People v. Doolin* (2009) 45 Cal.4th 390, 445 (*Doolin*).)

"Whether a new scientific technique has gained general acceptance is a mixed question of law and fact. [Citation.]" (*Doolin*, *supra*, 45 Cal.4th at p. 447.) The trial court's determination of factual findings and credibility is reviewed with deference, and then the reviewing court "'decide[s] as a matter of law, based on those assumptions, whether there has been general acceptance.' [Citation.]" (*Ibid.*) "[P]roof of such acceptance is not necessary if a published appellate opinion affirms a trial court ruling admitting

evidence obtained through use of that technique, at least until new evidence is admitted showing the scientific community has changed its attitude. [Citations.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 127.)[13]

B. Relevant Proceedings.

The prosecutor made a motion in limine to exclude the testimony of Guzek, and the trial court held a hearing. Guzek and the prosecution's expert, George Reis (Reis), testified.

1. *Guzek's Testimony*.

Guzek explained that if allowed to testify before the jury, he would compare a profile picture he took of appellant in jail prior to trial to a still of the shooter's profile from the iPhone video. In addition, Guzek explained he would compare a frontal picture he took of appellant's face and head in jail prior to trial to the face and head of the man in Exhibit 8 who is holding a cell phone to his ear. These comparisons were set forth in a report prepared by Guzek. According to Guzek, his goal was to "simply try and provide what information I can find by comparing shapes so that the parties involved that do make decisions can make more informed decisions."

Asked how he would compare the images, Guzek explained he would use, in part, Euclidean geometry.[14] He admitted this was a technique that

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[13] The *Kelly* test is sometimes referred to as the *Kelly/Frye* test, which is reference to *Kelly* and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014.)

[14] The Encyclopedia Britannica states: "Euclidean geometry [is] the study of plane and solid figures on the basis of axioms and theorems employed by the Greek mathematician Euclid. . . . It is the most typical expression of general mathematical thinking. Rather than the memorization of simple algorithms to solve equations by rote, it demands true insight into the subject, clever ideas for applying theorems in special situations, an ability to generalize from known facts, and an insistence on the importance of proof. In Euclid's great work, the Elements, the only tools employed for geometrical constructions were the ruler and the compass—a restriction retained in elementary Euclidean geometry to this day." (<https://www.britannica.com/topic/Euclidean-geometry> [as of June 13, 2017].)

other people did not use. Also, he used what he called Michelangelo theory—Guzek's technique of taking away portions of a distorted and/or blurred digital image to reveal the true features of the person in the iPhone video still and Exhibit 8—and an unnamed and unexplained technique for looking at bad images. Guzek thought his margin of error was five-to-eight percent.

To compare the iPhone video still to the profile picture of appellant, Guzek rotated the still so the two images would be aligned. This prompted defense counsel to ask if rotating the iPhone still would change the quality of the image. Guzek said the change would be minimal.

Guzek was aware of the many ways in which a digital image could be distorted and therefore rendered invalid. He mentioned motion blur,[15] aperture angles, low resolution, compression artifacts,[16] and voids depicted by shadows and highlights. He explained that compression artifacts can

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[15] "Motion blur" is an artifact "by which fast-moving objects appear blurred. Each frame in a conventional film is an average sample taken over about half the time it takes to record the frame. In consequence, fast-moving images appear blurred. Temporal aliasing is more severe in the case of computer-generated images where the image is likely to be defined at a specific point in time. (Online Encyclopedia, A Dictionary of Computing (2004) < http://www.encyclopedia.com/computing/dictionaries-thesauruses-pictures-and-press-releases/motion-blur> [as of June 13, 2017].)

[16] "Compression artifacts" are defined as follows: "Compacting of a digital signal, particularly when a high compression ratio is used, may result in small errors when the signal is decompressed. These unwanted defects are known as artifacts. Artifacts may resemble noise or edge busyness or may cause parts of the picture[,] particularly fast moving portions[,] to be displayed with the movement distorted or missing." (Gardner, Gardner's Film, Video & TV Dictionary (2003) p. 105.)

In video, an artifact "refers to something present in the reproduced image, notably crawling dots, rainbow swirls, and color contamination, and that was not present in the original picture or scene. Artifacts are the result of imperfect capture, processing, transmission, storage, and/or decoding of the video signal. With digital video, artifacts can result from overloading the input device with too much signal, or from excessive or improper compression." (Gardner, Gardner's Film, Video & TV Dictionary, *supra*, p. 29.)

contribute to an image being blurry. As a result, he looked for voids depicted by shadows and highlights, and for areas of motion blur and compression artifacts. Also, he measured the blur and angles relative to the "video stills" as best as he could. Guzek said he considered all these factors, but he also tried to "weigh it with the practical assumption of what . . . you [can] still surmise[.]"

On cross-examination, Guzek agreed he was "somewhat unique" in using Euclidean geometry in image analysis and comparison. He did not have a scientific degree or a degree in Euclidean geometry. When asked if his use of Euclidean geometry had been subjected to scientific and peer view, he stated, "Sometimes, but not in this case because it's a theorem to understand my logic. I'm not drawing lines. . . . [¶] . . . [¶] I'm using a theory. . . . I'm defending my logic with a theory in geometry[.]" On an as-needed basis, Guzek used a member of his staff for peer review. The prosecutor inquired if Guzek was aware of anyone using Euclidean geometry in the forensic analysis of photographs like him, and he replied, "By name? No."

Guzek was asked if he had made any effort "to distinguish between artifacts and properties of the individuals depicted" in Exhibit 8. He replied, "No. Not in the report." He was then asked if he tried to make a distinction in his analysis. He said, "As best as . . . one could possibly do, but there's quite a bit of pixilation on that image."

