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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. AARON HERRERA et al., Defendants and Appellants.	B267864, B269548 (Los Angeles County Super. Ct. No. BA411218)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant Aaron Herrera.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant Christopher Darrell Haas.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

After a joint trial, separate juries convicted Aaron Herrera (Herrera) and Christopher Darrell Haas (Hass) of murder and attempted murder, and found true allegations of firearm use and gang enhancements. Haas and Herrera appeal, and we affirm.

BACKGROUND

An amended information filed June 26, 2015 charged Herrera and Haas with the murder of Luis Ochoa (Ochoa) (Pen. Code,[1] § 187, subd. (a); count 1) and the attempted premeditated murder of Anthony Garay (Garay) (§§ 664, subd. (a); 187, subd. (a); count 2). The information alleged as to both counts that a principal personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (d), (e)(1)), a principal personally and intentionally used and discharged a firearm (§ 12022.53, subds. (b)–(e), (e)(1)), and both offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). As to Herrera, the

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

information alleged one prior strike conviction (§§ 667, subd. (d); 1170.12, subd. (b)) and one prior serious felony conviction (§ 667, subd. (a)(1)).

A joint trial proceeded with separate juries, with Herrera's jury called the green jury and Haas's jury called the yellow jury. Herrera's jury found him guilty on both counts and found all the allegations true, except for the allegation that Herrera personally discharged a firearm causing great bodily injury to Garay in count 2. Herrera admitted his prior conviction. The court denied Herrera's motion for new trial and sentenced him to a total of 130 years to life in state prison, with presentence custody credit, restitution, and fees.

Haas's jury also found him guilty on both counts, and found true all the allegations. The court sentenced Haas to 50 years to life on count 1 and 32 years to life on count 2, to be served concurrently, with presentence custody credits, restitution, and fees. Both filed timely notices of appeal, and we consolidated the appeals for briefing, oral argument, and decision.

I. Prosecution evidence

Sonia Esparza

Sonia Esparza (Esparza) testified that in 2013, she lived near the intersection of Maple and 37th in Los Angeles. She knew Ochoa, who was a friend of her brother's, and skateboarded around her home; she also knew Garay. At 10:30 p.m. on April 24, 2013, Esparza stood outside on the staircase talking to her mother. She saw Garay run and

"try[ ] to fight some other guy," and heard three men screaming at each other. Two or three minutes later Esparza saw a blue or black four-door Tahoe drive slowly by. The driver was a girl of age 17 or 19 with a ponytail, and another woman was the front passenger. The window behind the driver's seat was down, and as the Tahoe neared a stop sign at the intersection of Maple and 37th, a dark-skinned, chubby, nearly bald Hispanic man leaned his body out of the back window and shot at Garay. Esparza heard five shots. Frightened, she ran to the back and fainted. When she came to, she returned to the street and saw Ochoa's body; she did not see Garay.

Esparza met with police detectives about two weeks later. She was worried about going to court and did not want the detectives to use her name, but eventually identified a photograph of Herrera, the first in a six-pack, as looking most like the shooter. At trial, she was not sure whether the shooter was in the courtroom.

On cross-examination, Esparza testified that she was nearsighted and not wearing her glasses the night of the shooting. There were lights outside the apartment building and she could see the Tahoe and the shooter.

Mayra Sanchez

Mayra Sanchez (Sanchez) testified that she had originally been charged with murder and attempted murder as a codefendant with Haas and Herrera. She had agreed to testify truthfully in exchange for leniency (a plea to a lesser

charge of accessory after the fact, and three years in state prison).

At the time of the shooting, Sanchez was a 16-year-old high school dropout living with her parents. On Sunday, April 21, 2013, she took her father's four-door black Tahoe without his permission. Sanchez did not have a driver's license. She drove to a gas station, where she got into an accident that damaged the front passenger door so it would not open. Afraid to return home, she drove around and then spent the night at a friend's house.

The next day Sanchez saw Haas, a former classmate and a friend's boyfriend, on 41st Street; she believed he was a member of the 41st Street gang. After Sanchez told Haas her circumstances, he invited her to stay at his house, and that night she slept outside on his porch. The following day Sanchez went over to a female friend's house, but came back to hang around for a couple of hours with Haas. The following night she slept in the truck, and then on Wednesday, April 24, 2013, she returned to Haas's house to hang out on the porch.

