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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL ARCEO et al., Defendants and Appellants.	B218758 (Los Angeles County Super. Ct. No. TA079230)

APPEALS from judgments of the Superior Court for the County of Los Angeles. William R. Pounders, Judge. Affirmed.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel Arceo.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant Ernesto Mejorado.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer, Joseph P. Lee, and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

A jury convicted Ernesto Mejorado of three murders and a second jury convicted Gabriel Arceo of two of the murders. Both defendants were also convicted by their respective juries of conspiracy to murder two of the victims. Firearm and gang enhancements, as well as special circumstances allegations of murder while engaged in robbery (in Mejorado's case), multiple murders and murder of a witness, were found true. The juries could not agree on the death penalty in either case, and defendants were sentenced to consecutive terms of life without parole, as well as additional terms of imprisonment for the enhancements.

On appeal, Arceo asserts that the admission of testimony from witnesses who recounted inculpatory statements by Mejorado and another codefendant, who was tried separately, violated his Sixth Amendment right to confront adverse witnesses. Arceo also challenges the trial court's response to a jury inquiry about the meaning of the term "principal," and complains that gruesome photos of the bodies of the victims, which were burned after the killings by a codefendant and were unrecognizable, should not have been shown to his jury.

Mejorado joins in Arceo's contentions and also asserts that his confrontation and due process rights were violated when the trial court refused to allow him to elicit a statement from a witness that Mejorado, just after the first murder and in an excited state, said that Ramirez, a codefendant, shot someone (while the trial court admitted testimony from another witness that Mejorado said, "We just killed somebody"). Mejorado also contends the trial court erred in instructing the jury that all principals, including one who aids and abets the crime, are "equally guilty," and argues the evidence was insufficient to support the verdicts as to two of the murders and the gang allegations attached to those murder counts.

We find no prejudicial error and affirm the judgments.

FACTS

1. Overview of the Murders and the Participants

Defendants Arceo and Mejorado were members of a gang, the Krazy Ass Mexicans (or KAM), as was Francisco Ramirez. Sergio Mejorado, defendant Mejorado's half brother, was a member of a different gang. These four gang members were participants in some or all of the three murders in this case. (Sergio Mejorado was not a defendant in this case, and Ramirez, who was a defendant, is not a party to these appeals.)

Mejorado and Ramirez, who were good friends, lived in a converted garage adjacent to a house (the Lopez house) owned by Mejorado's grandmother, Maria Lopez. Maria Lopez lived there with her sons Adan and Ramon Lopez, and Ramon's son David Lopez. Another grandson, Tommy Lopez, also a gang member, lived elsewhere with his then-girlfriend, Jessika Merrill. Defendant Arceo and the codefendant's half brother, Sergio, also lived elsewhere. Arceo had two children with Maribel Mejorado, defendant Mejorado's cousin. Except for Tommy, none of the other Lopezes were gang members. (To avoid confusion, we refer to all of the Lopezes as well as to Sergio Mejorado by their first names.) Jennifer Sanchez and America (or Erica) San Miguel, two young women described as "druggies," spent a lot of time at the garage of the Lopez house with Mejorado and Ramirez.

The first murder victim was Raymundo Flores. Flores drove a green Impala with special chrome rims and electronic equipment, and there was evidence suggesting he had recently come into possession of $18,000 and that this was known to Ramirez and Mejorado. In the early morning hours of April 12, 2005, Flores was shot in the back of the head with a .380-caliber round from a semiautomatic handgun. He was found in an alley near the Lopez house and later died. That same morning, Mejorado knocked on the door of the Lopez house and, in an excited state, told his cousin, David, who had been sleeping in the living room, that "they [he and Ramirez] had murdered some guy" in the alley. David went back to sleep. A few hours later, when he got up to go to work, David saw a green car with expensive rims in the driveway, covered with blankets.

The next day, Ramirez and Mejorado took the rims off the car, replaced the tires with spare tires, and took the televisions and other electronic equipment from the car and put them in the house. Sanchez, one of the "druggies," was present, as were Tommy and his girlfriend Merrill.

Ramirez drove away in the stripped car with Sanchez, taking the car a couple of streets away from the Lopez house. Mejorado followed with Tommy and Merrill. When Tommy and Merrill drove up, the others "had gas on the car," and Mejorado then set it on fire.

The next two victims were Sanchez and San Miguel, the two young women who were frequently at the garage of the Lopez house with Mejorado and Ramirez. Twelve days after the Flores murder, the two young women were in the garage with Mejorado, Arceo, Ramirez, Sergio, David, and Robert Borjas (a codefendant who was tried jointly with Mejorado and Ramirez but was not convicted). In the course of the evening, after a conclave in the bathroom among Arceo, Sergio, Ramirez and Borjas, Borjas said, "We're going to tie these bitches up," which David understood to mean that Sanchez and San Miguel knew too much and had to be "gotten rid of."

David left the garage after some comments by Sergio that David understood as an indirect threat to David, and went to the Lopez house to go to bed. Thereafter, Sergio and Arceo killed Sanchez and San Miguel. In the morning, Mejorado woke up David and asked to borrow his car. David gave Mejorado the keys and went back to sleep. When he woke up again and went outside, Mejorado, Arceo, Sergio and Borjas were there. Borjas told David not to go into the garage because "they had just killed Jennifer and Erica." Arceo told David that Sergio had grabbed San Miguel, shoved her into the bathroom, and shot her a couple of times, and that he (Arceo) then took the gun from Sergio, grabbed Sanchez by her hair, and "put a bullet in the back of her head." Sergio bragged about the shooting as well.

Mejorado and Ramirez loaded the bodies (which had been dragged from the garage to the living room of the Lopez house) into the trunk of David's car; Sergio and Arceo were gone by this time. Ramirez left in the car with the bodies, which were found

the next day in Tulare County, burned and unrecognizable. Adan, David, Tommy and Merrill cleaned up the house, and Adan painted the garage. Ramirez brought David's car back, and David, Tommy and Merrill cleaned it.

2. The Aftermath of the Murders

After the murders of San Miguel and Sanchez, Mejorado and Ramirez did not return to the Lopez house again, and Adan moved into the garage.

The three killings may have remained unsolved were it not for Merrill, Tommy's girlfriend (who died before the trial). Several days after the murders of Sanchez and San Miguel, Merrill made a then-anonymous call to the Tulare County police, reporting the three murders. This resulted in a warrant to search the Lopez house, multiple interviews of David and Adan as well as interviews of Merrill, a search of a house in Delano belonging to Mejorado's mother, and a search of David's car. The bodies of San Miguel and Sanchez were eventually identified through fingerprints on one of the bodies and teeth from the other body.

Arceo was arrested on May 31, 2005, after a routine traffic stop, at which he gave a different name. Mejorado was arrested in August 2006 in Delano; he also used a different name and was later discovered to have outstanding warrants for the three murders.