2. *Reis's Testimony*.

In Reis's opinion, Guzek was not qualified as an expert in forensic analysis of videos or photographs. Reis never heard of anyone using Euclidean geometry to formulate an opinion on photographic comparisons and analysis. He noted Guzek used an image with aliasing, an artifact that makes diagonal and curved lines look like stairs. Also, the image had interlacing, an artifact in which the subject in an image is in two positions, and those positions are captured together. This led Reis to conclude: "So not only do we have aliasing that's causing a distortion of the features, but in addition to that we have two separate photographs of the image that are being combined here. So none of the features can be considered to be accurate." He went to explain that the Scientific Working Group for Imaging Technology committee has stated that a forensic video analyst must identify

features and not misidentify artifacts as being features. At that point, Reis opined that Guzek did not make any distinction between artifacts and features, and that "it appeared that he confused the two."

3. *The Trial Court's Ruling*.

The trial court stated, "I think under Evidence Code section 801[, subdivision (b),] [the] . . . scientific basis for [Guzek's opinion] has not been established and I don't know if it can be established. There's no reliability studies. No blind tests for making conclusions or exclusions. So I think under [Evidence Code section] 801[, subdivision (b)] . . . it's not admissible. [¶] And under [Evidence Code section] 802, the reasons for the opinion, which is what *Sargon* focused on, there's nothing to suggest that the techniques that he used are accepted and that it is the type of evidence that's going to be of assistance to the trier of fact."

C. Guzek's Testimony was Inadmissible under *Sargon*.

When comparing images in this case, Guzek indicated that he relied on Euclidean geometry (which is based on axioms and theorems that allow generalizations from known facts), a Michelangelo theory, and a theory for interpreting bad images that he opted not to explain or name. Fairly stated, Guzek's method involved some sort of amalgam of different theories. There was no evidence that anyone other than Guzek uses Euclidean geometry (or any of the other theories) when comparing images. Guzek does not have a degree in Euclidean geometry. Nor is there any evidence that other experts use Guzek's amalgam of theories.

Guzek said he was aware of various considerations such as motion blur, rolling shutter, aperture angles, low resolution, voids and compression artifacts. Also, he conceded that rotating the iPhone still would have changed the quality of the image. But his theory boiled down to comparing shapes, so he implicitly assumed artifacts were features. He also implicitly assumed that appellant's change in weight and hair length did not impact any comparisons.

The iPhone video is very low quality. There is substantial intermittent smearing and pixilation, and there is glare and smearing of light from multiple sources of light. The shooter moves from left to right. At one point, as he is extending a gun, he slows down as he is firing. But in the iPhone

video, he is never completely stationary, and then the iPhone moves erratically. The bottom line is that there is no point at which the shooter's head is free of substantial distortion.

For analysis, Guzek took a still from a frame in which the shooter is slowing down as he is shooting. Never did Guzek say the shooter was stationary, but Guzek implied as much by noting that other people must have been moving because they were smeared and there was no blur around the shooter's head. But even a lay person can see that the shooter's head is all blurred lines, and that his features are distorted. Regarding the shooter's head, it is apparent that distortions give his forehead an inhuman angle. Later in his testimony, Guzek seemed to contradict himself when he said, "So I'm assuming the motion blur was different people moving in the image and—but it was still pretty blurry." When he said it was still pretty blurry, he seemed to be referring to the shooter's head. Even later in his testimony, he specifically said the image was blurry. Despite that, and despite the atmospheric light, Guzek said he could get "some information" from the image.

Even though Guzek said he considered certain distortions, it is not clear how. Furthermore, he said he would weigh those considerations against practical assumptions of what he could surmise.

Turning to Exhibit 8, two things must be highlighted at the outset. First, despite obvious aliasing artifacts and the otherwise low quality of the image, the man holding the cell phone to his ear looks like appellant in his booking photograph. Second, appellant looks substantially different in his booking photograph (when he was heavier and had very short hair) than he does in the frontal photograph Guzek took of appellant in which he is much thinner and has longish hair. In fact, he looks so different that people could easily think the images were of two different people. Or, at a minimum, people would struggle to determine whether it was the same person.

In his report, Guzek did not analyze artifacts in Exhibit 8. Nor did he compensate for appellant's dramatic change in appearance. On the witness stand, he said he tried to make a distinction as best as one possibly could, but he admitted there was quite a bit of pixilation in the image. Because he did

not analyze the artifacts in the report, it is unclear how he tried to distinguish them.

Based on the foregoing, we conclude Guzek's comparisons were properly excluded. His method was full of theories and assumptions, and he ignored some or all of the artifacts at different points. Simply put, his opinion was not based on matter of a type on which an expert may reasonably rely. Beyond that, because Guzek essentially confused artifacts for features, his opinion was speculative.

D. Guzek's Testimony was Inadmissible Under *Kelly*.

Under *Kelly*, we must first determine whether Guzek's opinion was based on a new scientific technique.

"To be new, a technique must be meaningfully distinct from existing techniques. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 316.) The issue here is whether it is new to science or the law to use a mix of Euclidean geometry and other theories to compare facial features in a high quality photograph to the facial features in a low quality image with substantial artifacts. Reis testified that Guzek's use of Euclidean geometry and recognition of artifacts as features is an unreliable, novel technique of facial comparison that is not accepted in the scientific community. Moreover, Guzek testified that using Euclidean geometry was somewhat unique to him. He also testified that it was a technique "that people don't use that I use." When asked if he knew anyone using the same method, he said he did not know anyone by name. At the time of trial, Guzek did not have a scientific degree, and he had not been certified in forensic image analysis. When asked if his method had gone through scientific and peer review, he indicated that people on his staff did peer review, but that there had been no peer review for the theorems applied to his logic in this case. He did not identify any scientific review for the use of Euclidean geometry, Michelangelo theory or his third theory, which was unnamed. In our view, the trial court properly found that Guzek's technique was new because it was meaningfully distinct from the technique described by Reis, i.e., artifacts should not be treated as features, and because there was no evidence any other expert uses Guzek's method.