Sanchez and Haas were hungry, and she suggested they get something to eat. He went inside to get a sweater and she got into the truck. The back passenger door opened and she thought it was Haas, but Herrera (whom she had never seen before), wearing a hoodie, got into the back seat, and said, "Goofy." Haas came to the front passenger door and told Sanchez, " 'That's my friend. He's [coming] with us,' " and climbed into the car through the front passenger

window. No one said anything about going on a mission or shooting anyone. Sanchez was a little mad that a stranger entered her car, but with Haas (also wearing a hoodie) in the front passenger seat and Herrera in the back seat, she headed over to Tam's. When they changed their minds she drove toward the U.S.C. food court.

Sanchez drove down Maple at 10-15 miles per hour. No one told her to drive that route or gave her instructions. She was listening to loud rap music. When she stopped at the stop sign at 36th and Maple,[2] she heard about five gunshots from the back of the Tahoe; no one said anything. Sanchez ducked down, then sped off and stopped about a block away. She asked Haas what happened and he didn't reply. Sanchez felt a gun held to her right temple and Herrera told her not to say anything, so she assumed he was the shooter. She would not have driven the truck if she had known they planned to shoot someone.

Sanchez drove back to Haas's house, and Haas and Herrera got out of the Tahoe. Sanchez then drove to a friend's house, and moved back home the next day.

On May 7, 2013, Sanchez texted Haas, " 'Did you hear about that tramp who got dropped?' " and " 'That was us that one day, huh?' " ("Tramp" was a common term for a member of the 36th Street gang.) Haas responded, " 'The homie shot him in the head and in the chest.' " Sanchez had identified

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[2] Sanchez also stated that the shooting took place at 37th and Maple ("36, 37").

Herrera as the shooter in a photographic six-pack, and also identified him in court.

About two weeks after the shooting, her father took her down to the police station because he had reported her as a missing person. She had just learned that Haas had been arrested with the gun used in the shooting. Detectives interviewed Sanchez and at first she did not tell them the truth, saying nothing about Haas, and later saying he was driving. When the detectives pushed her to admit she was driving, she asked, " 'Don't you . . . have Chris Haas in for a weapon?' " They answered yes and she replied, " 'So put it together.' " Sanchez then talked to her father in another room, without knowing the conversation was being recorded. (A recording of this conversation was played for the jury, which also received a transcript.) Sanchez described the shooting and told her father she did not know that they had a gun.

Sanchez wrote Haas a letter and told him not to worry about the trial because " 'I got your back,' " meaning she would come into court and tell the truth regardless of what the prosecution wanted.

Anthony Garay

Garay testified that he was jumped into the 36th Street gang four years ago at age 18. His nickname was Enemy, and he had several prior felony and misdemeanor convictions. He hung out with Ochoa, also a member of the gang with the nicknames Silent and Turtle. The 36th Street

gang did not get along with the neighboring 41st Street gang.

At 10:30 p.m. on April 24, 2013, Garay was hanging out on the corner of 36th Street and Maple with Ochoa and a "little skater kid" who was not a gang member. Garay got into an argument and then a fistfight with another friend who then left. Three to four minutes later, a dark blue Chevy truck cruised by. Garay said to Ochoa " 'Look at the car,' " and ducked down. Garay was straightening up when Ochoa said, " 'Oh, I think it's just some girls.' " They were starting to walk away when the truck hit the stop sign and the shooting began. The shooters said, " 'Fuck Tramps,' " which was disrespectful to the 36th Street gang. Garay did not see the shooter. Garay threw himself to the floor and saw Ochoa go down, but when he rose up Ochoa did not move.

The jury heard a recording of Garay's interview with the detectives, in which he said that two girls were in the front seat of the truck. The driver, a female Hispanic, around 20 years old with long straight dark hair and big hoop earrings, kept looking at him. The passenger was a woman around the same age with a brown pony tail. He then saw a "full head" wearing a blue and orange hat come out of the back window of the driver's side. When the body was out of the window with a gun in one hand, the man shouted, " 'AAAA, fools, fuck tramps' " and " 'Hey, bullseye,' " and the shooting began. The truck drove off and Garay ran

home crying and screaming. The 36th Street gang had a beef with the 41st Street gang.