3. The Charges

An information was filed in November 2005 charging Arceo and Sergio with the murders of San Miguel and Sanchez. In April 2007, a first amended information charged Ramirez, Mejorado, and Borjas, as well as Arceo and Sergio, with the San Miguel and Sanchez murders (counts 1 and 2 respectively); charged Mejorado and Ramirez with Flores's murder (count 3); and contained various firearm, gang and special circumstances allegations.[1] The third amended information added charges that the five defendants

[1] The first amended information also charged Tommy in count 4 with concealing and aiding the others to avoid arrest and punishment for the murders (Pen. Code, § 32). The charges against Tommy were disposed of separately; the charges against Sergio Mejorado were also severed from this case.

conspired to commit the murders of San Miguel and Sanchez (counts 5 and 6 respectively). In the final, fifth amended information, Arceo and Mejorado were charged as follows:

Arceo was charged with the San Miguel and Sanchez murders and with conspiracy to commit those murders. (§§ 187, subd. (a), 182, subd. (a)(1).) The information alleged firearm use by a principal as to the two murders (§ 12022.53, subds. (d) & (e)(1), (c) & (e)(1), (b) & (e)), and included three personal firearm use allegations in connection with San Miguel's murder (*id.*, subds. (b), (c) & (d)), allegations that the murders were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)), and allegations of special circumstances: that San Miguel and Sanchez were killed because they were witnesses to a crime (§ 190.2, subd. (a)(10)), and multiple murders (*id.*, subd. (a)(3)).

Mejorado was charged with all three murders and with conspiracy to murder San Miguel and Sanchez. In addition, there were the same allegations of firearm use by a principal in connection with the three murders, allegations that all the offenses were committed for the benefit of a criminal street gang, and allegations of special circumstances: witness killing, multiple murders, and that Flores was murdered during the commission of a robbery (§ 190.2, subd. (a)(17)).

4. The Trial

The case was tried before two juries, one for Arceo and the other for Mejorado, Ramirez and Borjas. The trial extended over several months and more than 60 witnesses testified in the guilt phase. In the end, the only testimony at issue in these appeals (with minor exceptions), and the testimony critical to the murder convictions, is the testimony of David, Adan, and (in Arceo's case) Merrill.

At the risk of some repetition, we summarize the testimony from these witnesses that supports the convictions. Other evidence will be discussed as necessary in connection with our analyses of the specific issues raised by Arceo and Mejorado.

All statutory references are to the Penal Code unless otherwise specified.

a. Jessika Merrill

Jessika Merrill testified at Arceo's preliminary hearing, and her testimony was read to Arceo's jury.

Merrill was Tommy's girlfriend. She saw and participated in stripping the green Impala of its rims, tires and electronic devices, together with Tommy, Ramirez, Mejorado, David and Adan. The group, with Merrill and Tommy driving separately, then drove the car a couple of streets away from the Lopez house. When Merrill and Tommy drove up, the others "had gas on the car." Mejorado set it on fire, and "[i]t blew up." Mejorado got burned.

A few days later, Merrill saw Sanchez, whom she described as "a druggy that hung around at" the Lopez house, burn "the clothes [Ramirez] was wearing I guess the night of that murder." This occurred while the group (Ramirez, Mejorado, Tommy, David, and Adan) were having a cookout. Merrill saw "red . . . liquidy substance or dried red stains" on the clothing and on the shoes. Merrill, on several occasions after Flores's murder, heard various members of the group (Ramirez, Mejorado, Adan, David and Borjas) talk about an intention "[t]o dome her [Sanchez] because she knew too much." ("[D]ome the bitch" means "blow her head off.") "I heard them saying -- they said it right there in the open that they knew too much and they thought she was going to go and tell the cops." (Tommy said "don't do this, don't think about this, this is stupid.")[2]

Merrill testified that, after the Flores murder, Ramirez "had [Sanchez] basically in check." Sanchez "couldn't go anywhere. She couldn't do anything. She wasn't allowed to leave after the first murder." Merrill said that Sanchez tried to use the phone but was told by Mejorado that she could not use the phone. After the Flores murder, Ramirez and Mejorado left, taking "the stuff from the Impala," and went to Delano, taking Sanchez with them. They returned, then left again after burning the Impala. Merrill told Sanchez

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[2] Merrill also testified: "Whenever they are talking about doming her [Sanchez] and then Tommy Lopez, Adan Lopez and I think it was David told them that, no, that that was stupid, that there is no point in it, that she's not going to say anything, what's the point of killing her. There is no point." And "[a]ll the Lopez people" were saying "that is stupid, that there is no point in it."

that "they were going to dome her" and that she should leave and not come back. On one occasion, Merrill took Sanchez to the store and told her not to come back, but she did anyway.

Merrill and Tommy drove to the Lopez house on the day Sanchez and San Miguel were murdered and saw Ramirez and Mejorado. While they were there with Ramirez, Merrill heard gunshots; Mejorado was sitting outside in a little chair at the time. Ramirez looked at Tommy and said, "Get out of here," and Merrill and Tommy left. They went to their home, and a couple of hours later, Mejorado called and told Tommy "that they needed help." Merrill did not want Tommy to go, but "he had to go," because "[t]hat was his family." Merrill testified that, "I figured if I wouldn't have acted the way I did, I was cool with everything [the murders of Sanchez, San Miguel and Flores], I might have been the third one there."

Merrill and Tommy returned to find David's car backed up to the front door, and Mejorado, Ramirez, Adan, David and Borjas were all there, standing behind the opened trunk. (Merrill did not recall seeing Sergio and Arceo.) She approached and saw a big bag and smelled "a nasty stench." She went to sit in her truck, and saw Tommy and Adan holding up a blanket; she saw Mejorado and Ramirez moving something from the front entrance of the house into the trunk of the car. Ramirez then left in the car with the bodies in the trunk. Before Ramirez left with the bodies, he told Merrill, "See how easy this shit is," a comment which Merrill took as a threat.

Merrill and Tommy cleaned up some of the blood that was in the front (outside the house) and then went home. At some later point, David drove his car to Tommy and Merrill's house, and they helped him clean the car.

Merrill agreed that her memory was better when she was interviewed by the police two months after the murder. This exchange then occurred with the prosecutor:

> "Q. Do you remember saying that [Sergio and Arceo], you seen them --
>
> "A. In and out.

> "Q. -- at the house on the day of the murders of the two girls? [¶] So ma'am, you can answer the question. Do you remember, did you tell the police that you remember seeing [Sergio and Arceo] there very early on the day of the murders of the two girls?
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> "A. I recall seeing them. Like I said in and out those days, the day before and that day. I don't remember seeing them like talking to them. I didn't say anything to them, but I remember seeing them in and out. That's it."

Merrill's testimony was read only to Arceo's jury, but both juries heard various parts of Merrill's statements that were declarations against interest. Thus Detective Martinez, who interviewed Merrill, testified that Merrill told him that she helped to clean up the blood from the Lopez home, and "we helped them clean the trunk" of David's car, and talked about "how we blew up the car" (referring to Flores's car). After Sanchez and San Miguel were murdered, Merrill eventually called the police and told them what happened.

b. David

David was asleep in the living room of the Lopez house on the night of the Flores murder, when Mejorado knocked on the door. David opened the door and Mejorado and Ramirez were there. They were "kind of panicking," "[k]ind of like a freak mode, like they were in a rush to do things." Mejorado told him "they had murdered some guy." David told the police that Mejorado asked David if he had heard a gunshot, and said, "Man, we murdered somebody, we murdered somebody, hurry up," and "[w]e just murdered somebody." Mejorado grabbed some clothing and ran back out. David responded, when asked if he told police that only Mejorado came into the house and he (David) did not actually see Ramirez, "That could be right." When Mejorado said, "We just killed someone," David's impression was that Mejorado was talking about him (Mejorado) and Ramirez. David asked Mejorado, " 'Where,' and he said, 'In the alley.' "

David went back to sleep, and when he woke at 5:30 the next morning, he saw Flores's car with blankets on it in the driveway. A day or so later, he saw Mejorado and Ramirez stripping the car. They took the tires off the car and put some spare tires on it,

and took stereo equipment, CDs, and televisions out of the car. Sanchez was with them, sitting inside the car. Ramirez got some gas that he put in a milk container. Ramirez drove away in the car with Sanchez, and Tommy and Merrill drove away with Mejorado. David later saw Mejorado with burns on the side of his face. Mejorado told him he got burned because he tried to set the car on fire. (David did not tell the police about Mejorado's statement the first time he was interviewed, during which he "lied to the police and totally protected [Mejorado] and told [police] [he] didn't know anything"; David lied because "[h]e's family . . . .")

