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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL MENDEZ et al., Defendants and Appellants.	B234396 (Los Angeles County Super. Ct. No. BA358068)

APPEAL from judgments of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Modified and, as so modified, affirmed.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Mendez.

Robert D. Bacon for Defendant and Appellant Carlos Garcia.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Daniel Mendez and Carlos Garcia appeal their convictions for murder and attempted murder. Mendez and Garcia were sentenced to prison terms of 90 and 80 years to life, respectively.

Both appellants contend the trial court erred by refusing to instruct the jury on voluntary intoxication; the prosecutor committed prejudicial misconduct; and the trial court imposed an unauthorized sentence when it failed to stay or strike a minimum parole eligibility period. Mendez further contends the trial court improperly excluded evidence. Garcia further contends evidence of jailhouse conversations between him and Mendez should have been excluded, and the trial court abused its discretion by denying his request for post-trial discovery, a continuance, and his motion for a new trial. The People concede that the trial court erred by imposing minimum parole eligibility periods. We modify the judgment to correct the sentencing error. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Viewed in accordance with the usual rules governing appellate review (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304; *People v. Robinson* (1997) 53 Cal.App.4th 270, 273), the evidence relevant to the issues presented on appeal established the following. Appellants were members of the Westside 18th Street criminal street gang. The gang claimed a territory south of the 10 Freeway, between La Cienga and La Brea. Its primary activities included murder, assault with a deadly weapon, and drug dealing. Bloods gangs were its rivals. Mendez had a large, gang-related tattoo of red lips on his neck. Members of the gang often congregated and held parties at Garcia's apartment, which was known as "the Spot."

Louisa Bolanos dated 18th Street gang member Jimmy Arias. She owned a black Jeep Cherokee automobile. On the evening of May 7, 2009, she fell asleep at the Spot after getting drunk. Mendez, who was also at the Spot that evening, took the keys to the Jeep from Bolanos's purse. Mendez and Garcia drove off in the Jeep, with Mendez at the wheel and Garcia in the front passenger seat. Mendez, who was on parole, was wearing a

GPS tracking anklet that was monitored by the state parole office. It transmitted his location every minute. Mendez drove west, into the territory of rival Bloods gangs.

(i) *The hit-and-run accident.*

At shortly after 7:00 p.m., Mendez drove at a high speed down Carlin Street. He attempted a turn but was going too fast, and hit a parked car near the intersection of Carlin and Cochran Streets. He backed up and drove off, laughing and smiling. Filiberto and Emilia Lopez observed the accident, and Emilia wrote down the Jeep's license plate number. Filiberto observed that the Jeep's driver had a tattoo of red lips on his neck, and Emilia identified Mendez as the driver in a pretrial photographic lineup.

(ii) *The murder of Thomas Wade.*

Mendez and Garcia drove on through the neighborhood. Near the intersection of 27th and Cimarron Streets, the Jeep failed to stop at a stop sign and drove into the path of Thomas Wade's vehicle, which was in the intersection. Wade turned sharply to avoid a collision. He stopped his car and leaned out the window, apparently saying something to Mendez. Mendez backed up so that the Jeep was alongside Wade's car, with Mendez and Wade facing each other. Mendez and Wade appeared to exchange words. Mendez partially exited the Jeep and shot Wade. Mendez then sped off. The incident was captured by a nearby market's video surveillance system, and the tape was played for the jury.

Wade, a 34-year-old African-American, died of multiple gunshot wounds. He had been shot once from the side or behind, and once in the upper chest. Police found two .380-caliber shell casings in the street, and an additional casing in Wade's car. Wade was not a gang member. Mendez's ankle monitor indicated he was at the intersection of 27th and Cimarron at 7:18 p.m.

Zoila Marcos, who was at a second story apartment at 27th and Cimarron, heard gunshots and observed the Jeep speeding away from the scene. She saw that the front seat passenger was wearing a black baseball cap with a red logo. He was looking out the window and smiling. Marcos was unable to identify Garcia's photograph in a pretrial photographic lineup.

(iii) *The attempted murders of T.M. and R.M.*

A few minutes after the Wade murder, 17-year-old cousins T.M. and R.M. were crossing 27th Street at Arlington Boulevard. Neither was a gang member. The Jeep came speeding down the street, travelling at 75 to 80 miles per hour. It slowed and pulled up approximately 10 to 12 feet away from the youths. The front seat passenger pointed a gun out the window and said, "What's up Blood[?]" As the youths ran, they heard gunshots. A bullet grazed T.M.'s buttocks; R.M. saw a bullet fly past his face. The distance between the site of the Wade murder and 27th and Arlington could be travelled by car in under a minute. Mendez's ankle monitor indicated he was a block west of 27th and Arlington at 7:19 p.m.

(iv) *Arias's testimony.*

Eighteenth Street gang member Arias, who was initially a suspect in the case, told police that sometime after May 7, 2009, he and his girlfriend, Bolanos, encountered appellants at the Spot. Bolanos accused appellants of taking her Jeep without permission and doing "all kinds of shit in that car." Appellants stated they had been drunk at the time. Appellants boasted that they "shot at some City Stone" and "all kinds of other fools" and were " 'blasting at everybody.' " Appellants told Arias that they had accosted a rival Black P-Stone gang member and shot him in the chest four or five times. They claimed they went " 'blasting' " in the territory of the Bitty Stone Bloods gang.[1]

(v) *Jailhouse conversations between Mendez and Garcia.*

Los Angeles Police Department Detectives Ronald Kingi and Robert Lait arrested and interviewed Garcia and showed him the videotape of the Wade shooting. Afterwards they placed Mendez and Garcia in a cell together and surreptitiously recorded their conversation, which included the following statements: "[T]hey got that shit on camera"; "they showed me a picture of the [J]eep"; "[t]he camera starts following like . . . [it has you fool, it has me] . . . they showed me all the way to like everything . . . [even] when

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1 In exchange for his testimony, police relocated Arias.

the car, remember, was moving backwards and I put it in park"; "you can't even see me or nothing;" and "they got us, cuz of the license plate they knew the truck and the whereabouts." Mendez asked, "So you can't see me that I actually did it?" Garcia replied, "[n]ot really" and "[i]t just looked like you walked up to the car and shot homey." Garcia referenced "those little kids who got shot," and said, "Bam, bam" and "[y]eah . . . we hit him in the butt." Mendez told Garcia he was "[s]tupid" to have admitted the hit and run, because "[t]hat put you in the car."