The next issue is whether appellant established that the reliability of Guzek's technique has gained general acceptance in the relevant scientific community. According to appellant, he was not required to provide proof of general acceptance because Guzek's technique has been approved by case law.

At issue in *United States v. Alexander* (5th Cir. 1987) 816 F.2d 164 (*Alexander*), inter alia, was the expert opinion of Dr. Marshall I. Gottsegen, an orthodontist specializing in celphalometrics, the scientific measurement of the dimensions of the head. He examined film taken of a bank robber and a photograph of the defendant, and concluded that it was impossible for the defendant to be the bank robber. The trial court excluded the evidence on the grounds that the jury could make the necessary photographic comparisons without the aid of an expert witness. The reviewing court held that the trial court's exclusion of the expert witness was clearly erroneous. It concluded that "Dr. Gottsegen's testimony . . . would have illustrated claimed specific differences in [the defendant's and bank robber's] facial features which were revealed as a result of his scientific analysis of the photographs." (*Id*. at p. 167.) The reviewing court found it "unlikely that any of the jurors were sufficiently informed about celphalometry to undertake this type of comparison without expert assistance." (*Ibid*.)

Regarding Dr. Gottsegen's methodology, the *Alexander* court explained: "Dr. Gottsegen compared the profiles of [the defendant] and the bank robber by constructing a standard reference plane for each photograph. A standard reference plane is created by drawing a straight line from the tragion, the most anterior point in the supratragal notch of the ear, to the tip of the nose. A mesh-type grid of a simple four-square design is then created by drawing three lines perpendicular and two lines parallel to the original line. The perpendicular lines are tangent to the back of the head, through the tragion itself and tangent to the tip of the nose. The two parallel lines are tangent to the top of the head and to the bottom of the chin. Facial landmarks and other physical features are then examined in relation to the particular quadrant of the grid in which they are located. The ratio of any portion of the face to the whole may also be determined and compared." (*Alexander*, *supra*, 816 F.2d at p. 167, fn. 4.)

In *United States v. Cairns* (9th Cir. 1970) 434 F.2d 643, 644 (*Cairns*), the trial court allowed a special agent for the FBI was allowed to testify for the prosecution and compare a photograph taken by a bank's surveillance camera with a police photograph of the defendant. "To assist in his identification, he enlarged the head area of the surveillance photograph to the same size as the enlarged head area in the police photograph. The witness then pointed out the similarity in the two photographs in the nose and mouth areas, chin line, hair lines, ear contours and inner folds of the ears, among other things. He then testified that based on all the general characteristics the individual in the surveillance photograph is the individual in the police photograph 'or another individual having all of these characteristics as to nose, mouth, chin, and the ear characteristics[.]'" (*Id*. at p. 644, fn. omitted.)

Neither *Alexander* nor *Cairns* are on point. They did not involve experts who compared photographs by mixing Euclidean geometry with other theories, nor did they involve experts who were allowed to compare features to artifacts. These cases therefore do not establish Guzek's method as an accepted one. Thus, we must determine whether appellant offered proof of reliability.

For the reasons we discussed in connection with our *Sargon* analysis, we easily conclude that Guzek's method was not reliable.

III. Evidentiary Issues.

Appellant contends the trial court erred when it excluded evidence that other people had Clarence Street stomach tattoos; when it excluded impeachment evidence against Limon; when it admitted Deputy Medina's testimony about appellant's gang affiliation; and when it admitted Limon's plea agreement. If these purported errors were not individually prejudicial, appellant contends that their cumulative effect resulted in the denial of his right to a fair trial.

To the degree any of his evidentiary objections were forfeited, appellant contends he received ineffective assistance of counsel.

A. Relevant Law; Standard of Review.

"No evidence is admissible except relevant evidence," and "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." (Evid.

Code, §§ 350, 351.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Although a trial court "'has broad discretion in determining the relevance of evidence . . . [, it] lacks discretion to admit irrelevant evidence.' [Citations.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 289.)

The trial court also has discretion to exclude relevant evidence under Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Under the due process clause of the Fourteenth Amendment, a defendant must be afforded a meaningful opportunity to present a complete defense. (*Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 763.) Thus, a defendant has a right to present all relevant evidence of significant probative value. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) The exclusion of such evidence constitutes denial of a fair trial (*ibid*), which results in a violation of due process. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*).)

When evidence is so extremely unfair that its admission violates the fundamental concepts of justice, due process is implicated. (*Perry v. New Hampshire* (2012) 132 S.Ct. 716, 723.) "Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions. Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, fn. omitted (*Jammal*); *People v. Hunt* (2011) 196 Cal.App.4th 811, 817 [quoting the *Jammal* language with approval].)

A trial court's evidentiary ruling is reviewed for an abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) "Absent fundamental

unfairness, state law error in admitting evidence is subject to the traditional . . . test [set forth by our Supreme Court in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.) In contrast, evidentiary error giving rise to a constitutional violation is subject to review under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) [error reversible unless it is harmless beyond a reasonable doubt].)

B. Exclusion of Evidence of Other People with Stomach Tattoos of Gang Names that Start with the Letter C.

1. *Relevant Proceedings*.