When Mejorado told David that they had just killed somebody, he did not identify the victim. David found out later that it was Flores, "[w]hen [Ramirez] bragged about it." (David told police that it was Mejorado who told him they had killed Flores.) David testified that a couple of days before the Flores murder, a girl he did not know told Mejorado (and perhaps Ramirez) that Flores had $18,000 because of a "tax return or something like that."

After the Flores murder, David observed that Sanchez "couldn't go nowhere without -- without them [Ramirez and Mejorado] being with her or without their authorization." "She would go to the alley, you know, they had to be aware of it. She couldn't just go off anywhere by herself." On one occasion, Sanchez tried to go to the alley, "and I think [Mejorado] ran after her and then asked her where she was going." It appeared to David that "they weren't letting her leave."

Twelve days after the Flores murder, Sanchez and San Miguel were in the garage socializing and drinking beer with David, Mejorado, Arceo, Ramirez, Sergio, and Borjas. In the course of the evening, Arceo, Sergio, Ramirez and Borjas were talking in a group, and Arceo had a .380-caliber or nine-millimeter handgun. The four of them rushed into the bathroom and David followed them because he wanted to know what was going on. (Mejorado did not follow the group into the bathroom; he had recently been shot in the leg and it was difficult for him to get around.) Ramirez and Sergio then walked out of the bathroom, and Borjas said, "We're going to tie these bitches up," which David understood to mean that Sanchez and San Miguel "knew too much so they had to get rid

of them." David's impression was that Sergio and Ramirez "didn't want me to hear anything. Every time I got close to them, they kind of like backed away from me." Sergio said something like "I have home girls that are down to kill," or "down for murder." David took Sergio's comment as meaning "that the girls are down to kill people" and as an indirect threat to David, so David left the garage and went to bed.

In the morning, Mejorado woke David up and asked to borrow David's car; Sergio was sitting on the couch and was sweating. David gave Mejorado the keys and went back to sleep. When he woke up again and went outside, Mejorado, Arceo, Sergio and Borjas were there. Borjas told David not to go into the garage because "they had just killed Jennifer and Erica." Arceo bragged about the murders, telling David that Sergio had grabbed San Miguel, shoved her into the bathroom, and shot her a couple of times, and that he (Arceo) then took the gun from Sergio, grabbed Sanchez by her hair, and shot her. Sergio bragged about his part in the murders as well.

David said that Adan came outside the house and asked David if he had seen what was inside, referring to the bodies. David then went inside and saw the bodies for the first time. Mejorado, Sergio and Ramirez loaded the bodies into the trunk of David's car. David and Adan held up blankets while the bodies were being loaded in the car, so that no one in the neighboring church parking lot could observe what was being done.

After the bodies were loaded up, Ramirez drove the car away. David never saw Ramirez return to the Lopez house after that time, nor did he ever see Mejorado again. David helped clean up the house, "meaning mop up blood and stuff like that." David painted and cleaned up "the blood and stuff in the shower." Tommy and Merrill were present when the house was being cleaned up.

David later called Mejorado to tell him he (David) wanted his car back. Mejorado was angry at David for demanding the return of his car and David felt threatened. Ramirez eventually brought the car back to the driveway of the Lopez house. One of the sides of the car was "trashed." David took the car to Tommy's house and David, Tommy and Merrill cleaned the trunk of his car. Ramirez told David to burn the car, but David refused; Ramirez then told him to change the tires, and David did so.

David said that after the murders, Ramirez and Mejorado fled to Guadalajara (and tried to get David to go with them); David moved to Delano to live with his brother.

David was interviewed by the police several different times in May 2005, and twice more in May and July 2006. During his first interview, he lied to the police to protect Mejorado and told them he did not know anything. In subsequent interviews, he told "part of the truth . . . and some I held back." Some time after the May 2005 interviews, David moved to Oregon. He was arrested in Oregon by federal agents in March 2006, and told them that his cousin (or cousins) "shot couple of girls for no reason" and all he did was to clean up blood.

David was charged with aiding and abetting after the fact (§ 32); he pled guilty and was put on probation (after serving a little time in county jail). David first told the police that Arceo and Sergio had bragged to him about shooting the girls in his fifth interview, in July 2006, after he had served his time on the accessory charge and had been relocated back to Oregon.

c. Adan

Adan is the uncle of Mejorado, David and Tommy, and lived in the Lopez house. Mejorado was his favorite nephew. Like David, he was arrested and pled guilty to charges of aiding in the murders after the fact (§ 32). He was in custody when he testified at trial because he had called Detective Martinez and told him he would not testify unless Mejorado was released. He said that he feared for his life because he was testifying, and when he talked to the police in May 2005, he was concerned that he might be killed by friends or homeboys of Arceo's or Sergio's. Adan told police he lied to them in his first interview because, when Ramirez's, Arceo's and Sergio's home boys -- their fellow gang members -- "find out that I'm telling you that I told you everything, they're going to be -- they're going to be on me and they're going to try to kill me. That's why I lied the first time."

Adan was also asleep in the living room of the Lopez house on the night of the Flores murder, when he was awakened by Mejorado's knocking on the door. Mejorado looked scared. Adan walked out on the porch, heard a car engine and saw a green car;

Ramirez was in the car. Adan then went back to sleep. The next morning, he saw the green Impala covered with blankets.

Adan also saw Mejorado and Ramirez taking the rims off the car. Ramirez told Adan that he shot Flores in the back of his head. After they took the rims off the car and put them in the garage, Ramirez drove away in the car with Sanchez. Mejorado left with Tommy and Merrill. The next day, Adan saw Mejorado with burns on his face.

When Adan woke up on the morning after Sanchez and San Miguel were killed, he saw Sergio sitting on the couch. He went back to sleep and when he woke up again, he saw San Miguel's body wrapped in a blanket behind the couch. He "got freaked out" and went outside, where he saw Sergio and Ramirez. He eventually saw Mejorado walk out of the garage.

Sergio told Adan that he had gone in the bathroom and shot Sanchez while she was standing in the shower. Sergio said he was going to shoot San Miguel, but Arceo told Sergio that he would take care of San Miguel; Sergio handed the gun to Arceo and Arceo shot San Miguel in the head. At trial, Adan said he never spoke to Arceo, but Adan told the police that Arceo told him (Adan) the same story that Sergio told him, including that Arceo told Sergio to give him (Arceo) the gun, Sergio did so, " 'and that's when he [Arceo] got [San Miguel] and took her to the restroom.' "[3]

Adan saw that Sanchez's body was put in his (Adan's) duffle bag. Adan testified he saw Ramirez and Borjas loading the bodies into a car, but when he was first interviewed by Detective Martinez, he told Martinez "it was [Ramirez] and [Mejorado] loading the bodies," and Sergio and Arceo were gone by this time.