(vi) *Other surreptitiously recorded conversations.*

In one recorded telephone conversation with his girlfriend, Angie Perez, Mendez discussed what story she should tell the probation officer. In another call, an unidentified woman told Mendez that Bolanos wanted to know what to tell police. Mendez advised that she should say she always had her car and she did not know him.

(vii) *Firearms and fingerprint evidence.*

Firearms analysis of cartridge casings found at the scene of the T.M./R.M. shooting and in Wade's car established that both shootings were committed with the same gun. Garcia's fingerprints were found on the outside of the Jeep's passenger side front door, and on a can of wax in the cargo compartment.

(viii) *Gang evidence.*

When presented with a hypothetical based upon the facts of the case, a gang expert opined that the crimes were committed for the benefit of the Westside 18th Street gang. The locations where the shootings occurred were in the territory of the Bitty Stone Bloods and Rollin' 20's Bloods, rivals to the 18th Street gang. In the expert's opinion, the purpose of the trip to rival gang territory was to shoot at anyone perceived as a member of a rival gang, thus intimidating the community and enabling the gang to commit crimes with impunity.[2]

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[2] Because appellants do not challenge the sufficiency of the evidence offered in support of the gang enhancement, we do not further detail it here.

b. *Defense evidence.*

Jose Rodriguez testified that he saw the hit-and-run accident at Carlin and Cochran. When shown a pretrial photographic lineup, he identified Arias as the driver of the Jeep, and a person other than Garcia as the passenger. A month later, police showed Rodriguez a different photographic lineup and he identified Mendez as the driver.

A gang expert called by Garcia testified that the shootings were not typical gang shootings; that a "road rage" incident would not have been for the benefit of the gang; and that the phrase " 'What['s] up, Blood' " would not have been used by a non-Bloods gang member.

At trial, Mendez did not dispute that he was the driver of the Jeep and fired shots at Wade.

2. *Procedure.*

Mendez and Garcia were tried together by a jury. Both appellants were convicted of the murder of Wade. (Pen. Code, § 187, subd. (a).)[3] As to Mendez, the jury found the murder to be in the first degree; as to Garcia, the jury found the murder to be in the second degree. Both men were also convicted of the attempted murders of T.M. and R.M. The jury found the attempted murders were deliberate and premeditated; that during all the crimes a principal personally discharged a firearm (§ 12022.53, subds. (c), (d) & (e)(1)); and that all the crimes were committed for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced Mendez to a term of 90 years to life in prison, and Garcia to 80 years to life. As to both defendants, the court imposed restitution fines, suspended parole restitution fines, criminal conviction assessments, and court security assessments. Mendez and Garcia appeal.

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3 All further undesignated statutory references are to the Penal Code.

DISCUSSION

1. *The jailhouse conversations.*

Prior to trial Garcia brought two separate motions seeking to suppress or exclude the statements he made during the interview with detectives, as well as the recorded jailhouse conversations, on the grounds they were (1) the fruit of an illegal arrest, and (2) the fruit of a coercive interrogation. The trial court denied both motions. The People did not seek to introduce the police interview at trial, but did present evidence of the jail-cell conversations. Garcia contends this was constitutional error. We disagree.

a. *The jailhouse conversations were not the fruit of an illegal arrest.*

(i) *Additional facts.*

Garcia initially moved to suppress on the ground the jail-cell conversations were the fruit of an illegal detention and arrest. The trial court conducted an evidentiary hearing, at which Detective Kingi and two parole officers testified. Kingi testified that during the investigation, he learned that the Jeep belonged to Arias's girlfriend, Bolanos. Arias was an 18th Street gang member. Police found the Jeep parked outside Arias's house, and Arias had been known to drive it in the past. Police therefore arrested Arias as a suspect. Detectives Kingi and Lait conducted a tape recorded interview of Arias on May 14, 2009, a few days after the shootings. Arias stated that Mendez and Garcia were involved in the shootings. Bolanos had told Arias that Mendez and Garcia took the Jeep and " 'did some dirt' " in it. Both Mendez and Garcia had told Arias that they went to a rival gang's territory, and "shot some OG Bitty," that is, an older gang member, "in the chest four or five times."

Kingi contacted Parole Agent Roger Kemp and told him Garcia was a suspect in a shooting. Kingi learned from Kemp that tracking information from Mendez's GPS ankle monitor showed Mendez was at the locations of the two shootings at the times they occurred. Kingi confirmed this information by reviewing the GPS data himself. When Garcia came into the parole office on May 18, 2009, Kingi and Lait arrested him.

After considering the testimony and the arguments of the parties, the court denied the suppression motion. It concluded that, based on the evidence known to detectives,

including Arias's statements and the data obtained from Mendez's GPS monitoring device, probable cause existed to arrest Garcia.

(ii) *Discussion.*

" 'Probable cause exists when the facts known to the arresting officer would persuade someone of "reasonable caution" that the person to be arrested has committed a crime. [Citation.] "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . . ." [Citation.] It is incapable of precise definition. [Citation.] " 'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' " and that belief must be "particularized with respect to the person to be . . . seized." [Citation.]' " (*People v. Scott* (2011) 52 Cal.4th 452, 474; *Maryland v. Pringle* (2003) 540 U.S. 366, 371; *People v. Celis* (2004) 33 Cal.4th 667, 673.) On review of a denial of a suppression motion, we defer to the trial court's express or implied factual findings if supported by substantial evidence, but exercise our independent judgment to determine whether, on the facts found, the seizure was reasonable under the Fourth Amendment. (*In re H.M.* (2008) 167 Cal.App.4th 136, 142.) Challenges to the admissibility of a search or seizure must be evaluated solely under the Fourth Amendment. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141.)