Defense counsel issued a subpoena to the City of Los Angeles asking the Los Angeles Police Department to provide photographs of abdominal tattoos of gang names that start with the letter C. The city moved to quash the subpoena. Defense counsel argued that the discovery was relevant because a witness identified the shooter by his abdominal tattoo and the defense should be able to show the jury that "this sort of tattoo is, in fact, quite common."

The trial court stated that it was granting the motion to quash. But it also stated, "I am going to order the People to make an inquiry as to their photographic documentation of abdominal tattoos of the Clarence Street [g]ang and to provide for purposes of this trial any abdominal tattoos [of such a nature] that have been documented photographically by the Los Angeles Police Department. And that will cover a period, I would suggest, of five years."[17]

The prosecution disclosed two photographs of individuals with Clarence Street gang stomach tattoos. The trial court asked defense counsel how he intended to use the photographs. He refused to specify other than to say, "I don't plan to use the face of the people in . . . the photographs."

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[17] As explained by the People's gang expert, the Clarence Street gang members refer to the gang, among other names, by the names Clarence, Clarencia, Clarencio, or C with the X. Appellant had "Clarenciero" tattooed across his stomach. Presumably the order covered all such names.

The trial court stated that evidence that someone else at the crime scene had a Clarence Street gang stomach tattoo was relevant, but evidence that other people in Los Angeles County had Clarence Street gang stomach tattoos had minimal relevance and was more time consuming than probative. The prosecutor noted that the individuals in the two disclosed photographs were not connected to the events that resulted in the murder and attempted murders.

Defense counsel asked the trial court to hold off on making a ruling on the admissibility of the two disclosed photographs. He argued that "[m]ultiple gangs that start with the letter C were mentioned and I think that it is absolutely relevant, your Honor." According to defense counsel, he could show that appellant's stomach tattoo was not the only such gang tattoo in the county. Moreover, he argued that the inquiry would not be more time consuming than probative. The trial court stated that whether other people in Los Angeles County had Clarence Street gang tattoos on their stomachs might be irrelevant depending on their physical description and their whereabouts at the time of the crime. In the trial court's view, it would be time consuming to litigate those facts. The trial court barred defense counsel from stating in his opening argument that other people have Clarence Street gang tattoos on their stomachs.

2. *Analysis*.

Appellant maintains that evidence of other people with Clarence Street gang tattoos would have supported his argument that stomach tattoos were not uncommon among gang members, and that appellant was not the shooter. The People, on the other hand, argues that the evidence was irrelevant, and that it was barred under Evidence Code section 352.

If other people have a Clarence Street gang tattoo starting with a C on their stomachs, appellant could still have been the shooter. Any inference to the contrary is purely speculative. This is all the more true because there was no evidence or offer of proof that any other people with Clarence Street gang stomach tattoos were present when Fernando was shot. More importantly, the evidence had no tendency in reason to prove appellant's alibi. Just because other people had a similar stomach tattoo did not mean appellant was in Orange County instead of at the intersection of Olympic and

Hill on the night of the shooting. In fact, one of appellant's other tattoos—the one of Gustavo's skeleton tattoo—was so obviously unique and personal, it placed appellant outside The Mayan on the night of the shooting. Jimena testified that a man showed her a thigh tattoo of a skeleton and said it was his son's drawing. Also, The Mayan surveillance captured a man pulling down his pants and showing a thigh tattoo to Jimena. Though there is only a partial view of the thigh tattoo, and the image is low quality, the lines of the partial view are consistent with appellant's thigh tattoo.

As explained in case law, "'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.' [Citation.]" (*People v. Babbitt*, *supra*, 45 Cal.3d at pp. 681–682.)

We conclude the evidence was not relevant, and for that reason its probative value was outweighed by the undue consumption of the time that would have been taken up by the offering of that evidence.

C. Exclusion of Impeachment Evidence.

1. *Relevant Proceedings*.

At one point in the trial, after Limon had already testified, the prosecutor indicated he was going to recall Limon.

Defense counsel stated that he planned to impeach Limon by asking him about his criminal history. As presented by defense counsel, Limon's rap sheet contained, inter alia, the following entries: a 1996 sustained juvenile petition for criminal threats (§ 422); a 1998 sustained juvenile petition for assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)); and a 2006 conviction for misdemeanor battery. The trial court stated that the sustained juvenile petitions were not convictions for any purpose. Defense counsel replied, "[I]f they're not admissible, they're not admissible." Regarding the 2006 conviction, defense counsel stated that he did not have a good faith basis for asking Limon about the underlying acts because he did not have the arrest report. The trial court stated, "Then absent any kind of good faith belief that the underlying conduct is something that would qualify as a valid act involving moral turpitude[,] I'm going to rule that the

August 18, 2006, incident is not admissible to impeach." Summing up, the trial court ruled that all three priors were inadmissible.

Before appellant testified in his own defense, the prosecutor indicated that he intended to impeach appellant with his prior convictions as well as a sustained juvenile petition for robbery and a sustained juvenile petition for carjacking. The trial court indicated its belief that the sustained juvenile petitions were inadmissible, but stated it would conduct further research on the issue. Later, the trial court stated it had found two published cases holding that the underlying conduct of a juvenile adjudication is admissible, and it cited to *People v. Smith* (2007) 40 Cal.4th 483 and *People v. Rivera* (2003) 107 Cal.App.4th 1374. The trial court permitted the prosecutor to impeach appellant with the underlying conduct that supported the two sustained juvenile petitions. Defense counsel asked, "It was the conduct anyway that comes in?" The court answered, "Right."

2. *Analysis*.