After he found out how Sanchez and San Miguel were killed and after the bodies were moved, Adan helped Mejorado cleaning up the house. He washed down the blood in the driveway and mopped up the blood in the living room. Tommy and Merrill arrived during the cleanup of the house.

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3 David's and Adan's accounts conflicted in that David testified that Arceo said that Sergio killed San Miguel and he (Arceo) killed Sanchez, while Adan testified that Sergio and Arceo told him that Sergio killed Sanchez and Arceo killed San Miguel.

Adan told the police that Mejorado told him that Arceo and Sergio killed Sanchez and San Miguel. Adan told police that Ramirez told him that they killed the girls because they were afraid Sanchez was going to snitch on them (about the Flores murder). Ramirez drove away with the bodies and Borjas burned clothing in the alley.

5. The Verdicts and Sentences

a. Arceo

Arceo's jury convicted him of the first degree murders of Sanchez and San Miguel and of the two conspiracy counts, and found all the enhancing allegations and special circumstances true. The jury declared itself deadlocked on the death penalty, and the prosecution decided not to retry the penalty phase. The court sentenced Arceo to life in prison without the possibility of parole for each of the two murders. As to count 1 (San Miguel), the court imposed a consecutive sentence of 25 years to life under section 12022.53, subdivision (d) (personally and intentionally discharging a firearm proximately causing death) and stayed the findings on the other firearm enhancements (§ 12022.53, subds. (b), (c) & (e)(1)). As to count 2 (Sanchez), the court also imposed a consecutive term of 25 years to life under section 12022.53, subdivisions (d) & (e)(1) (for a principal's personal and intentional discharge of a firearm causing death with a section 186.22 gang allegation found to be true). The court imposed and stayed sentences of life without parole on the conspiracy counts (§ 654), and made various other orders on restitution, presentence custody credits and so on.

b. Mejorado

Mejorado's jury found him guilty of the first degree murder of Flores. The jury found true the allegations that a principal personally and intentionally discharged a firearm proximately causing the death of Flores (as well as the lesser firearm allegations), and found the special circumstance allegation (that Mejorado committed the murder while engaged in a robbery) to be true.

The jury also found Mejorado guilty of the first degree murders of San Miguel and Sanchez, and found true the allegations that a principal personally and intentionally discharged a firearm proximately causing the deaths of San Miguel and Sanchez (as well

as the lesser firearm allegations and the gang allegation). The jury found the special circumstance allegations that San Miguel was intentionally killed because she was a witness to a crime, and that Mejorado committed more than one offense of murder, to be true. The jury also found Mejorado guilty of conspiracy to commit the murders of San Miguel and Sanchez, and found the gang allegations attached to those counts to be true.

The jury could not reach verdicts on the special allegation that Sanchez was killed because she was a witness to a crime or on the gang allegation attached to the Flores murder count, and the court declared a mistrial on those allegations.[4]

As in Arceo's case, Mejorado's jury declared itself deadlocked on the death penalty. The court sentenced Mejorado to three terms of life without parole, plus 50 years to life for the firearm enhancements with respect to the San Miguel and Sanchez murders. The court imposed and stayed sentences on the conspiracy counts under section 654, and made various other orders on restitution, presentence custody credits and the like.

Arceo and Mejorado filed timely appeals.

DISCUSSION

1. Arceo

Arceo asserts three errors: the admission of testimony in violation of his Sixth Amendment confrontation rights, the trial court's response to a jury inquiry on the meaning of the term "principal," and the admission of gruesome photos of the bodies of the victims. We treat each contention in turn.

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[4] As to Borjas, the jury could not reach any verdicts and the court declared a mistrial. Ramirez was convicted of the murders of San Miguel and Sanchez (and the jury made true findings on the related firearm and gang allegations, as well as on the special circumstance allegations of witness killing in the San Miguel murder and multiple murders), but the jury could not reach a verdict on the Flores murder (or the witness killing allegation as to Sanchez), and the trial court declared a mistrial as to that count and allegation.

a. The admission of testimony from David and Adan did not violate Arceo's Sixth Amendment right to confront adverse witnesses.

Before and throughout the trial, Arceo sought to exclude and objected to the admission of testimony from David and Adan recounting the inculpatory statements that Sergio and Mejorado made to them. Likewise on appeal, Arceo challenges the introduction of those statements as a denial of his Sixth Amendment confrontation rights. Specifically, Arceo complains of three sets of statements: (1) David's testimony that Sergio confirmed Arceo's own account of the murders; (2) Adan's testimony that Sergio bragged to him about the murders; and (3) Adan's prior statement to the police (elicited by counsel for Borjas) that Mejorado told him that Sergio and Arceo perpetrated the murders.

The substance of Arceo's claim is that the testimony in question consisted of hearsay statements of nontestifying codefendants, and that such statements are inadmissible under *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*). Further, the argument continues, various exceptions to the *Bruton/Aranda* rule -- declarations against interest, hearsay statements containing particularized guarantees of trustworthiness, and coconspirator statements in furtherance of a conspiracy -- do not apply. Ergo, use of incriminating statements by nontestifying codefendants (Sergio and Mejorado) who cannot be cross-examined violates the confrontation clause of the Sixth Amendment.

Our review of the applicable precedents leads us to conclude otherwise.

(1) The applicable law

First, the confrontation clause has no application to out-of-court nontestimonial statements (*Whorton v. Bockting* (2007) 549 U.S. 406, 420 (*Whorton*); *People v. Gutierrez* (2009) 45 Cal.4th 789, 812), including statements by codefendants. (*United States v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 (*Figueroa-Cartagena*) [*Bruton* must be viewed "through the lens of *Crawford* and *Davis*;"[5] if the challenged

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[5] *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*); *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*).

statement is not testimonial, the confrontation clause has no application]; see also *U.S. v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326 ["[b]ecause it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to non-testimonial statements"].)

Second, even if the *Bruton* rule applied to nontestimonial statements of nontestifying codefendants, *Bruton* itself involved hearsay statements of codefendants that were "clearly inadmissible" under the rules of evidence. As Arceo necessarily concedes, under *Bruton* and its progeny, a codefendant's hearsay statement *is* admissible "if it falls within a 'firmly rooted' hearsay exception or is 'supported by a showing of particularized guarantees of trustworthiness.' [Citations.]" (E.g., *U.S. v. Mussare* (3d Cir. 2005) 405 F.3d 161, 168.)

Third, California courts before and after *Crawford* 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. Cervantes* (2004) 118 Cal.App.4th 162, 176-177 (*Cervantes*); *People v. Greenberger* (1997) 58 Cal.App.4th 298, 330-331 (*Greenberger*).)

We reprise the pertinent cases in more detail.