Contrary to Garcia's argument, probable cause existed to support the arrest. Detectives knew, based on information from Mendez's GPS tracker, that Mendez was at the locations of the murder and shooting at the times they occurred. They knew from Arias, a fellow gang member, that Mendez and Garcia had taken and driven Bolanos's Jeep, the vehicle used in the crimes. Mendez and Garcia had told gang associates that they "did some dirt" while in the car, including travelling to a rival gang's neighborhood and shooting someone perceived to be a rival gangster in the chest. These facts would readily lead a person of reasonable caution to conclude Mendez, accompanied by Garcia, had committed the Wade murder. There was ample probable cause for Garcia's arrest.

Garcia's argument that the trial court "improperly relied on hindsight and on information not in the record" before it when ruling on the motion is not persuasive. While the court did reference certain facts that, while accurate, were not admitted in

evidence or testified to by the witnesses at the suppression hearing, as we have discussed the facts that *were* in evidence established probable cause.[4]

b. *The jailhouse conversations were properly admitted.*

(i) *The interrogation.*

After driving Garcia from the parole office, Detectives Kingi and Lait interviewed him at the police station in an interview room. Kingi advised Garcia of his *Miranda* rights, and Garcia affirmed he understood. Garcia replied, "I guess so," when Kingi stated they were going to talk about "what happened." Kingi falsely told Garcia the interview was not being recorded, and disingenuously and repeatedly assured him that he was being straightforward.

During the first portion of the interview, Kingi falsely told Garcia that eyewitnesses had identified him as the passenger in the car. He also showed Garcia a fabricated six-pack photographic lineup in which Garcia's photograph was circled. Kingi accurately related that police had a videotape of the shooting and knew who the driver was because he had been wearing a GPS anklet. Kingi urged Garcia to explain what had happened, suggesting the shooting was unplanned and Garcia was an unwitting passenger who was just "along for the ride." Kingi queried whether Garcia knew that "homeboy had a gun," and invited him to explain what was said during the confrontation with Wade. Kingi cautioned, "as of right now, you're the passenger and you're involved, depending on what your story is." Garcia indicated he understood "exactly" what Kingi was saying, explaining, "I've been through this. I've done it a lot of times."

Kingi reminded Garcia of the "number one rule" that he needed to take care of himself and his family, including his two young daughters. He urged that if Garcia failed to tell his side of the story he was "up the creek" and it would appear he and the driver

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[4] In an earlier hearing, the trial court tentatively held that because Garcia was a parolee, he had limited constitutional rights and could be detained for any legitimate reason without probable cause. The People urge this provided an alternative basis for the court's ruling; Garcia disagrees. We need not reach the issue because the court's probable cause finding was amply supported.

had been hunting for persons to shoot. Garcia professed ignorance and expressed skepticism that police actually had a videotape depicting him. He stated he wanted to see his "picture on the camera."

Kingi remonstrated, "You're not the one that killed [that] guy. I only investigate people that are responsible." Kingi opined that it was "not fair" to see Garcia "go down for this . . . . It's not fair for you to not have to see your family, to watch your daughters grow up." Garcia continued to profess a lack of knowledge of the shooting.

The detectives then tried a different tactic. They showed Garcia a photograph that made it falsely appear as if there had been a gun on the floorboard of Wade's car. Kingi stated that the detectives had interviewed Mendez, and that Mendez had not been booked for murder. Kingi implied that Mendez wanted Garcia to tell detectives the shooting had been in self-defense, thereby exculpating Mendez. Kingi also stated that Garcia had been booked only for a parole violation, because "we don't believe that it was an actual murder." Garcia asked what would happen if he told them what had happened. Lait said, "Well, my guess is if the story is a lot like what [Mendez] said, then—like my partner said, we give you a ride home. [¶] It's not like we couldn't get you again; right?" Lait referenced the fact that Garcia had just been fitted with a GPS tracking device at the parole office, and stated that the detectives were still conducting the investigation. Garcia again declined to provide information, stating "I ain't got no story."

The detectives took a break, during which they showed Garcia the videotape of the Wade shooting. The video had been altered to make it appear as if the Jeep's license plate number was readable; in fact, the number was not clear on the tape. When Garcia pointed out that he could not be seen on the videotape, Kingi falsely reiterated that he had been identified by witnesses. Shortly thereafter Garcia told detectives that before the shooting Wade had called out his gang name and brandished a gun. Garcia claimed he could not recall much else, and had been intoxicated. Garcia indicated he had no more information and said, "See you guys don't take me to jail, man." "I thought you were just going to let me go . . . ." He complained, "I've did my little part of the work . . . ." After

taking another break, the detectives questioned Garcia about the shooting involving T.M. and R.M. Garcia refused to provide further information.

Three times during the interview, Garcia referenced obtaining an attorney, but did not unambiguously request counsel.[5] At the end of the interview he stated, "I'm going to have to get me a lawyer. I don't know nothing no more." Interrogation ceased.

(ii) *The motion to exclude and the trial court's ruling.*

Garcia moved in limine to exclude the interview and jailhouse conversations on various grounds, including that his statements were involuntary. After an evidentiary hearing at which a defense police interrogation expert testified, the trial court denied the motion, finding Garcia's statements voluntary. The trial court expressed concern about the detectives' comments that suggested a promise of leniency, but found that such statements were not the dominant focus of the interrogation and Garcia's will was not overborne. The court also reasoned that Garcia's statements in the jail cell were admissible because there was a clear break between the interrogation and the jail-cell conversation.