In California, misdemeanor conduct involving moral turpitude is admissible to impeach a witness in a criminal trial. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295 (*Wheeler*).) In *People v. Lee* (1994) 28 Cal.App.4th 1724 (*Lee*), the court cited *Wheeler* and held that except for past conduct arising from cases covered by Welfare and Institutions Code section 1772,[18] "the prosecution may introduce prior conduct evincing moral turpitude even if such conduct was the subject of a juvenile adjudication, subject, of course, to the restrictions imposed under Evidence Code section 352[.]" (*Lee*, *supra*, at p. 1740.)

Here, the trial court properly exercised its discretion because defense counsel sought to admit the fact of Limon's prior juvenile sustained petitions rather than the underlying conduct evidencing moral turpitude.

Appellant might contend that defense counsel was trying to introduce the underlying conduct. But later in the trial, when the trial court permitted the prosecution to impeach appellant with the conduct underlying his

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[18] Welfare and Institutions Code section 1772 provides, inter alia, that certain persons who have been honorably discharged from control by the Youth Authority Board shall be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed.

sustained juvenile adjudications, defense counsel did not argue that he wanted to admit the conduct underlying Limon's sustained juvenile adjudications, and that the trial court should reverse its previous exclusion. It does not appear that defense counsel wanted to introduce the underlying conduct.

Presuming for the sake of argument there was state error, or a violation of appellant's Sixth Amendment right to confrontation, there was no prejudice. Defense counsel impeached Limon with his jailhouse conversations with the mother of his children, Alita, by eliciting that he told her "not to say nothing" because "it mixes everything up[.]" Also, defense counsel was able to elicit that Limon told Alita, "The lawyer is going to tell me what to say, what not to say." Limon admitted that he had been charged with murder in this case, and faced a life sentence. In addition, he admitted that he entered a plea deal that allowed him to plead guilty to manslaughter and receive an 11-year sentence in exchange for testifying against appellant. On top of the foregoing, Limon's testimony was corroborated by the testimony of Perez, Balestra, Haroldo, Jimena, and Quintanilla, and by the images from The Mayan surveillance video, all of which placed appellant at The Mayan and the scene of the shooting, and it undermined appellant's alibi that he was in Orange County. Accordingly, whether we apply *Watson* or *Chapman*, there is no basis for us to reverse appellant's convictions. The excluded line of cross-examination would not have produced a significantly different impression of Limon's credibility. (*People v. Frye* (1998) 18 Cal.4th 894, 946–947 (*Frye*), disapproved on other grounds by *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Attacking from a different vantage, appellant suggests that a successful attack on Limon would have caused the prosecution's case to crumble because Limon was the lynchpin, and because the memory expert successfully called into question the reliability of all other identifications. At this juncture, we deem it important to stress that one of the most compelling and incriminating pieces of evidence against appellant was Jimena's testimony. Whether memories fade or other gang members have stomach tattoos with gang names that start with the letter C, appellant cannot escape that he has a skeleton tattoo drawn by his son on his thigh, that he showed

Jimena that tattoo and revealed its origin to her, and that The Mayan surveillance captures him showing it to her. That tattoo is so unique and personal, the jury was bound to believe Jimena's testimony. Her testimony placed appellant outside The Mayan on the night of the shooting, which single-handedly destroyed appellant's alibi, and also corroborated the testimony of Limon, Perez and Haroldo.

D. Deputy Medina's Testimony.

1. *Relevant Proceedings*.

During trial, the prosecutor indicated that he planned to call Deputy Medina to testify that while she was escorting appellant to the "court line" in jail, she asked where he was from, and he said, "I am from Clarence Street," and that when she asked what he was known by, appellant said, "Travieso." The prosecutor stated that he planned to offer the testimony as foundational material for the gang expert's testimony connecting appellant to the Clarence Street gang. Defense counsel objected on relevance grounds, stating that the encounter occurred after appellant was in custody. The trial court overruled the objection and stated, "I think it's highly relevant, particularly in light of the suggestion that [appellant] has been out of the gang for some period of time." When Deputy Medina was called to the witness stand, she testified consistent with the offer of proof.

2. *Analysis*.

Appellant contends Deputy Medina obtained the incriminating statements from appellant in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), which requires that a defendant be advised of their rights before speaking to law enforcement.[19] But appellant waived his *Miranda*

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[19] Presumably, appellant was given his *Miranda* advisement when he was arrested. Therefore, we infer he contends he should have been readvised. "After a valid *Miranda* waiver, readvisement prior to continued custodial interrogation is unnecessary 'so long as a proper warning has been given, and "the subsequent interrogation is 'reasonably contemporaneous' with the prior knowing and intelligent waiver." [Citations.]' [Citation.] The necessity for readvisement depends upon various circumstances, including the amount of time that has elapsed since the first waiver, changes in the identity of the interrogating officer and the location of the interrogation, any reminder of the prior advisement, the defendant's experience with the criminal justice

objection by not asserting it below. (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.)

Even if there was error, the admission of appellant's statements to Deputy Medina was harmless beyond a reasonable doubt. (*People v. Cunningham* (2001) 25 Cal.4th 926, 994.) Appellant testified that he was in the Clarence Street gang when he was younger. The name of appellant's gang was tattooed on his stomach and other parts of his body. Perez saw appellant lift his shirt to show his stomach tattoo to the group from the Escalade before they began fighting. Quintanilla heard someone yell "Clarence Street" and saw that person show his stomach tattoo just prior to gunshots being fired. The Mayan surveillance video showed appellant lifting his shirt to show Jimena his stomach tattoo. Sandra told Officer Quach in December 2010 that she was afraid of appellant because he was an active Clarence Street member. Officer Diaz testified that the primary activities of the Clarence Street gang included murder, and the jury concluded that appellant murdered Fernando. Because the jury disregarded appellant's alibi defense, it is apparent the jury found appellant's testimony not credible. As a result, it is highly unlikely the jury believed appellant when he testified that he was no longer a member of the Clarence Street gang. Even if he was not an active member, the jury could have concluded that his actions were nonetheless done in association with the gang because he showed his stomach tattoo and announced the gang's name when he first confronted Quintanilla by the Escalade. Further, Officer Diaz opined that the shooting of Fernando and the others was committed in association with and for the benefit of the Clarence Street gang. Accordingly, there was overwhelming evidence that supported the jury's finding on the gang allegation.