In *Bruton*, the high court held that the introduction of a codefendant's confession implicating defendant in a joint trial violated the right of cross-examination secured by the confrontation clause of the Sixth Amendment, even if the jury is instructed to consider the confession only against the codefendant. (*Bruton, supra,* 391 U.S. at p. 137; see also *People v. Fletcher* (1996) 13 Cal.4th 451, 455 [*Bruton* "extends only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant"].)[6] *Bruton* emphasized that the hearsay statement

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[6] Courts have held that *Bruton* "applies not only to custodial confessions, but also when the statements of the non-testifying codefendant were made to family or friends, *and are otherwise inadmissible hearsay*. [Citations.] A hearsay statement is admissible under *Bruton* and its progeny, however, if it falls within a 'firmly rooted' hearsay

inculpating the defendant "was clearly inadmissible against him under traditional rules of evidence . . . ."[7] (*Bruton, supra,* at p. 128, fn. 3.) The court continued: "There is not before us, therefore, any recognized exception to the hearsay rule insofar as [defendant Bruton] is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." (*Ibid.*) In *Aranda, supra,* 63 Cal.2d 518, which preceded *Bruton*, the California Supreme Court adopted an approach similar to the *Bruton* rule as "judicially declared rules of practice." (*Aranda*, at pp. 530-531.) (*Aranda* was abrogated in 1982 -- "[t]o the extent that [*Aranda*] constitutes a rule governing the admissibility of evidence, and to the extent this rule of evidence requires the exclusion of relevant evidence that need not be excluded under federal constitutional law" -- by the "truth-in-evidence" provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)).) (*People v. Fletcher, supra,* at p. 465.)

In *Crawford, supra,* 541 U.S. 36, the high court held that the confrontation clause barred the admission of testimonial statements of a witness who did not appear at trial, unless he was unavailable to testify and the defendant had had a previous opportunity for cross-examination.[8]

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exception or is 'supported by a showing of particularized guarantees of trustworthiness.' [Citations.]" (*U.S. v. Mussare, supra,* 405 F.3d at p. 168, italics added.)

[7] In *Bruton,* a postal inspector testified that, in the course of two interrogations in a city jail (while the codefendant was in custody on state criminal charges), the codefendant orally confessed to him that he and defendant committed an armed robbery. (*Bruton, supra,* 391 U.S. at p. 124.)

[8] Before *Crawford,* the rule enunciated by the Supreme Court in *Ohio v. Roberts* (1980) 448 U.S. 56 governed: the hearsay statement of a declarant not present for cross-examination at trial was admissible under the confrontation clause only if the declarant was truly unavailable and the statement bore adequate indicia of reliability. *Roberts* is no longer the law. "[The United States Supreme Court] has made clear that *Roberts* . . . and its progeny are overruled for all purposes, and retain no relevance to a determination whether a particular hearsay statement is admissible under the confrontation clause. . . . Thus, there is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution." (*People v. Cage* (2007) 40 Cal.4th 965, 981-982, fn. 10, citation omitted.)

In *Davis, supra*, 547 U.S. at page 821, the high court explained that "[o]nly statements of this sort [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. [Citation.] It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (See *People v. Garcia* (2008) 168 Cal.App.4th 261, 291 ["after *Davis*, the determination of whether the admission of a hearsay statement violates a defendant's rights under the confrontation clause turns on whether the statement is testimonial"; if the statement is not testimonial, "it does not implicate the confrontation clause, and the issue is simply whether the statement is admissible under state law as an exception to the hearsay rule"].)

In *Greenberger*, *supra*, 58 Cal.App.4th at pages 330-331, a case pre-dating *Crawford* and *Davis*, the court held that the "admission of a statement [of a codefendant] possessing sufficient indicia of reliability to fall within the hearsay exception of a declaration against penal interest does not deny a defendant the right of confrontation guaranteed by the United States Constitution."[9]

In *Cervantes, supra*, 118 Cal.App.4th 162, the court, relying on *Crawford* and *Greenberger*, explained that *Crawford* recognized that if the statement at issue is nontestimonial, the rules of evidence, including hearsay rules, apply; state courts may consider " 'reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. [Citation.]' [Citation.]" (*Cervantes*, at p. 173.) Thus *Cervantes* held that the trial court properly admitted a codefendant's nontestimonial statement as against the other defendants, because the statement qualified

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9 *Greenberger* observed: "In order for a statement to qualify as a declaration against penal interest the statement must be genuinely and specifically inculpatory of the declarant; this provides the 'particularized guarantee of trustworthiness' or 'indicia of reliability' that permits its admission in evidence without the constitutional requirement of cross-examination. Therefore, the determination that the statement falls within this hearsay exception also satisfies the requirements of the confrontation clause." (*Greenberger, supra*, 58 Cal.App.4th at p. 329.)

as a declaration against interest and satisfied the constitutional standard of trustworthiness. (*Id.* at p. 177.)

(2) This case

Arceo concedes that the statements by Sergio and Mejorado to David and Adan were not testimonial. But he resists the conclusion that, because the statements were not testimonial, there was no confrontation clause violation. Instead, he asserts that the *Bruton* line of cases represents a "special rule" that applies to extrajudicial statements of unavailable codefendants who make incriminating statements, "a rule that survives the 'testimonial vs. nontestimonial' classification." Arceo points to *People v. Garcia*, where the court observed that, "Whether the *Aranda/Bruton* rule applies only to extrajudicial *testimonial* statements appears to be an unsettled question, and one that we need not address in this case."[10] (*People v. Garcia, supra*, 168 Cal.App.4th at p. 282, fn. 12.)

But, as we have seen, since *People v. Garcia*'s observation, a number of federal courts have expressly held that the *Bruton* rule does not apply to nontestimonial statements. (E.g., *Figueroa-Cartagena*, *supra*, 612 F.3d at p. 85; *U.S. v. Johnson*, *supra*, 581 F.3d at p. 326.) In *Figueroa-Cartagena*, where the extrajudicial statements at issue were nontestimonial, the court first pointed out that *Davis* stated that nontestimonial statements "do not 'cause the declarant to be a "witness" ' within the meaning of the Sixth Amendment and thus are 'not subject to the Confrontation Clause.' [Citation.]" (*Figueroa-Cartagena*, at p. 84.) The court then discussed the earlier *Bruton/Richardson*[11] framework for determining admissibility when a nontestifying

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10 It was unnecessary to address the point because to the extent there was *Bruton/Aranda* error, it was harmless beyond a reasonable doubt. (*People v. Garcia, supra*, 168 Cal.App.4th at p. 282.)

11 In *Richardson v. Marsh* (1987) 481 U.S. 200, 211 (*Richardson*), the court held that the confrontation clause "is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."

defendant's statement is proffered at trial. (*Figueroa-Cartagena*, at p. 85.) The court reasoned that the *Bruton/Richardson* framework "presupposes that the aggrieved codefendant has a Sixth Amendment right to confront the declarant in the first place." (*Figueroa-Cartagena*, *supra*, at p. 85.) The court continued:

> "If none of the co-defendants has a constitutional right to confront the declarant, none can complain that his right has been denied. It is thus necessary to view *Bruton* through the lens of *Crawford* and *Davis.* The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause 'has no application.' " (*Figueroa-Cartagena*, *supra*, 612 F.3d at p. 85, quoting *Whorton*, *supra*, 549 U.S. at p. 420.)[12]

Arceo insists that *Figueroa-Cartagena*'s reasoning is flawed. He points out that *Whorton*, on which the *Figueroa-Cartagena* court relied for the proposition that under *Crawford*, the confrontation clause has no application to out-of-court nontestimonial statements (*Whorton*, *supra*, 549 U.S. at p. 420), did not involve a statement by a nontestifying codefendant, and did not purport to overrule *Bruton.* Of course *Whorton* did not overrule *Bruton*, but there is nothing flawed in *Figueroa-Cartagena*'s reasoning.