Detective Jose Calzadillas

Before the Haas jury only, Detective Jose Calzadillas testified that on May 8, 2013, he interviewed Haas after he was arrested for possession of a .380 firearm.[3] Haas was 17 years old at the time of the interview.

The prosecution played a recording of the interview for the juries. After Haas received his *Miranda*[4] warnings, he at first denied involvement in the shooting at Maple and 37th Street, saying he had heard the shooting from his girlfriend's house. When he went home he saw Sanchez in her dad's dented Tahoe; she "was just busting a mission" with Goofy and Bullet. Goofy and Sanchez were laughing, and Goofy said he was in the back seat when he "smashed down Maple and they seen some fools," and "I just shot the tramp fool. I just shot the tramp." Bullet gave the gun to Haas.

Eventually, Haas told the detectives that Goofy was at Haas's house and said he wanted Haas to go "bust a mission" with them. When Haas said no, Goofy "said if you don't fool

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[3] Another police officer testified that on May 7, 2013, he saw Haas standing on the street with a few others, holding a bottle of beer. When Haas saw the police car pull up, he removed a .380 caliber handgun from his pocket and tossed it into the bushes. The officer detained Haas, recovered the gun, and booked it into evidence.

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

I'm going to kill you," pointing the gun at Haas. Haas was scared, so he got into the Tahoe's back seat behind Bullet. He was shaking with fear. Goofy, who was in the back seat behind Sanchez, called Haas "a bitch" and Sanchez and everyone laughed. Sanchez rolled down Maple, and at Maple and 37th they saw a group of people on the driver's side. Goofy put his head and his hand outside the window and started shooting. Haas jumped out and ran, and the truck blasted off; he hadn't seen them since. Goofy's name was Aaron Herrera.

During his detention, Haas admitted he was a 41st Street member with the moniker "Smiley."

Before the Haas and Herrera juries, Detective Calzadillas testified that he had responded to the intersection of 37th and Maple at 11:30 p.m. on the night of the shooting. Five cartridge casings were at the crime scene. One bullet was on the ground next to Ochoa's body, another was in the rear license plate of a car parked nearby, and there were bullet holes in a second parked car.

Herrera and Sanchez both were arrested on May 10, 2013. Herrera had tattoos on the back of his head, his arms, his chest, and his leg, and on his fingers were the numerals 4 and 1 and PWS, which stood for Peewees, a clique in the 41st Street gang. Haas's tattoos included a numeral 4 and a numeral 1.

Officer Anthony Cabriales

Officer Cabriales testified as a gang expert familiar with the 41st Street gang, whose territory bordered on the

territory of the 36th Street gang. The intersection of 37th and Maple was the stronghold of the 36th Street gang. 41st Street members identified themselves with tattoos of the numerals 4 and 1. The gang committed violent crimes, vandalism, and sales of narcotics. 41st Street called rival gang 36th Street " '[t]ramps,' " and 36th Street called 41st Street " 'funky 1's' " or " 'fleas.' " Officer Cabriales identified two predicate offenses committed by members of the 41st Street gang. Based on Herrera's and Haas's tattoos, Officer Cabriales opined both men were members of the 41st Street gang. Presented with a hypothetical mirroring the evidence presented regarding the shooting on April 24, 2013, Officer Cabriales opined that the shooting was for the benefit of the gang, raising its reputation and that of the shooter, and allowing the other passenger to "put[] in work for the gang." He also opined that older gang members often had younger gang members hold weapons, because younger members would receive lesser penalties if found in possession of firearms.

Investigation

A deputy medical examiner for the Los Angeles Department of the Coroner testified that Ochoa had a fatal gunshot wound through the head, and a nonfatal gunshot wound through the left thigh. A criminalist testified that the five cartridge cases and two bullets found at the scene were fired from the gun found in Haas's possession. A custodian of records for a cellular phone company testified

that exhibit 33B was a copy of text messages from Haas's cellphone.