(iii) *Applicable legal principles*

An involuntary confession—one that is not free because the defendant's will was overborne—is inadmissible at trial under the due process guarantees of the United States and California Constitutions. (*People v. Massie* (1998) 19 Cal.4th 550, 576; *People v. Smith* (2007) 40 Cal.4th 483, 501.) "A confession elicited by any promise of benefit or leniency, whether express or implied, is involuntary and therefore inadmissible, but

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[5] Those statements were as follows. When Kingi assured Garcia that he was being honest with him, Garcia replied "Yeah, I know. That's why I told you if I needed a lawyer for stuff like this cause you don't got nothing on me." When Kingi repeatedly urged that Garcia should explain what happened, Garcia replied, "Fuck it. Let's go. Just . . . book me for whatever you're going to book me for . . . and give me a lawyer or something." Later in the interview, Garcia said, "I don't know. I got to get me a lawyer, man. That's it. Well, for a violation I guess or whatever, I don't need no lawyer unless you all are booking me for something; right?"

merely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a confession involuntary. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 600; *People v. Holloway* (2004) 33 Cal.4th 96, 115; *People v. Maury* (2003) 30 Cal.4th 342, 404-405.) Detectives may point out the benefits that flow naturally from a truthful and honest course of conduct. (*People v. Tully* (2012) 54 Cal.4th 952, 993.)

The voluntariness of a suspect's statement is determined based on the totality of the circumstances. (*People v. Tully, supra*, 54 Cal.4th at p. 993.) The relevant factors include the "crucial element" of police coercion; the length of the interrogation; its location; its continuity; and the defendant's maturity, education, physical condition, and mental health. (*People v. Williams* (1997) 16 Cal.4th 635, 660.) No single factor is dispositive. (*People v. Williams* (2010) 49 Cal.4th 405, 436.) Questioning may include confrontation with contradictory facts, debate, and even exaggerated statements implying that the police have more knowledge about a crime than they actually possess. (*People v. Williams, supra,* 49 Cal.4th at p. 443; *People v. Holloway, supra*, 33 Cal.4th at p. 115; *People v. Jones* (1998) 17 Cal.4th 279, 299.) Only those " 'psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable' " are inadmissible. (*People v. Smith* (2007) 40 Cal.4th 483, 501.) The People have the burden of establishing the statement was voluntary. (*Tully, supra,* at p. 993.) We accept the trial court's resolution of disputed facts and inferences, as well as its evaluations of credibility, if substantially supported. We independently determine from the facts found by the trial court whether the challenged statement was legally obtained. (*Smith, supra,* at p. 502; *Tully, supra,* at p. 993.)

(iv) *Voluntariness of the statements made during the police interview.*

Garcia complains the interrogation was so coercive as to render his statements involuntary. We view the question as close.

The interview commenced shortly before 6:00 p.m., included two breaks, and was relatively brief. Neither its duration nor the hour of day suggested coercion. Garcia was advised of his *Miranda* rights and adequately waived them. (*People v. Cruz* (2008) 44

Cal.4th 636, 667-668.) Garcia was not a naïve youth lacking experience with the criminal justice system; he was four days shy of his 27th birthday, had previously been incarcerated, and had been a gang member since the age of 12. His sophistication was reflected in his statements to the detectives that he had "been through this. I've done it a lot of times" and "I know what you guys are doing." Nothing suggests he suffered from mental or physical infirmities. His statements strongly suggested he was not actually intimidated. He expressed skepticism about some of the detectives' representations and did not hesitate to refuse to provide information. Further, the tenor of Garcia's jail-cell comments do not suggest he had been coerced or intimidated. These aspects of the record suggest Garcia's will was not overborne. (See *People v. Williams, supra*, 49 Cal.4th at p. 442.)

We disagree that several of the factors cited by Garcia indicate coercion. Garcia argues that his requests for counsel were ignored, which indicated coercive interrogation. But each of Garcia's first three references to counsel were ambiguous, and the detectives had no obligation to stop the interview or ask clarifying questions. (See *People v. Bacon* (2010) 50 Cal.4th 1082, 1105; *Davis v. United States* (1994) 512 U.S. 452, 459; *People v. Williams, supra,* 49 Cal.4th at p. 427; *People v. Sapp* (2003) 31 Cal.4th 240, 266.) Because the detectives did not act improperly, their conduct cannot have contributed to a coercive interrogation. Likewise, their references to Garcia's family were brief, nondeceptive, and do not appear to have motivated Garcia's statements. (See generally *People v. Kelly* (1990) 51 Cal.3d 931, 953.)

Nor do the detectives' deceptive comments that witnesses had identified Garcia, and that the Jeep's license plate number was visible in the video, compel a finding of involuntariness. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240-1241; *People v. Thompson* (1990) 50 Cal.3d 134, 167.) " 'Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' " (*People v. Farnam* (2002) 28 Cal.4th 107, 182; *People v. Lee* (2002) 95 Cal.App.4th 772, 785.) Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of voluntariness is warranted.

(*Farnam,* at p. 182 [false representation that the defendant's fingerprint was found on the victim's wallet did not render a confession involuntary].) The deceptive statements were not of a type likely to induce an untrue statement, especially given that police actually did have evidence the Jeep was the car used in the crime and Garcia was the passenger.

The same cannot readily be said of the detectives' false representation that a gun was found in Wade's car. It appears that this ruse did, in fact, result in untrue statements by Garcia: he falsely told police that Wade pulled a gun and called out his gang's name. Also problematic are the detective's statements that if Garcia's story was the same as Mendez's supposed story, the detectives would give Garcia a "ride home." This statement falsely represented that if Garcia told detectives the shooting had been in self-defense, he would be released. This promise of lenience amounted to more than simply pointing out the benefits flowing from a truthful course of conduct; the detectives knew no gun had been found in Wade's car and Mendez did not act in self-defense. The "ride home" statement was arguably somewhat equivocal; it was followed by statements suggesting the detectives were still investigating, and could arrest Garcia again. But there was certainly a chance Garcia would understand the comments to imply he would be released if he corroborated Mendez's supposed self-defense claim. Indeed, Garcia's later statements suggest this was precisely how he interpreted the remarks.