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12 A number of federal cases are in agreement, as shown in *U.S. v. Johnson*, *supra*, 581 F.3d at pages 325-326 (codefendant's recorded statements were not testimonial and were admissible as statements against the codefendant's penal interest under the Federal Rules of Evidence):

> "The Supreme Court's recent clarification of the scope of the Confrontation Clause also eliminates any need to analyze the admissibility of the tape-recording [made by a prison inmate of a conversation with a codefendant] under the rule established in *Bruton* . . . . [Citations.] Because it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements. *See United States v. Pugh*, 273 Fed. Appex. 449, 455 (6th Cir. 2008) ('[T]he statement at issue . . . is nontestimonial in nature, and therefore, does not implicate the Confrontation Clause as analyzed under *Bruton* or otherwise.'); *see also United States v. Vargas*, 570 F.3d 1004, 1009 (8th Cir. 2009) (holding that *Bruton* does not apply to nontestimonial codefendant statements); *United States v. Pike*, 292 Fed. Appex. 108, 112 (2d Cir. 2008) ('[B]ecause the statement was not testimonial, its admission does not violate either *Crawford* [] or *Bruton* [].')."

Bruton itself did not purport to govern any recognized exception to the hearsay rule: "[W]e intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." (*Bruton, supra,* 391 U.S. at p. 128, fn. 3.)

In sum, from this body of law we can draw only one conclusion. *Crawford, Davis,* and *Whorton* mean what they say -- the confrontation clause applies only to testimonial statements -- and nothing in the cases applying that principle to extrajudicial statements by nontestifying codefendants is inconsistent with or purports "to overrule *Bruton*," which itself did not address "any recognized exception to the hearsay rule." (*Bruton, supra,* 391 U.S. at p. 128, fn. 3.) Accordingly, if Sergio's statements to David and Adan, and Mejorado's statement to Adan, were admissible under state law as exceptions to the hearsay rule, there was no error in the admission of that testimony. And, as California courts have held, " '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.' " (*Cervantes, supra,* 118 Cal.App.4th at p. 177, quoting *Greenberger, supra,* 58 Cal.App.4th at p. 334.)

We turn to the specific testimony at issue.

(a) Sergio's statements to David and Adan

Arceo objects to David's testimony that Sergio confirmed Arceo's account of the murders. Specifically, after describing Arceo's account to him of the murders, which David described as "bragging," David testified that he told the police that Mejorado, Sergio, Borjas and Arceo were all there during the bragging, and that Sergio "brag[ged] about his part too," and that "they both admitted their involvement." Similarly, Arceo objects to Adan's testimony that Sergio bragged to him about the murders. Specifically, Adan testified that Sergio described how he killed Sanchez, and told Adan that, when he was going to shoot San Miguel, Arceo told Sergio that he would take care of her. Sergio told Adan that he handed the gun to Arceo, who tried to grab San Miguel, and when she resisted, Arceo shot her. (Adan also told the police that Arceo told him the same story that Sergio told him.)

To the extent that Sergio's "bragg[ing] about his part" and "admitt[ing] [his] involvement" implicate Arceo (and respondent asserts they do not), the statements are declarations against interest and admissible under Evidence Code section 1230, as are Sergio's statements to Adan describing the murders. Section 1230 provides that:

> "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

Certainly Sergio's bragging to David about his part in the murders meets this statutory definition, as does Sergio's description to Adan of his and Arceo's actions; in each case, the statements subject Sergio to criminal liability. And, as *Greenberger* points out, statements genuinely and specifically inculpating the declarant provide particularized guarantees of trustworthiness.[13] (*Greenberger*, *supra*, 58 Cal.App.4th at p. 329; see also *Cervantes*, *supra*, 118 Cal.App.4th at pp. 175-177.)

Arceo insists that *Greenberger* is "wrong," and "bad law," pointing to *Lilly v. Virginia* (1999) 527 U.S. 116 (*Lilly*), where the plurality opinion held that a declaration against penal interest is not a "firmly rooted" exception to the hearsay rule, and does not necessarily render a statement trustworthy so as to be admissible. (*Lilly*, at pp. 126-134; see also *People v. Schmaus* (2003) 109 Cal.App.4th 846, 857 [stating *Lilly* plurality opinion casts doubt on *Greenberger*].) But *Lilly*, which involved a 50-page custodial confession, also observed that "[w]hen a court can be confident . . . 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,' the Sixth Amendment's residual 'trustworthiness' test allows the admission of the declarant's statements." (*Lilly*, *supra*, at pp. 136, 139 [confession of an accomplice while in custody, primarily responding to leading questions and under the influence of alcohol were not so inherently reliable that

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13 See also *People v. Spriggs* (1964) 60 Cal.2d 868, 874 ("a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest").

cross-examination would have been superfluous].) Indeed, *Greenberger* recognizes that not all statements which incriminate the declarant and implicate the codefendant are admissible. The statement must satisfy the statutory definition and the trustworthiness requirement. "This necessarily requires a 'fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved . . . .' [Citation.]" (*Greenberger, supra,* 58 Cal.App.4th at p. 332.)

Here, our independent review of the circumstances surrounding Sergio's statements confirms that his statements bear sufficient indicia of trustworthiness and fall within the declaration against interest exception. Sergio's statements were specifically disserving of his penal interest. His statement to David "bragg[ing] about his part" and "admitt[ing] [his] involvement" patently disserves his penal interests. The same is true of his statements to Adan about Arceo's part in the murders; he told Adan that, when he (Sergio) was going to shoot San Miguel, Arceo said that he would take care of her and Sergio handed him the gun, clearly subjecting Sergio to criminal liability for the second murder.

The trustworthiness of Sergio's statements is equally clear. In addition to the "reasonable assurance" of the veracity that ordinarily flows from a person's interest in not being criminally implicated (*People v. Spriggs, supra,* 60 Cal.2d at p. 874), the circumstances surrounding Sergio's statements confirm their reliability. Sergio's statements were not made in a custodial context or in any other context remotely close to "an accomplice's statements that shift or spread the blame" to another. (*Lilly, supra,* 527 U.S. at p. 133.) Instead, Sergio's statements were made in " 'the most reliable circumstance,' " that is, " 'one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures.' "[14] (*Cervantes, supra,*

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14 Arceo suggests that Sergio and Mejorado may not have been speaking to David and Adan in the capacity of friends in a noncoercive setting, saying that the "likely thinking" of Sergio and Mejorado was to notify David and Adan of the killings so they would not be surprised and act rashly (as cleanup and disposal of the bodies without the awareness of David and Adan was unlikely). This appears to be rank speculation, but if it were so, the statements likely would be admissible (as respondent argues) as statements

118 Cal.App.4th at p. 175, quoting *Greenberger, supra,* 58 Cal.App.4th at p. 335, citing cases.) We have no hesitation in concluding that, on the circumstances presented by this record, Sergio's statements to David and Adan qualified as declarations against interest and were " 'so trustworthy that adversarial testing would add little to [their] reliability . . . .' " (*Cervantes, supra,* 118 Cal.App.4th at p. 177, quoting *Idaho v. Wright* (1990) 497 U.S. 805, 821.)