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system, and '[other] indicia that the defendant subjectively underst[ood] and waive[d] his rights.' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 434–435.) Neither side analyzes these issues. For purposes of this opinion, we assume readvisement was necessary to the degree that Deputy Medina's questions would have required a *Miranda* advisement if asked upon appellant's arrest.

E. Limon's Plea Agreement.

1. *Relevant Proceedings*.

During Limon's direct examination, the prosecutor showed the plea agreement to the jury without objection, and it was later admitted into evidence without objection.

2. *Analysis*.

Appellant contends that the trial court erred when it admitted Limon's plea agreement because it implied the prosecution knew the truth about what happened on the night of the shooting, and because it specified that Limon's truthfulness would be determined by a judge.

Given that appellant did not object to the admissibility of the plea agreement, he waived his objection. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Fauber* (1992) 2 Cal.4th 792, 821 (*Fauber*) [claim that the prosecutor and trial judge improperly vouched for witness's credibility in reading the witness's plea agreement into evidence forfeited for failure to object].) Even if the argument were properly before us, we would not find reversible error.

A prosecutor may not vouch for the credibility of prosecution witnesses by referring to evidence outside the record, or by placing the prestige of his or her office behind a witness by offering the impression that he or she has taken steps to assure a witness's truthfulness at trial. (*People v. Redd* (2010) 48 Cal.4th 691, 740; *Frye, supra,* 18 Cal.4th at p. 970.

It is, however, permissible for a prosecutor to refer to a witness's plea deal that is part of the record. In *People v. Williams* (1997) 16 Cal.4th 153, 256 (*Williams*), the defendant argued "that improper 'vouching' occurred when the prosecutor stated that [a witness] had 'cut a deal' with the prosecution, agreeing to testify 'truthfully and honestly' in return for being allowed to plead guilty to robbery on certain charges pending against him." The court held: "There was no error in the prosecutor's faithfully recounting the nature of the prosecution's agreement with [the witness] as an aid to the jury's evaluation of his credibility. 'Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper "vouching," which usually involves an attempt to bolster a witness by reference to facts *outside* the record.'

[Citation.] No impermissible 'vouching' occurs where 'the prosecutor properly relie[s] on facts of record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief.' [Citations.]" (*Id.* at p. 257.) Based on *Williams*, it was not error for the trial court to admit the plea agreement. We reach this conclusion notwithstanding the cautions and procedures in the Ninth Circuit. (*United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 536 [a strong case can be made for excluding a plea agreement because it may vouch for a witness's credibility; "[a] trial court should be alert to the problem of vouching before admitting a plea agreement containing a promise to testify truthfully[,]" and it "should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions"]; *United States v. Shaw* (9th Cir. 1987) 829 F.2d 714, 717 [a plea agreement should not be admitted into evidence until an issue of a witness's credibility is raised].) Inarguably, we are bound by *Williams* because it was penned by a state court of superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Our conclusion is bolstered by *Frye*. In *Frye*, prior to a witness testifying, the prosecutor read the text of an immunity agreement between the witness and the prosecution. That agreement stated that the witness had cooperated with police and prosecutors in their investigation of the crime and memorialized her assertion "'that she will continue to be truthful in her statements.'" (*Frye*, *supra*, 18 Cal.4th. at p. 970.) The agreement further stated that in consideration of the witness's promise to cooperate with the police and district attorney in their investigation, and of the witness's promise "to testify in court and to tell the truth," the district attorney agreed that no charges would be filed against the witness. (*Ibid.*) The defendant argued that the prosecutor committed misconduct by vouching for the witness's credibility in reading the immunity agreement to the jury. The *Frye* court disagreed because the prosecutor did not vouch for the witness by reference to facts outside the record, and did not suggest a personal belief in the witness's credibility. (*Ibid.*)

The next issue is the admission of the portion of the plea agreement that said the judge would determine if Limon was telling the truth.

With respect to this issue, we find *Fauber* instructive. In *Fauber*, our Supreme Court stated that a plea agreement's reference to a judge's determination of a witness's truthfulness was not relevant to credibility. Moreover, the Court noted that the reference carried a slight potential for jury confusion. As a result, the Court concluded that the trial court would have acted correctly by excluding it based on relevancy if there had been an objection. (*Fauber*, *supra*, 2 Cal.4th at p. 823.) The Court found no possibility of prejudice because "[t]he jury could not reasonably have understood [the] plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether [the witness's] testimony was truthful." (*Ibid.*) In addition, the Court concluded that the jury could not have been misled by anything that the prosecutor said in argument. (*Id.* at pp. 823–824.)

Appellant argues that the trial court violated his right to a fair trial, and that the error was prejudicial. Based on *Fauber* and *Chapman*, we cannot accede.

The jurors were instructed with CALCRIM No. 200, which provides: "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial." CALCRIM No. 222 was also given. It provides: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom." Next, the jurors were given CALCRIM No. 226, which provides: "You alone must judge the credibility or believability of the witnesses." In addition, the jurors were told that when evaluating a witness's testimony, they could consider whether the witness was promised immunity or leniency in exchange for his or her testimony. Given these instructions, the jury could not have reasonably believed that it was relieved of its responsibility to determine whether Limon was telling the truth. This is all the more so because the trial court never purported to rule on the truthfulness of Limon's testimony.