II. Defense evidence

Haas called Dr. Robert Shomer to testify as an expert on eyewitness identification. Dr. Shomer testified that eyewitness identification is unreliable, especially when stress or a sudden unexpected situation is involved. Identification is even less accurate if a weapon is present, as the weapon draws the attention of the observer away from the face of the person wielding the weapon.

DISCUSSION

I. Haas

A. *The jury instructions on murder and attempted murder were correct.*

Haas argues that the trial court erred in its jury instructions regarding murder, and that all his convictions must be reversed as a result. We address this issue despite Haas's failure to object at trial, as it affects his substantial rights. (*People v. Cardona* (2016) 246 Cal.App.4th 608, 612, review granted July 27, 2016, S234660.)

First, Haas argues that the trial court erred in giving a jury instruction for first degree murder based on a violation of section 246, where that instruction did not inform the jury that it must find that Haas acted with the intent to kill. There is no basis for this argument. First, Haas was not charged with a violation of section 246, which punishes as a felony shooting at an inhabited home, building, vehicle, aircraft, housecar, or camper, and the jury was not

instructed regarding section 246. Rather, the information charged Haas with a violation of section 187, subdivision (a), which defines murder as the "unlawful killing of a human being, or a fetus, with malice aforethought." Section 189 further provides that "any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree." The court properly instructed the jury (without objection by Haas) that murder required malice aforethought; that first degree murder required deliberation and premeditation; and that "[m]urder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death is murder of the first degree." [5] The court also instructed the jury that principals included aiders and abettors; when the crime is murder or attempted murder "the aider and abettor's guilt is determined by the combined act of all the participants as well as that person's own mental state"; and "[a] person aids and abets the commission or attempted commission of a crime when he or she, with knowledge of the unlawful purpose of the perpetrator, and with the intent or purpose of committing or encouraging or facilitating the commission of

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[5] For first degree drive-by murder under section 189, "premeditation is not required to establish the crime, [but] a specific intent to kill is required." (*People v. Chavez* (2004) 118 Cal.App.4th 379, 382, 384.)

the crime, and by act or advice aids, promotes, encourages, or instigates the commission of the crime." The jury was amply instructed that for a finding that Haas aided and abetted the murder of Ochoa and the attempted murder of Garay, Haas must have known of Herrera's intent to kill and Haas also must have intended to aid and abet in Herrera's intentional act.

Haas also argues that the court gave improper instructions on first degree attempted murder, allowing the jury to find him guilty even if the evidence demonstrated premeditation only by Herrera. The court instructed the jury that principals include those who aid and abet the attempted commission of the crime; "[w]hen the crime charged is either murder or attempted murder, the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person's own mental state"; "the aider and abettor's guilt may be less than the perpetrator's, if the aider and abettor has a less culpable mental state"; and first degree murder required an intent to kill resulting from deliberation and premeditation, which the instructions also defined fully.

The jury found true, as to both Haas and Herrera, "that the aforesaid attempted murder [of Garay] was committed willfully, deliberately, and with premeditation within the meaning of . . . section 664[, subd.] (a)."

Substantial evidence supports this finding. Sanchez testified that after she got into the car to take Haas to lunch, Herrera entered the back driver's side and identified himself

as Goofy. Haas then told Sanchez that Herrera was his friend and was coming with them, and Haas entered the front passenger seat through the window. Haas was in the front passenger seat when Sanchez stopped at the stop sign at 36th and Maple, where she heard five shots from the back. She sped off and asked Haas what happened; he did not reply. Herrera held a gun to her temple and told her not to say anything, and she dropped Herrera and Haas off at Haas's house. Sanchez asked Haas later in a text whether he heard about the tramp who got dropped and whether that was " 'us,' " and Haas replied that the " 'homie shot him in the head and chest.' " Haas was later arrested with the gun. In his police interview, Haas said Herrera wanted him to go on a mission and pointed the gun at Haas to make him get in Sanchez's truck, and Haas jumped out and ran when Herrera started shooting. Haas admitted he was a member of the 41st Street gang.