(b) Mejorado's statement to Adan

Arceo also challenges the admission of a statement by Mejorado to Adan to the effect that Sergio and Arceo perpetrated the Sanchez and San Miguel murders. This statement was elicited during Adan's cross-examination by counsel for Borjas to show inconsistencies in Adan's statements to the police. We agree with respondent that Mejorado's statement to Adan -- that Sergio and Arceo committed the murders -- was admissible as a statement by Mejorado in furtherance of a conspiracy.[15]

Hearsay statements by coconspirators may be admitted against a party if independent proof of a conspiracy has been shown, and three preliminary facts are established: " '(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy.' [Citation.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 139.) "[W]hether statements made are in furtherance of a

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in furtherance of a conspiracy, a "firmly rooted" exception to the hearsay rule requiring no separate analysis of trustworthiness.

[15] Evidence Code section 1223 states: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

conspiracy depends on an analysis of the totality of the facts and circumstances in the case." (*Id.* at p. 146.)

As respondent points out, Mejorado, Arceo and the others were charged with conspiracy to murder San Miguel and Sanchez, and the prosecutor specifically alleged that overt acts in furtherance of the conspiracy included transporting the victims' bodies to Tulare County and burning the bodies. The "totality of the facts and circumstances" (*People v. Hardy, supra*, 2 Cal.4th at p. 146) shows that the conspiracy extended to concealing the bodies of the victims. The evidence showed that when Adan woke up on the morning San Miguel and Sanchez were killed, he saw San Miguel's body wrapped in a blanket behind the couch, and "freaked out." It is reasonable to infer that, because Adan saw one of the bodies, Mejorado had to explain what had happened in order to have Adan join in the conspirators' efforts to clean up the house, dispose of the bodies and otherwise conceal the murders.

Arceo concedes that the scope and extent of a conspiracy and its objectives is a question of fact for the jury,[16] but insists there was "no evidence that Arceo was part of a conspiracy to conceal the murders by cleaning up the garage or disposing of the bodies." Therefore (Arceo contends) Mejorado's statements were not made "prior to or during" the conspiracy to which Arceo was a party (the murders themselves). But no evidence that Arceo himself was "a participant in the cleanup or disposal of the bodies" was necessary. The scope of the conspiracy was for the jury to decide, and a conspirator is

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16 Adan's statement to the police (his first, on April 29, 2005) indicated that after he saw Sanchez's body, he left to go to a friend's house, and his conversation with Mejorado, in which Mejorado told him that he did not kill the girls and it was Arceo and Sergio who did so, occurred a day or two after the murders. But Adan admitted he lied to the police in this first statement (and that he was at the Lopez house and helped clean up after the bodies were taken away). Consequently, the jury could properly conclude that the conversation occurred during the time Adan and others were cleaning up after the murders. That issue was for the jury to decide; it was properly instructed under CALJIC No. 6.24 that evidence of a statement made by one conspirator (here, Mejorado) against another (Arceo) was not to be considered unless the jury determined "[t]hat the statement was made in furtherance of the object of the conspiracy and was made before or during the time when the party against whom it was offered was participating in the conspiracy."

liable for the acts of his coconspirators until he effectively withdraws from the conspiracy. There was not the slightest evidence Arceo communicated to his cohorts any rejection or repudiation of the continuing conspiracy to dispose of the bodies.

In any case, even if Mejorado's statement had been inadmissible, Adan's testimony on this point was cumulative and harmless beyond a reasonable doubt. (See *People v. Burney* (2009) 47 Cal.4th 203, 232 [*Bruton/Aranda* error is scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18; " 'if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless' [Citation.]"].) Here, the jury heard properly admitted testimony that Arceo himself told both David and Adan that he shot one of the victims, and that Sergio told both David and Adan the same story. Under these circumstances, it is inconceivable that the jury would not have convicted Arceo in the absence of Adan's additional statement that Mejorado told him the same thing.

b. The trial court's response to the jury's inquiry on the meaning of the term "principal" did not eliminate the prosecutor's burden of proof as to the Sanchez murder.

The trial court instructed the jury on the definition of "principal" with CALJIC No. 3.00, as follows:

> "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime."

During deliberations, Arceo's jury requested "clarification on 'Principal' in addition to information provided" in its instructions. The trial court decided to read the jury the CALCRIM definition of "principal" and aiding and abetting (CALCRIM Nos. 400 & 401), indicating the CALCRIM instruction explained the term in different language but without changing the concept. Arceo's counsel objected generally to using the CALCRIM instructions on the ground they were skewed against defendants and less

neutral than CALJIC. The trial court modified the CALCRIM instruction on aiding and abetting so that it stated, "it must be proved," rather than "the People must prove" the elements of aiding and abetting. (The court stated its belief the CALCRIM instruction was incorrect in stating "the People must prove" the elements, because the question was whether the evidence (which could be a defendant's admission on the stand of an element of the crime) proved the elements of the crime.)

The trial court then advised the jury as set forth in the margin.[17]

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17 The court stated in part:

> "First about a further clarification of the term 'principal' in addition to what's in the instructions that I gave you. [¶] I'm not changing those instructions. This is a different version of the same concept that may help you, and I'll give you individual copies of these additions. [¶] Again not to set aside anything that's already been done, but about the definition of principal.
>
> "(Reading:)
>
> "A person may be guilty of a crime in two ways. [¶] One, he may have directly committed the crime, I will call that person a perpetrator. [¶] Two, he may have aided and abetted a perpetrator who directly committed the crime. [¶] A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it. [¶] Under some specific circumstances if the evidence establishes aiding and abetting of one crime, the person may also be found guilty of other crimes that occurred during the commission of the first crime.
>
> "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, ***it must be proved that***:
>
> "One, the perpetrator committed the crime; [¶] two, the defendant knew that the perpetrator intended to commit that crime; [¶] three, before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing the crime; [¶] and, four, the defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime." (Italics and boldface added.)

Arceo contends that the trial court's substitution of "it must be proved" for "the People must prove" (with respect to the elements of aiding and abetting) was "a substantial change to the instruction which changed its meaning and created confusion in light of other instructions." The "confusion" Arceo posits is that (1) the reasonable doubt instruction assigns the burden of proof to the prosecutor, but (2) the instructions concerning accomplices place the burden of proof on the defendant, so (3) because the trial court's instruction on the elements of aiding and abetting did not expressly state that the prosecutor had the burden of proof, the jury may have concluded that Arceo had the burden of proving that he was not an aider and abettor. We cannot agree.

In reviewing Arceo's contention, we consider the instructions as a whole "to determine whether there is a ' "reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 1021.) We find no likelihood, reasonable or otherwise, that the jury concluded that Arceo had the burden to prove he was not an aider and abettor.

The accomplice instructions to which Arceo refers concerned David and Adan. Because Merrill's testimony showed that David and Adan were parties to conversations about "doming" Sanchez because she knew too much, the court gave instructions on accomplices and their testimony. These included CALJIC No. 3.19, instructing the jury that:

> "You must determine whether either witness David Lopez or Adan Lopez was an accomplice as I have defined that term. [¶] The defendant has the burden of proving by a preponderance of the evidence that David Lopez or Adan Lopez was an accomplice in the crimes charged against the defendant."

These instructions were specific to David and Adan and to the question whether they were accomplices for purposes of corroboration, and could scarcely be clearer. We cannot see how any jury could leap from the instruction that Arceo had the burden of proving that David and Adan were accomplices to the conclusion -- nowhere suggested in the instructions or arguments -- that Arceo also had the burden of proving he was not an aider and abettor.