Furthermore, the testimony of Limon, Perez, Balestra, Haroldo, Jimena, and Quintanilla, and The Mayan surveillance video, established that appellant was at The Mayan the night of the shooting and was the shooter. Conversely, it defeated appellant's evidence that he was in San Diego County.

Beyond a reasonable doubt, the outcome would have been the same even if the trial court had excluded the portion of the plea agreement stating that the trial court would determine Limon's truthfulness.

F. Cumulative Error.

If there were multiple evidentiary errors that were individually harmless, appellant contends that they were cumulatively prejudicial by denying him a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) Due to waivers of objections, there was no error. Even if it is debatable whether there was error regarding the exclusion of impeachment evidence, that error—as we have indicated—was harmless.

G. Ineffective Assistance of Counsel.

Appellant contends that defense counsel provided ineffective assistance because he failed to challenge the trial court's understanding about the law regarding impeachment with juvenile adjudications; failed to object to Deputy Medina's testimony on *Miranda* grounds; and failed to object to the admission of Limon's plea agreement. "To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Scott* (1997) 15 Cal.4th 1188, 1211–1212.) We conclude that even if defense counsel fell below the standard of reasonableness, there was no prejudice.

None of the purported failings of defense counsel go to the admissibility of the evidence from Perez, Balestra, Haroldo or Jimena, or to the admissibility of The Mayan surveillance video establishing that appellant was present near The Mayan on the night of the shooting rather than in San Diego County. That evidence was so overwhelming, there is no reasonable probability that the result would have been more favorable to appellant had defense counsel done anything different.

IV. Cross-Examination of Limon.

Appellant contends the trial court improperly limited the cross-examination of Limon regarding whether he tried to influence Solis to lie about appellant being the shooter. Appellant asks us to reverse on that basis. In addition, he asks us to review sealed portions of the record to determine whether they reveal avenues of inquiry on this topic that should have been permitted.

A. Relevant Law; Standard of Review.

Under Evidence Code section 352, a trial court has the discretion to restrict defense cross-examination of an adverse witness. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207.)

A "'trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' [Citation.]" (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 208.) The confrontation clause "'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citations.]" (*People v. Clair* (1992) 2 Cal.4th 629, 656, fn. 3.) "The confrontation clause allows 'trial judges . . . wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' [Citation.]" (*Ibid*.)

Rulings under Evidence Code section 352 are reviewed for an abuse of discretion. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314–1315.)

"We review de novo a claim under the confrontation clause that involves mixed questions of law and fact. [Citation.] Under this standard, we defer to the trial court's determination of 'the historical facts'—which 'will rarely be in dispute'—but not the court's 'application of [the] objective, constitutionally based legal test to [those] historical facts.' [Citation.]" (*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964.)

B. Relevant Proceedings.

While Limon was being cross-examined, he testified that he originally told the police that he did not know the identity of the shooter. Limon testified that the police told him he could visit with his daughter for 10 or 15 minutes if he helped them. It was at that point, according to Limon, that he remembered his cousin, known as Listo, was arrested in 1997 with Travieso, and Listo was later deported. Then, according to Limon, he told the police that the shooter was Travieso, who was from the Clarence Street gang.

Defense counsel asked Limon: "You tried to tell Mr. Solis who was also in custody to say that [appellant] was the shooter; is that right?" Limon responded in the negative. When defense counsel asked Limon if Solis refused to go along with the plan, the prosecutor objected. The objection was sustained. Soon after, the prosecutor said there was a "legal foundational issue here that we need to address." He requested to be heard in chambers pursuant to section 1054.7.[20]

The trial court held two in camera hearings, one with the prosecutor and one with Solis's defense counsel. Those transcripts were sealed.

Subsequently, the trial court convened a hearing with the prosecutor, counsel for Limon and counsel for appellant all present. The trial court stated that there was a question as to whether Limon had attempted to have Solis testify falsely against appellant. The trial court conceded that evidence that Limon was biased against appellant and attempting to influence witnesses to testify falsely against appellant would be relevant to Limon's credibility. On the other hand, the trial court noted that "there does not appear to me to be an awful lot of bases, at least in the record of this case, for

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[20] Section 1054.7 provides, in part: "Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter."

the proposition that this incident[] in fact[] happened[,] and given the milieu of this case[,] it seems to me that to have those kinds of allegations out there floating around without any factual basis for them has a possibility of creating significant problems down the road for Mr. Solis. And I'd rather avoid those if [I] can." Defense counsel confirmed that the only basis for his line of questioning was a statement made by appellant.

The trial court ruled that it would allow defense counsel to ask Limon two questions regarding whether he or his family asked Solis to lie. The trial court denied defense counsel's request to ask Limon whether he simply attempted to have Solis identify appellant as the shooter. The court explained that requesting Solis to identify appellant as the shooter did not show Limon was biased or that such testimony was false if Solis was not asked to lie.

Prior to Limon being asked the two questions, the trial court held an in camera hearing with Limon's attorney.

When Limon resumed being cross-examined, the prosecutor asked, "Mr. Limon, at one point in the last two years you tried to tell Mr. Solis who is also in custody to testify falsely against [appellant], didn't you?" He said no. The prosecutor then asked Limon, "At another point you had your family members go and contact Mr. Solis's family to try and influence them to have Mr. Solis testify falsely, didn't you?" Limon said, "Not . . . falsely but true."