The jury was entitled to believe Sanchez's testimony that Haas directly aided and abetted Herrera by providing a truck and a driver (Sanchez), letting Herrera get into the back, and vouching for Herrera. That testimony also serves as evidence of planning and premeditation by Haas, who then rode along to the intersection where Herrera shot at Garay. The jury was also entitled to believe Sanchez that Haas stayed in the car and got out with Herrera at Haas's home (rather than jumping out of the car immediately following the shooting, as Haas told the detectives). Haas's

texts confirmed that it was us who shot the tramp, although the shooter was " 'the homie.' "

Haas cites *People v. Favor* (2012) 54 Cal.4th 868, and our Supreme Court's grant of review in *People v. Mateo*, review granted May 11, 2016, S232674, but those cases concern whether the jury must be instructed that an aider and abettor must have premeditated to be found guilty of first degree attempted murder under the natural and probable consequences doctrine. That doctrine provides that when a defendant aids and abets an intended crime (a target offense), the defendant may also be found guilty of any other crime (nontarget offense) the direct perpetrator commits, if the nontarget offense is a natural and probable consequence of the target offense. (*Favor*, at p. 880.) Here, the record shows that the jury verdict was based on the theory that Haas *directly* aided and abetted the attempted murder of Garay. "[S]ection 664[, subd.] (a)[6] properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted with

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6 Section 664, subdivision (a) provides: "[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." The statute also requires (as occurred in this case) that the information charge, and the jury find true, that the attempted murder was willful, deliberate, and premeditated.

willfulness, deliberation, and premeditation, even if he or she is guilty as an aider and abettor. [¶] We therefore conclude that the trial court did not err by failing to instruct the jury to determine personal willfulness, deliberation, and premeditation in the case of an aider and abettor." (*People v. Lee* (2003) 31 Cal.4th 613, 627–628.) The natural and probable consequences doctrine is a separate theory of aider and abettor culpability which was not argued, supported by the evidence, or instructed upon in this case, and therefore it does not apply. (See *People v. Chiu* (2014) 59 Cal.4th 155, 168.)

B. *The trial court was not required to give a duress instruction.*

Haas argues that the trial court was required to instruct the jury that Haas acted under duress. In his opening statement before the yellow jury, Haas's counsel told the jury that Herrera coerced Haas at gunpoint to go on the "mission." After the jury left the courtroom, the court advised counsel that duress was not a defense to murder, and counsel explained he meant that Haas did not have the intent required for a murder conviction. In closing, counsel argued that Haas did not possess the intent to assist Herrera, who pulled a gun on him and forced him to go along. The prosecutor in rebuttal stated that even if the jury believed Haas was afraid of Herrera, "it's still not a defense."

Counsel did not request a duress instruction, but we address the issue nevertheless, as it affects Haas's

substantial rights. (*People v. Cardona*, *supra*, 246 Cal.App.4th at p. 612.)

"[D]uress is no defense to murder," (*People v. Anderson* (2002) 28 Cal.4th 767, 785), and duress also cannot "negate the requisite intent for one charged with aiding and abetting a first degree murder." (*People v. Vieira* (2005) 35 Cal.4th 264, 290.) Haas argues that duress may serve as a defense to felony murder under some circumstances, but felony murder was not a theory in this case and no felony-murder instruction was given. Haas also argues that duress could be a defense to a charged violation of section 246, but as we explained above, he was not charged with a violation of that statute, which makes it a felony to shoot at an occupied home or vehicle. Haas argued to the jury that he was forced to go along with Herrera and thus did not have the intent required for murder. He has not shown how he was prejudiced by the failure to give a duress instruction.

No duress instruction was required.

II. Herrera

A. *The trial court properly admitted Haas's text messages into evidence.*

The prosecution sought to introduce evidence of Haas's text message exchanges with his girlfriend and with Sanchez. Shortly after the shooting, on April 25, 2013 at 12:42 a.m., Haas texted his girlfriend: " 'we shot on 37 and maple,' " and when she asked if they shot somebody, he replied at 12:45 a.m., " 'Yeah goofy did not me baby.' " On objection by Herrera's counsel, the court allowed the first

text message as a declaration against interest, but disallowed the second in which Haas denied shooting and implicated Herrera, as that statement, in the court's view, was not against Haas's interest. The court allowed into evidence Sanchez's May 5 text exchange with Haas, in which she texted, " 'Did you hear about that tramp that got dropped last week? That was us that one day, huh?' " and he replied, " 'Yeah. The homie shot him in the head and the chest. What's up? You don't got your truck.' " The texts were a declaration against interest in which Haas showed his involvement when he agreed it was " 'us' " who shot the 36th Street gang member. Herrera's counsel objected that the statement was not against Haas's interest because he "carv[ed] himself out," but the court responded that in context Haas's response to Sanchez's text was against Haas's interest, as it confirmed that Haas participated without identifying the shooter beyond calling him the homie.[7]