However, we need not determine whether Garcia's statements during the interrogation were voluntary. Even assuming arguendo that they were not, the jail-cell conversations—the portion of the evidence challenged here—were clearly admissible.[6]

People v. Jefferson (2008) 158 Cal.App.4th 830 and *People v. Terrell* (2006) 141 Cal.App.4th 1371 are on point. In *Terrell,* an 18-year-old defendant admitted during a police interrogation that he had committed murder and robbery. At the conclusion of the police interview, he asked if he could call his mother. The officers agreed, but surreptitiously taped the call. During the call the defendant confessed the killing to his

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6 As noted, the People did not seek to introduce evidence of Garcia's statements during the interrogation.

mother and other family members. (*Id.* at p. 1376.) He successfully moved to suppress his confession made during the police interview, on the ground his *Miranda* rights had been violated and the confession was coerced. However, the "telephonic statements were admissible even if [defendant's] confession under police interrogation was not." (*Id.* at p. 1382.) The confessions to the mother and other relatives were not the product of coercion or a custodial interrogation, and the defendant had initiated the call on his own. (*Id.* at pp. 1377, 1382.) The court rejected the argument that the phone call was inadmissible because it was the "direct result of unlawful police interrogation tactics which led first to his coerced confession to the police." (*Id.* at p. 1379.) The police did nothing to prompt the call. The defendant did not know the call was being recorded. From the defendant's point of view, the coercive atmosphere of the interrogation had ended, and he was having a private conversation with his family. His motivation in speaking to his family members was entirely different from his motivation when confessing to police: he was not seeking to avoid reprisals or obtain more lenient treatment. (*Id.* at p. 1385.) Thus, his voluntary decision to telephone his family and confess was an intervening circumstance that broke the causative chain. (*Ibid.*)

In *Jefferson,* police separately interviewed two gang members suspected of committing a drive-by murder together. Police gave each man false information about the evidence, telling one that gunshot residue had been found in his Suburban automobile (the car used in the murder), and the other that his fingerprint had been found inside the Suburban. (*People v. Jefferson, supra,*158 Cal.App.4th at p. 835.) Officers then put the men together in a surreptitiously bugged jail cell, where they discussed the crimes and the information that had been given to them by police. *Jefferson* rejected the argument that placing the men in the cell together, where it was reasonably likely they would make incriminating statements, was a form of interrogation. (*Id.* at p. 840.) "Settled law shows that [the defendants] were not 'interrogated.' 'Interrogation' requires 'a measure of compulsion above and beyond that inherent in custody itself.' [Citation.] That compulsion is missing when a suspect speaks freely to someone the suspect thinks is a fellow cellmate." (*Ibid.*) From the defendants' perspective, "the problem was the

opposite of compulsion. They were candid because they thought no one else was listening, not because they were getting the third degree. It was, as the officers hoped, a spontaneous and natural conversation between friends with a dilemma on their minds." (*Id.* at p. 841.) Accordingly, the statements were voluntary.

Terrell and *Jefferson* compel the same result here. The detectives did not continue the interrogation simply by placing the men in the same cell. " 'Officers do not interrogate a suspect simply by hoping that he will incriminate himself.' [Citation.]" (*People v. Terrell, supra,* 141 Cal.App.4th at p. 1386, quoting *Rhode Island v. Innis* (1980) 446 U.S. 291, 302; *People v. Jefferson, supra,* 158 Cal.App.4th at p. 840.) The jail-cell conversation did not take place under conditions resembling a custodial interrogation or its functional equivalent. (*Terrell,* at p. 1386). No coercion or police prompting was used to elicit the jail-cell statements. Garcia did not know the jail-cell conversation was being taped. (*Terrell,* at p. 1386 [there can be no coercion when the defendant is subjectively unaware of police involvement in eliciting or recording his statements].) From Garcia's point of view, any coercive atmosphere extant during the interrogation had ended. (*Id.* at p. 1385.) As in *Jefferson*, the problem, from Garcia's point of view, was the opposite of compulsion. While Garcia is correct that many of the incriminating jail-cell statements pertained to information provided to him during the police interview, this does not compel exclusion; the same was true in *Jefferson*. (*Jefferson,* at pp. 835-836.) That the police interview in *Jefferson* was not coercive is, in our view, insignificant. " 'A subsequent confession is not the tainted product of the first merely because, "but for" the improper police conduct, the subsequent confession would not have been obtained. [Citation.]' " (*Terrell,* at p. 1386.) Moreover, the jail-cell conversation did not occur until after Garcia had been booked and moved to a jail cell, a more definitive break than that present in *Terrell.* As in *Terrell,* there was an " 'intervening circumstance' that broke the causative chain." (*Id.* at p. 1385.)

Garcia urges that this case more closely resembles *People v. Hogan* (1982) 31 Cal.3d 815, disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836, in which the California Supreme Court held a defendant's post-interrogation telephone

conversation with his wife was inadmissible. (*People v. Hogan*, *supra*, at p. 843.) But, as *Terrell* explained at length, *Hogan* is distinguishable. The coercive police conduct at issue in *Hogan* included a series of three interrogations occurring over two days, interspersed with several conversations between the defendant and his wife. (*Id.* at pp. 835-838.) Police deliberately exploited the defendant's initial confession by priming the wife with information leading her to believe her husband was guilty, and then setting up the follow-up conversations in which she could elicit further incriminating evidence from him. In essence, the wife unwittingly "acted as an arm of the police, allowing them to continue to interrogate Hogan by means of questions posed by her." (*People v. Terrell, supra,* 141 Cal.App.4th at p. 1384.) Here, in contrast to *Hogan*, the detectives did not prompt the jail-cell conversation and did not use a family member as a tool to continue a de facto interrogation.

2. *Contentions related to voluntary intoxication.*

Mendez contends the trial court erred by precluding testimony from a lay witness that the driver of the Jeep appeared to be drunk. Both defendants contend that the trial court erred by denying their request that the jury be instructed on voluntary intoxication. Because additional proof of intoxication would have been relevant to the court's ruling on the instruction, we consider the issues seriatim.

a. *Exclusion of Rodriguez's testimony.*

Defense witness Jose Rodriguez testified that he observed the hit-and-run accident. He saw a car speeding down Cochran Street at 50 to 55 miles per hour. The car attempted to turn on Carlin, but was going too fast, missed the turn, and crashed into a small Honda. Mendez's counsel asked, "The way you described this car driving the speed and the turn and the collision, was that consistent with or like the driver was drunk?" The prosecutor objected on lack of foundation grounds, and the court sustained the objection.