C. Analysis.

We have reviewed the sealed transcripts. They do not reveal any lines of inquiry that should have been permitted. We turn, now, to the issue of whether the trial court improperly limited cross-examination.

Appellant argues that he could have established that Limon was biased by showing that he solicited Solis to identify appellant as the shooter regardless of whether Limon was asking Solis to lie. Contrary to what appellant urges, we do not perceive an abuse of discretion based on the trial court's limitation of Limon's cross-examination on Evidence Code section 352 grounds. If Limon solicited Solis to truthfully identify appellant as the shooter, that could not have had more than a minimal impact on the jury's assessment of Limon's credibility. After all, the plea agreement reducing Limon's charges in exchange for his testimony was placed into evidence, so

the jury already knew Limon had incentive to have appellant convicted. Thus, inquiry into Limon soliciting a truthful identification from Solis had little probative value, it would have unnecessarily consumed time, and it could have confused the jury or otherwise misled it into thinking that such a solicitation meant Limon was asking Solis to lie. Moreover, the trial court was rightly concerned that without an offer of proof justifying such an inquiry, the implication that Solis was involved in conversations about identifying appellant as the shooter could unnecessarily jeopardize his safety.

Next, appellant argues that he should have been permitted to probe further into Limon's actions vis-à-vis Solis. But appellant does not explain what further questions he could have asked. Once again, we perceive no error.

To the degree appellant asserts a federal claim, no violation of his right to confront Limon as a witness has been established. The veracity of Limon's account of the shooting and the identity of the shooter were corroborated by Perez, Haroldo and Balestra. Limon's contention that appellant was present that night was corroborated by The Mayan surveillance video as well as the testimony of Jimena. Also, as already stated, the jury was well aware of the plea agreement and Limon's incentive to testify to facts that supported the prosecution's case. Thus, it cannot be said that a reasonable jury might have received a significantly different impression of Limon's credibility had the excluded cross-examination been permitted.

V. Sentencing.

The trial court did not orally specify whether the sentences on the four counts were to run consecutive or concurrent. Appellant contends that we must presume the sentences run concurrent. The People, on the other hand, contend that the matter must be remanded for resentencing because the trial court was not aware of its discretion in the matter.

A. Relevant Law.

Section 669, subdivision (a) provides, inter alia: "When a person is convicted of two or more crimes, . . . the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the

possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction."

Section 669, subdivision (b) provides in relevant part that "[u]pon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

The rules of court outline the criteria to be considered in selecting concurrent or consecutive terms. (Cal. Rules of Court, rule 4.425.)

"[W]hen the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion. [Citations.]" (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421.) On the other hand, remand is unnecessary "when the record indicates the court was aware of its discretion or the record is merely silent on whether the court misunderstood its sentencing discretion. [Citation.]" (*Ibid.*)

B. Relevant Proceedings.

The prosecutor filed a sentencing memorandum. He argued section 654 did not apply because the crimes were committed against separate victims, the firearm enhancement must be imposed for each count because the crimes were committed against separate victims, and the gang enhancement should be stayed on count 1 and imposed on counts 2, 3, and 4. The prosecutor concluded that each count carried a sentence of 40 years to life, and that the sentence should run consecutively for a total sentence of 160 years to life in prison.

At the sentencing hearing, the following colloquy occurred between the trial court, the defense counsel, and the prosecutor:

"TRIAL COURT: [Defense Counsel], do you have anything to add to what's in the probation report and what was in the trial?

"DEFENSE COUNSEL: Not specifically.

"TRIAL COURT: *Not that there's a lot of discretion in this case.*

"DEFENSE COUNSEL: There's not, your Honor, and I have nothing specific to add other than I object to the People's calculation. [¶] It's not the

defense burden to calculate the sentence, but I'll just object on behalf of my client.

"TRIAL COURT: It's actually the court's burden. So I'll do it. How's that? [¶] [People], do you have anything to add to the probation report, *keeping in mind that there appears to be very little discretion in this matter*?

"[THE PROSECUTOR]: No, your Honor. I filed a written sentencing memorandum. I'll submit on my written motions.

"TRIAL COURT: Very well." (Italics added.)

The trial court concluded that appellant was not eligible for probation and added, "but even if he were eligible for probation, given the nature of the charges and the nature of his criminal behavior and his criminal past, he would be completely and utterly unsuitable for probation." The trial court then sentenced appellant to 40 years to life as to each count but did not expressly state the terms were to run consecutive or concurrent.

The minute order for the sentencing hearing includes the following statement: "The total aggregate term of imprisonment for all counts and enhancements in this case is life plus 115 years to life." The abstract of judgment indicates that counts 2, 3, and 4 are to run consecutive to count 1.

C. Analysis.

It is apparent from context—the prosecutor's sentencing memorandum calculating the total sentence based on the sentences running consecutive, defense counsel's objection to the prosecutor's sentencing calculation but not to the idea the sentences should be consecutive, and the minute order setting forth an aggregate term of imprisonment—that the trial court intended for at least some of the sentences to run consecutive. Then, in its minute order, the trial court ordered a sentence of 115 years to life. It is unclear how the trial court calculated this sentence. What is clear, however, is that the trial court was unaware of its discretion to sentence appellant to consecutive or concurrent terms. "An erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion." (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247; *People v. Deloza* (1998) 18 Cal.4th 585, 599–600 [case remanded for resentencing after the trial court indicated that it did not have discretion and ordered consecutive sentences].) Thus, the matter must be remanded for resentencing.

DISPOSITION

The judgment is remanded for resentencing so the trial court can determine whether the sentences on counts 2, 3 and 4 should run consecutive or concurrent. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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