Herrera acknowledges that the text messages are nontestimonial as admissions, but argues that they are nevertheless inadmissible under *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and *People v. Aranda* (1965) 63 Cal.2d 518, and violate the confrontation clause. We disagree.

First, Herrera did not object on due process grounds, and has therefore not preserved this claim for review.

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[7] The court presented redacted records of Haas's text messages (exh. 33B) to both juries. Herrera's jury did not see the " '[y]eah goofy did not me baby' " message.

(*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Further, his argument lacks merit. "First, the confrontation clause has no application to out-of-court nontestimonial statements [citations], including statements by codefendants. [Citations.] [¶] Second, even if the *Bruton*[, *supra*, 391 U.S. 123] rule applied to nontestimonial statements of nontestifying codefendants, *Bruton* itself involved hearsay statements of codefendants that were 'clearly inadmissible' under the rules of evidence. . . . [U]nder *Bruton* and its progeny, a codefendant's hearsay statement *is* admissible 'if it falls within a "firmly rooted" hearsay exception . . . . [Citation.]' [Citation.] [¶] Third, California courts before and after *Crawford* [*v. Washington* (2004) 541 U.S. 36] have held that the admission of statements possessing sufficient indicia of reliability to fall within the hearsay exception for declarations against interest does not deny a defendant the right of confrontation guaranteed by the United States Constitution." (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571–572.) *Crawford*, at page 68, involved testimonial statements made under police interrogation; *Bruton*, at page 128, footnote 3, addressed a codefendant's confession inculpating the defendant, a testimonial statement which was "clearly inadmissible against him under traditional rules." By contrast, the admitted text messages Herrera challenges in this case were Haas's nontestimonial statements falling under the recognized hearsay exception for declarations against interest. " ' "[A] declaration against interest may be admitted in a joint trial

so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness." ' " (*Arceo*, at p. 575.) " '[T]he most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.) Here, the text messages were between Haas and his girlfriend immediately after the shootings, and Haas and his friend Sanchez two weeks later; the messages blame a homie for the actual shooting but admit that Haas participated; and they were casual and friendly.

Because we conclude that the trial court properly admitted the text messages, we need not discuss whether the evidence was sufficient to convict Herrera had the court not allowed them into evidence.

B. *The court did not err in instructing the jury regarding eyewitness identification.*

The trial court proposed to give CALJIC No. 2.92 regarding eyewitness testimony, and Herrera's counsel objected, requesting a pinpoint instruction described as "basically what is CALCRIM 315 instead of CALJIC 2.92, and I added some factors that I think apply to this case." The court declined to give the instruction: "There is nothing wrong with the CALJIC. Unless there is some perceived gap, I'm not going to give it." The court instructed the jury with CALJIC No. 2.92.

"CALJIC No. 2.92 normally provides sufficient guidance on the subject of eyewitness identification factors." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230–1231.) The language in the requested instruction not specifically present in CALJIC 2.92 asked "Was a weapon used during the crime and did the witness see and describe the weapon?" and named specific factors regarding the witness's ability to observe (such as time of day/night, lighting, and distance).

On appeal, Herrera simply states that his proposed instruction was "far more comprehensive and focused on the evidence presented." He does not identify how CALJIC No. 2.92 was deficient or how he was prejudiced by the giving of that instruction. "Nothing in [the eyewitness] . . . instruction . . . prevents the parties from arguing any factors the jury should consider if supported by the evidence." (*People v. Mendoza* (2000) 24 Cal.4th 130, 181–182.) Herrera's expert, Dr. Shomer, discussed weapon focus, and in cross-examination Herrera's counsel asked Esparza about the light outside the apartment building. In closing, the prosecutor argued to the jury that Esparza had a good opportunity to observe, as there was plenty of light ("[t]his might be the best lit street in the city of Los Angeles"), and Herrera's counsel countered that it was dark, and that Esparza's identification was otherwise unreliable. Herrera has not shown that the giving of CALJIC No. 2.92 rather than his revised CALCRIM No. 315 prejudiced his defense.