Mendez assumes that Rodriguez would have given an affirmative answer, and complains that the trial court erred by sustaining the prosecutor's objection. He is incorrect. A non-expert witness may offer his or her opinion if it is " '[r]ationally based

on the perception of the witness" and "[h]elpful to a clear understanding of his testimony." (Evid. Code, § 800; *People v. Bradley* (2012) 208 Cal.App.4th 64, 83.) The decision whether to permit lay opinion rests in the sound discretion of the trial court. (*Bradley*, at p. 83.)

The trial court did not abuse its discretion. Rodriguez's opinion was not rationally based on his perceptions. Rodriguez observed, from a distance, the Jeep speeding and miss a turn. From these limited observations, Rodriguez could not have rationally formed an opinion about whether the driver was drunk. As Mendez appears to acknowledge, it is an unfortunate fact that sober persons, as well as intoxicated drivers, sometimes drive at excessive speeds and have accidents. Without a further basis for the opinion, Rodriguez's testimony was properly excluded. Mendez's citation to cases holding that lay witnesses are permitted to give their opinion on intoxication is unhelpful. (See, e.g., *People v. Williams* (1992) 3 Cal.App.4th 1326, 1332 ["Lay witnesses have been permitted to give an opinion of another's state of intoxication when based on the witness's personal observations of such commonly recognizable signs as an odor of alcohol, slurring of speech, unsteadiness, and the like"].) This principle is unquestionably correct. The problem is that Rodriguez's opinion was not based on these commonly recognizable signs, nor was he close enough to the Jeep to have been able to make such observations. There was no error.

b. *Refusal to instruct on voluntary intoxication.*

Appellants requested that the trial court instruct the jury with CALCRIM No. 625, regarding voluntary intoxication.[7] The trial court denied their request on the ground there

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[7] CALCRIM No. 625 provides: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ <insert other specific intent required in a homicide charge or other charged offense>.] [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating

was insufficient evidence to support the instruction. Appellants contend omission of the instruction violated their constitutional rights to due process, to present a defense, and to jury trial.

A trial court must instruct, sua sponte, on the general principles of law that are closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Boyer* (2006) 38 Cal.4th 412, 468-469.) A defendant has the right to an instruction that pinpoints the theory of the defense. (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, a court is not obliged to instruct on theories that lack substantial evidentiary support. (*People v. Burney* (2009) 47 Cal.4th 203, 246.) Substantial evidence is evidence sufficient to deserve consideration by the jury, that is, evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.) A trial court "need not give instructions based solely on conjecture and speculation." (*People v. Young* (2005) 34 Cal.4th 1149, 1200.) Doubts about the sufficiency of the evidence to warrant an instruction should be resolved in the defendant's favor. (*Moye*, at p. 562.) We independently review the question of whether the trial court erred by failing to instruct on a defense. (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) In deciding whether an instruction is required, we do not determine the credibility of the defense evidence. (*People v. Manriquez* (2005) 37 Cal.4th 547, 585; *People v. Salas* (2006) 37 Cal.4th 967, 982.)

Evidence of voluntary intoxication is " 'admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice

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effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose." (Italics omitted.)

aforethought.' " (*People v. Roldan, supra,* 35 Cal.4th at p. 715; § 29.4, subd. (b).) "Accordingly, a defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication *and the intoxication affected the defendant's "actual formation of specific intent*." ' [Citation.]" (*Roldan,* at p. 715, italics added; *People v. Williams* (1997) 16 Cal.4th 635, 677.)

Here, the only evidence offered in support of the instruction was the following. First, Arias told detectives that appellants had taken Bolanos's Jeep for two days. They had been at the "Spot," a location where gang members got high and attended parties, and were "all fucked up." They told Arias they went on a "big ass shoot out for, like, two, three days"; were "drunk as fuck"; and " 'just blasted everyone, just drunk on a good one, just blasting everywhere.' " Second, Emilia Lopez, an eyewitness to the hit and run, testified that the culprits were laughing and appeared to be lost. On cross-examination counsel asked whether she had the impression that the men in the Jeep "might have been drunk." She answered affirmatively but gave no further basis for her opinion. Third, during the recorded jail-cell conversation, Garcia stated that he had told the detectives he was drunk at the time of the crimes.

Assuming arguendo that this evidence was sufficient to show appellants were intoxicated at the time of the crimes—as opposed to some other period during their two- or three-day "shootout"—it provides no evidence that they were so intoxicated they did not form the requisite criminal intent. "[A]n intoxication instruction is not required when the evidence shows that a defendant ingested drugs or was drinking, unless the evidence *also* shows he became intoxicated to the point he failed to form the requisite intent or attain the requisite mental state." (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661-1662, and cases cited therein ; *People v. Williams, supra,* 16 Cal.4th at pp. 677-678 [defendant's statements that he was " 'doped up' " and " 'smokin' pretty tough' " were insufficient evidence his intoxication affected his mental state]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1179-1181 [that defendant drank 8 to 10 beers was insufficient evidence intoxication had an effect on his mental state].) The evidence that Mendez drove too fast

and hit another car was insufficient to show either appellant had not formed the requisite intent. Omission of the instruction was proper.

3. *Prosecutorial misconduct.*

During argument, the prosecutor urged that appellants were "going out and hunting for rivals to kill." She discussed the jury instructions on premeditation and deliberation. In the course of that argument, she stated: "In this case we have much more than that because we have gang members, . . . the instruction tells you the amount of time required for deliberation, premeditation can vary from person to person and according to the circumstances. What that tells you is that you can look to all the other evidence about these particular defendants that you know to consider whether or not they deliberated. [¶] *A gang member is different than an ordinary person because at some point in time that person decided to join a gang. And when they do so, they know that gang members aren't groups of people that are choir boys, they are people that commit crimes. And as soon as they join a gang, they have to think—you think if they're any type of reflective person, they have to think, am I going to be down for my gang? If I'm presented with a rival if I'm with one of my homies, if I see someone, will I be the type of person that can kill. They've already decided this when they decided to join the gang.* They decided this when they . . . got together, put a gun in the car or put it in their waistband and decided to drive around rival territory at their own risk." (Italics added.)