III. The trial court properly instructed the jury regarding Sanchez's accomplice liability.

Herrera's counsel proposed instructions stating that Sanchez was an accomplice as a matter of law, and that her testimony therefore required corroboration and should be viewed with caution. The trial court rejoined that given Sanchez's testimony that she drove the car but had no idea that a shooting would take place, the court would instruct the juries that they should decide whether or not Sanchez was an accomplice. Haas's counsel argued, "There is simply no evidence whatsoever that she had knowledge." The court stated that the evidence allowed both inferences, that Sanchez knew and that she did not, but "[i]t's just not a clear-cut, absolute, she is an accomplice."

The court instructed both juries that an accomplice was an aider and abettor subject to prosecution to the same offenses as the defendants, and the juries could not find the defendants guilty based on testimony or out-of-court statements by an accomplice unless the testimony or statements were corroborated by other, independent evidence. The court also instructed: "You must determine whether the witness Mayra Sanchez, was an accomplice as I have defined that term. The defendant has the burden of proving by a preponderance of the evidence that Mayra Sanchez was an accomplice in the crimes charged against the defendant."

During deliberations, Herrera's jury asked the court whether it had to unanimously agree that Sanchez was an

accomplice, and the court answered that each juror was to decide for his or herself and then, if the juror determined that she was an accomplice, apply the accomplice rules as given in the instructions.

Both Haas and Herrera argue that the trial court erred in its instructions regarding Sanchez. Haas argues that the jury instructions regarding her accomplice liability were unsupported by any evidence that Sanchez was an accomplice. Herrera argues that the court should have instructed the jury that Sanchez was an accomplice as a matter of law, and also argues that the court should have given pinpoint jury instructions regarding corroboration of accomplice testimony and leniency granted to Sanchez. None of these arguments has merit.

A. *Evidence at trial supported the jury instructions regarding Sanchez's accomplice liability.*

"An accomplice must have ' "guilty knowledge and intent with regard to the commission of a crime." ' " (*People v. Lewis* (2001) 26 Cal.4th 334, 369.) While an accomplice is a principal who may be prosecuted for the same offense as the defendants, "[a] mere accessory . . . is not liable to prosecution for the identical offense, and therefore is not an accomplice." (*People v. Horton* (1995) 11 Cal.4th 1068, 1113–1114.) "Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom. [Citation.] The burden is on the defendant to prove by a preponderance

of the evidence that a witness is an accomplice." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)

The record in this case supports, but does not dictate, the conclusion that Sanchez was an accomplice. Sanchez testified that she had been charged as a codefendant, and had received leniency (a plea to accessory after the fact and three years in prison) in exchange for her testimony. She testified she did not know Haas and Herrera were going on a mission and would not have driven the truck if she had known they planned to shoot someone. She told her father at the police station she did not know they had a gun. This testimony was evidence from which the jury could conclude she was not an accomplice. The trial court was correct to refuse to instruct the juries that Sanchez was an accomplice as a matter of law.

There was also evidence from which the jury could infer that Sanchez was an accomplice. The jury could have concluded that Sanchez knew she was driving the Tahoe to find and shoot at 36th Street gang members; they were not required to believe Sanchez's self-serving version of events. Garay told the detectives that the girl driving the truck kept looking at him and Ochoa. Haas told the detectives that Sanchez was laughing as she drove and headed down Maple to the scene of the shooting. Sanchez's text messages with Haas could be read as evidence of her participation in the mission. The jury could have inferred that Sanchez knew of and intended to assist Haas's and Herrera's mission to find and shoot at rival gang members. The trial court was correct

to instruct the juries to decide whether Sanchez was an accomplice.

B. *The court was not required to instruct the jury that one accomplice cannot corroborate another.*

Herrera argues that the court should have sua sponte instructed the jury with CALJIC No. 3.13: "The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of [his][her] accomplices, but must come from other evidence."