Appellants argue the italicized portion of the prosecutor's statements constituted prejudicial misconduct and violated their rights to confrontation and due process. They contend that the argument violated the court's limiting instruction that gang evidence was admissible only to prove intent, purpose, knowledge, or motive, but not character.[8] In

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[8] The trial court instructed the jury, in pertinent part: "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendants acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancement charged; [¶] OR [¶] The defendants had a motive to commit the crimes charged. [¶] . . . [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that a defendant is a person of bad character or that he has a disposition to commit crime."

appellants' view, the prosecutor essentially told jurors that gang members are the type of people who kill, that is, they have a propensity or character for violence and murder. Appellants also contend that the prosecutor's argument referenced facts not in evidence, because no witness testified that gang members "take a vow or commit themselves to killing people when required [to do so] by the gang."

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Vines* (2011) 51 Cal.4th 830, 873; *People v. Redd* (2010) 48 Cal.4th 691, 733-734.) When a claim of misconduct focuses on comments the prosecutor made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained of remarks in an objectionable fashion. (*Samayoa,* at p. 841.) We must place the challenged statement in context and view the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

When the defense fails to object to asserted prosecutorial misconduct and request that the jury be admonished, the claim ordinarily is forfeited on appeal. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1358; *People v. Souza* (2012) 54 Cal.4th 90, 122.) Because appellants failed to object to the challenged portion of the prosecutor's remarks, they have forfeited their prosecutorial misconduct claims. (*McKinzie,* at p. 1358; *Souza,* at p. 122.) Contrary to appellants' assertions, the record does not suggest an objection would have been futile. (See generally *People v. Redd*, *supra*, 48 Cal.4th at p. 745.)

Appellants urge that to the extent their claims were forfeited by their counsels' failure to object, their attorneys provided ineffective assistance. To prevail on an ineffective assistance claim, a defendant must establish both that counsel's performance

fell below an objective standard of reasonableness, and resultant prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105; *People v. Bradley, supra,* 208 Cal.App.4th at pp. 86-87.)

The prosecutor did not commit prejudicial misconduct. While it is misconduct for a prosecutor to argue evidence outside the record (*People v. Thomas* (2011) 51 Cal.4th 449, 494; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353), that did not occur here. A prosecutor is " 'given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.' " (*People v. Dykes* (2009) 46 Cal.4th 731, 768; *People v. Thomas, supra,* at p. 494.) The prosecution's gang expert testified, among other things, that the primary activities of the 18th Street gang included murder and attempted murder; that in the gang culture, respect is of paramount importance, and must be earned by committing crimes for the gang, such as shootings, murders, and other activities; that it is important for gang members to feel that their fellow gang members know they are capable of committing violent crime; and that if gang members travelled into a rival gang's territory, they would expect a shooting to occur. Given this evidence, it was a reasonable inference that persons mired in the gang culture are often called upon to commit shootings for their gangs and must be willing to do so if they are to earn "respect." Contrary to appellants' argument, the prosecutor did not state that gang members take a vow to kill.

Nor do we think there is a reasonable likelihood jurors would have interpreted the prosecutor's remarks as appellants suggest. The prosecutor's point was that persons who choose to join a gang do so knowing that they may be called upon to commit violent acts for the gang, and therefore must have considered, before joining, whether they were willing and able to comply with the gang's norms and demands. This was a fair inference and comment on the evidence, and was not prohibited character evidence. While it would perhaps have been preferable for the prosecutor to avoid the phrase "a gang member is different than an ordinary person," certainly her comments were not deceptive, reprehensible, or egregious, and did not infect the trial with unfairness.

Because the prosecutor's argument was not objectionable, defense counsel did not perform inadequately by failing to object. Defense counsel is "not required to make futile motions or to indulge in idle acts to appear competent." (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

4. *The discovery request and motions for a continuance and a new trial.*

a. *Additional facts.*

Prior to trial, Garcia sought contact information for the People's witnesses. Pursuant to a standard court procedure followed in cases in which a gang enhancement is alleged, in the interests of witness safety the contact information was not disclosed, but the People agreed to make the witnesses available for interview.

During the People's case-in-chief, defense witness Marcos testified that the front seat passenger in the Jeep wore a black baseball cap with a red logo.

On the day Arias testified, the prosecutor informed the defense that she had inadvertently failed to turn over 155 photographs taken of the search of Arias's house. The defense examined the photographs in court. One of the pictures showed a black baseball cap with a red logo hanging in Arias's mother's closet. The defense introduced the photograph into evidence and questioned Arias about it. During Garcia's closing argument, defense counsel displayed the photograph for the jury and argued it was possible Arias was the front seat passenger. Defense counsel did not seek to recall Marcos after obtaining the photograph.

After the jury rendered guilty verdicts, Garcia filed a "Request for Discovery" seeking contact information for Marcos and her parents, Eulalia and Jose. Defense counsel averred that the information was necessary in order for her to prepare a motion for a new trial. Counsel averred that Eulalia and Jose, who did not testify at trial, had also stated that the front seat passenger wore a black cap with a red logo. Counsel stated she intended to show the three witnesses the photograph of the cap and ask "whether that might have been the hat" they saw. Garcia also moved for a continuance on the same grounds.

At the hearing on the motions, the prosecutor stated that the photographs had been referenced in the police report. The defense had been in possession of the photographs during trial but never requested a continuance and did not seek to call additional witnesses, recall Marcos, or interview Eulalia and Jose. The prosecutor observed that the hat was found in Arias's mother's closet, next to a Quizno's uniform apron, and appeared to be part of the uniform. The prosecutor also noted that during the jail cell conversations, Garcia had stated that he had been wearing a dark hat with a logo. The trial court opined that both motions "border[ed] on [the] frivolous" and denied them. It reasoned that the evidence of the cap was "[not] a big deal" and numerous similar hats were to be found in Los Angeles.

Garcia subsequently filed a motion for a new trial on the grounds of, inter alia, prosecutorial misconduct.[9] The misconduct alleged was that the prosecutor did not turn over the 155 photographs before trial. Counsel averred that the black cap "exactly matches the description of what the front seat passenger was wearing" provided by Marcos and, presumably, her parents. Had the photographs been turned over, counsel could have questioned Marcos and the other witnesses about the cap, potentially establishing Arias was in the front passenger seat and was the person who shot at T.M. and R.M. The trial court denied the motion. It concluded the trial evidence was "extremely compelling," particularly the fact that Garcia stated in the jail cell conversation that he was in the car. Moreover, there was no prosecutorial misconduct. The defense was able to use the photograph of the cap at trial.

Garcia now contends denial of all three motions was error. We disagree.

b. *The discovery request.*

There is no general constitutional right to discovery in a criminal case. (*People v. Valdez* (2012) 55 Cal.4th 82, 109-110.) California's reciprocal discovery statutes, section

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9 The motion also averred that new evidence had been discovered suggesting Arias was a passenger in the car. Garcia does not challenge the court's denial of the motion as it pertained to that ground.

1054 et seq., provide the exclusive means for discovery. (§ 1054, subd. (e); *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 570.) With the exception of section 1054.9, which does not apply here, the reciprocal discovery statutes do not provide for post-conviction discovery. (*People v. Superior Court (Pearson), supra,* at pp. 570-572.) "[T]he purposes of the discovery statutes cannot be furthered where, as here, a jury has already rendered its verdict on the substantive charges against the defendant . . . . Rather, in this situation any violation of a defendant's pretrial right to discovery is appropriately addressed by available posttrial remedies such as an appeal from the judgment [citation], a motion for new trial [citation], or a petition for habeas corpus [citation]." (*People v. Bowles* (2011) 198 Cal.App.4th 318, 327.) Garcia therefore failed to establish he was entitled to the requested discovery.

Furthermore, the prosecutor did, in fact, disclose the photographs during trial and had apparently offered to make the three witnesses at issue available for an interview. Garcia's counsel introduced the photograph into evidence and argued its significance to the jury. If Garcia felt aggrieved by the People's tardy disclosure, he was not without remedy. The discovery statute requires that the prosecution disclose specified categories of information to the defense 30 days before trial. (*People v. Bowles*, *supra*, 198 Cal.App.4th at p. 325.) The trial court may enforce the discovery statutes by ordering immediate disclosure and a variety of sanctions. (*Ibid.*) If Garcia felt additional discovery, accommodations, or sanctions were warranted, he could easily have sought them during trial, but failed to do so.

c. *The motion for a continuance.*

A continuance of a criminal trial may be granted only for good cause, and the trial court has broad discretion to determine whether good cause exists. (§ 1050, subd. (e); *People v. Alexander* (2010) 49 Cal.4th 846, 934; *People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) We review the trial court's denial of a motion for a continuance for abuse of discretion. (*People v. Mungia, supra*, at p. 1118.) " 'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the

reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*Id.* at p. 1118.) "In reviewing the decision to deny a continuance, '[o]ne factor to consider is whether a continuance would be useful. [Citation.]' " (*Ibid.*)

The trial court did not abuse its discretion here. First, as best we can tell, Garcia sought the continuance in conjunction with the discovery request so he could show the three witnesses the photograph of the black hat. As the court properly denied the discovery request for the witnesses' contact information, this point was moot. Second, immediately after the trial court denied the motions for discovery and a continuance, defense counsel stated, "I do have a motion for new trial prepared." Thus, there was no necessity for a further delay.

d. *The new trial motion.*

Section 1181, paragraph (5), provides that a new trial may be granted when the prosecutor has "been guilty of prejudicial misconduct during the trial thereof before a jury." We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard. (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.) A trial court's ruling on a motion for new trial will not be disturbed absent a manifest and unmistakable abuse of discretion. (*Lightsey,* p. 729.)

We discern no abuse of discretion here, because the new trial motion lacked merit. We have set forth the standard governing prosecutorial misconduct claims *ante.* While the prosecutor should have turned over the photographs 30 days before trial (§ 1054.7), her failure to do so was inadvertent. The tardy production of the photographs cannot be characterized as deceptive or reprehensible, nor was it an egregious pattern of conduct that rendered the trial unfair. (See *People v. Vines, supra,* 51 Cal.4th at p. 873.) Garcia claims that, had he possessed the photograph earlier, he would have asked Marcos if the cap resembled the one worn by the passenger, and might have called Marcos's parents as witnesses for the same purpose. Although Garcia postulates that the cap evidence was significant in the way the case was litigated, we do not see how timely discovery of the photograph could have bolstered the defense case. The cap was found in Arias's mother's closet. Based on the prosecutor's representations and Arias's statements, it

appears it was part of Arias's mother's work uniform, making it unlikely jurors would believe it was the one worn by the shooter. Despite the tardy disclosure, the defense introduced the photograph into evidence and argued its significance to the jury. Given that the jury had a photograph of the hat, and knew that the front seat passenger was wearing similar headgear, it is unlikely the testimony of Marcos or her parents would have added much to the case. Further, as the trial court reasoned, the hat was not a unique item. Finally, given the evidence of the jail-cell statements in which Garcia admitted he was present during the shootings, the fact Arias's mother—or Arias—had a similar cap was unlikely to impress the jury. The new trial motion was properly denied.

5. *The minimum parole eligibility period.*

At sentencing, the trial court imposed a 15-year minimum parole eligibility requirement on both appellants. They contend this was error, and the People concede the point. We agree. Section 186.22, subdivision (b)(5) provides for a 15-year minimum parole eligibility period for persons who commit felonies punishable by life imprisonment where the gang enhancement is found true. However, here both appellants received additional terms under section 12022.53 for the personal use of a firearm. Section 12022.53, subdivision (e)(2) provides: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." The jury found, as to both appellants and each count, that a *principal* personally discharged a firearm. Accordingly, the 15-year minimum parole eligibility requirement should be stayed. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238.) Because the 15-year parole eligibility requirement is not reflected on the abstracts of judgment, their modification is unnecessary.

DISPOSITION

The judgments are modified to stay the 15-year minimum parole eligibility requirement. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.