Herrera did not request the instruction, and ordinarily that failure would forfeit the issue on appeal. (*People v. Sanders* (1995) 11 Cal.4th 475, 533.) In any event, having given comprehensive instructions regarding accomplice liability and the requirement of corroboration, the court did not have a duty to instruct sua sponte that one accomplice may not corroborate another. (*Id.* at p. 534.)

Further, Herrera points to the text messages between the two accomplices Haas and Sanchez, arguing that they could not be used to corroborate Sanchez's testimony that Herrera was the shooter. The purpose of CALJIC No. 3.13 is to guard against the danger of conviction on the basis of statements of multiple accomplices motivated by self-interest to testify adversely to the defendant. (*People v. Davis* (2005) 36 Cal.4th 510, 547.) There is no such danger when two accomplices engage in what they believe to be a private conversation. (*Ibid.*) Here, Sanchez and Haas believed their texting to be a private conversation. The statements in the text messages were nontestimonial; they

were "not made to law enforcement officials in the hope of leniency or immunity," and so there was no need to instruct the jury with CALJIC No. 3.13. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1133.)

C. *The court did not err in declining to give a special instruction on leniency.*

Herrera proposed a special instruction stating: "To the extent that the testimony of Ms. Sanchez tended to incriminate the defendant Mr. Herrera, it should be viewed with caution. Testimony and statements by an accomplice may be consciously self-interested and calculated. You may consider the evidence of leniency and the plea agreement she entered into with the prosecution in exchange for her testimony. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and the light of all the evidence in this case." The instruction was not discussed during the conference on jury instructions, and the trial court did not give the instruction. Herrera argues that the absence of a pinpoint instruction regarding evidence of leniency prejudiced the verdict.

In *People v. Harrison* (2005) 35 Cal.4th 208, 253, two prosecution witnesses charged with crimes either had received or stood to receive favorable treatment for their testimony. The defendant requested, but the trial court refused, a similar special instruction providing that the testimony of a witness who provides evidence against the

defendant in " 'expectation of leniency in his punishment must be examined and weighed by the jury with greater care than would be applied to the testimony of an ordinary witness.' " (*Ibid.*) The trial court noted that the proposed instruction was overspecialized, as the standard instruction "adequately focused the jury's attention on the existence or nonexistence of bias, interest, or other motive of a witness." (*Ibid.*) The California Supreme Court agreed that the trial court need not give a pinpoint instruction if it duplicates other instructions, and as the jury received instructions on the credibility of witnesses in general and on the credibility of a witness who has been convicted of a felony, "these instructions adequately informed the jury that the 'existence or nonexistence of a bias, interest, or other motive' and a witness's prior conviction of a felony were factors it could consider in determining the believability of a witness." (*Id.* at pp. 253–254.) As the defendant cited no authority that the general instructions were inadequate and the court found none, the failure to give the instruction did not violate the defendant's right to a new trial. (*Id.* at p. 254.)

So here. The trial court gave the standard instruction which states that the jury may consider "the existence or nonexistence of a bias, interest, or other motive" in evaluating the credibility of witnesses. The court also instructed the jury that the jury could not find a defendant guilty based on accomplice testimony unless that testimony was corroborated by independent evidence. Taken together, these instructions adequately informed the jury that in

evaluating Sanchez's testimony, the jury could take into account the leniency Sanchez received, and if the jurors determined she was an accomplice, her testimony could not serve as the sole basis for a conviction but must have independent corroboration. The failure to give the pinpoint instruction did not deny Herrera a fair trial or otherwise prejudice him.

As we conclude no error occurred, Herrera's claim of cumulative error necessarily fails.

IV. The convictions for murder and the gun use enhancement do not violate the prohibition on multiple convictions or the double jeopardy clause.

The jury convicted both Haas and Herrera of first degree murder and found true that a principal had personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)). Herrera argues that this constitutes a prohibited multiple conviction and violates the federal constitution double jeopardy clause. We are bound by the decisions of the California and United States Supreme Courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) *People v. Sloan* (2007) 42 Cal.4th 110, 115–125, *People v. Izaguirre* (2007) 42 Cal.4th 126, 130–134, and *Hudson v. United States* (1997) 522 U.S. 93, 99 require us to reject Herrera's argument.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.