Further, the challenged instruction itself, merely because it is stated in the passive voice, does not suggest Arceo had any burden of proof. The trial court merely told the jury that the elements of aiding and abetting -- that the perpetrator committed the crime, that the defendant knew the perpetrator intended to do so, and so on -- "must be proved." These words simply cannot be understood to mean that the *defendant* must prove the very opposite (i.e., that the perpetrator did *not* commit the crime, or that the defendant did *not* know the perpetrator's intent). And of course the instructions as a whole repeatedly indicate that it is the state's burden to prove beyond a reasonable doubt that the defendant committed the crime with which he is charged. In short, there is no merit to Arceo's claim of error.

c. The trial court did not abuse its discretion by permitting Arceo's jury to see photographs of the burned bodies of San Miguel and Sanchez.

Arceo contends the admission of photographs of the burned bodies of San Miguel and Sanchez at the site of their discovery, autopsy photographs and, in some instances, "life" photographs of the victims "to be contrasted with the burned remains," were either irrelevant or more prejudicial than probative and violated his right to a fair trial and due process of law. We disagree.

The applicable principles are aptly described in *People v. Mills* (2010) 48 Cal.4th 158, 191-192. The admission of gruesome photographs is a question of relevance over which the trial court has broad discretion. (*Id.* at p. 191.) The court's decision to admit photographs under Evidence Code section 352 is reversible only if the prejudicial effect of such photographs clearly outweighs their probative value. (*People v. Mills*, at p. 191.) Moreover, "That the challenged photographs may not have been strictly necessary to prove the People's case does not require that we find the trial court abused its discretion in admitting them. '[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case.' [Citation.]" (*Ibid.*) An appellate court may not disturb the trial court's ruling

"unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner." (*Id.* at p. 192.)

Here, there is no basis for reversing the trial court's rulings.

The first issue is relevance. As to the photographs of the burned bodies (in the orchard where they were found), Arceo claims these were irrelevant to his criminal liability, as there was no evidence he was involved in transporting the bodies or burning them. But the prosecution's theory of the case was that Arceo conspired with his fellow gang members to murder the two women in order to protect Mejorado and Ramirez by disposing of evidence of the Flores murder, and one of the overt acts charged in furtherance of the conspiracy was Ramirez's transporting the bodies of the two women to Tulare County and burning them. We do not see why the end result of the conspiracy -- the burned bodies of San Miguel and Sanchez -- should be withheld from the jury simply because Arceo confined his participation (so far as the evidence shows) to shooting one of the victims in the back of the head. On the contrary, it was the acts of the conspiring defendants that created the burned bodies, and it was fair for the jury to see them. The photographs were relevant to show how the charged crimes occurred, how and where the bodies were found, and that defendants wanted to conceal the murders and the identities of the victims by transporting the bodies far from the place of the murders and burning them. The photographs were relevant to consciousness of guilt, to the special circumstances allegation that the victims were killed because they were witnesses to crimes, and as corroboration of witness testimony. And the photographs were relevant to show a common modus operandi connecting the murders. Just as Mejorado and Ramirez burned evidence of the Flores murder (the green Impala), Ramirez burned evidence of the Sanchez and San Miguel murders (their bodies). As *People v. Mills* tells us, the prosecution is not limited in its proof to verbal recitations; " 'the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case.' [Citation.]" (*People v. Mills, supra,* 48 Cal.4th at p. 191.)

As to the autopsy photographs showing a bullet wound to the skull of San Miguel, Arceo claims these "could have been sanitized without losing legitimate value to the

prosecutor." He claims the trial court should have excluded everything in the photos except the skull and gunshot wound (eliminating the "charred and distorted face, the distorted body, the mutilation and decomposition, the absence of the portions of the bodies that had been burned away" (fn. omitted)). We see no legal basis for this claim. These photographs were relevant to show how San Miguel met her death, and the prosecution is not required to edit them in order to paint a prettier picture. In any event, the portions showing the burned state of the bodies were relevant to show "the real-life consequences" of Arceo's actions (*People v. Mills*, *supra*, 48 Cal.4th at p. 192) and why dental records and fingerprints were necessary to identify the victims.

The second issue is prejudicial effect. We find no abuse of discretion in the trial court's ruling that the prejudicial effect of the photographs did not outweigh their probative value. The trial court carefully reviewed all the photographs to which objections were made and excluded some of them (for example, photographs showing parts of San Miguel's body were missing, which the court said were "probably among the worst photographs I've ever seen of crime victims"). Others the court admitted, such as a photograph of San Miguel's head, with portions charred, which included jewelry and was relevant to the identification of her body; the court described this as "not much worse than any other autopsy photo that I've seen." Another example consisted of three photographs showing the back of San Miguel's head, part of her skull which had been removed, and her body lying down with the skull removed (which the prosecutor argued showed the bullet path and damage to the skull). In overruling objections that these were "particularly repellant," the trial court said:

> "Well, almost any photograph of a homicide victim is going to create some emotional response. The question is are they so prejudicial that they overcome the probative value, and I don't believe they do, and I don't find great prejudice in those to the extent that although they're certainly not pretty, death is not pretty. [¶] But it's very difficult even to determine that those are human body parts that we're talking about. They're not that graphic. They're gruesome to the extent they show the skin eliminated from the body, but I don't sustain the objection on those."

In other cases, the court overruled objections stating that the photographs were not prejudicial "because basically it looks like a pile of carbon. It's all burned material."[18]

As in *People v. Mills*, the trial court "took no small amount of time reviewing each photograph, listening to counsel's arguments as to each one, and then excluding several as cumulative but admitting others," and this supports the conclusion that the court did not act arbitrarily. (*People v. Mills, supra,* 48 Cal.4th at p. 192.) As the Supreme Court stated, "murder is seldom pretty '[b]ut as unpleasant as these photographs are, they demonstrate the real-life consequences of [defendant's] actions. The prosecution was entitled to have the jury consider those consequences.' [Citation.]" (*Ibid.*)

We have examined the photographs to which Arceo objects and conclude the trial court's decision to admit them fell within its broad discretion. Accordingly, the trial did not err.

2. Mejorado

Mejorado, in addition to joining in Arceo's contentions, asserts three other errors: the trial court's refusal to allow him to elicit a statement from Adan that Mejorado told him, just after the Flores murder, that Ramirez had just shot someone; error in instructing the jury that all principals are "equally guilty"; and insufficiency of the evidence as to the San Miguel and Sanchez murders and related gang allegations.

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18 In other instances, the trial court said (for example): "These are gruesome, but they're not so prejudicial they overcome the probative value that there's an attempt to destroy evidence, and that's one reason the evidence can't be offered from the bodies that have been, so much of the body has been consumed, but it isn't looking at torn up pieces of bodies, it's basically a charred black mess that has a few feet sticking out from it." And: "I recognize it's a face and that the faces [photos of Sanchez alive] are there for the comparison. What it does is show the hair of Jennifer Sanchez that matches all we can see of a face, which is the hair, and I don't find it prejudicial. It's not happy, it's not a good thing to look at."

a. The trial court's exclusion of Mejorado's statement that Ramirez had just killed someone, whether error or not, was harmless beyond a reasonable doubt.

(1) Background

At several points during the trial, the court and counsel discussed the admissibility of a statement by Adan that, on the night of the Flores murder, Mejorado told him that Ramirez had shot Flores. At an Evidence Code section 402 hearing, Adan testified that Mejorado knocked on the door, Adan opened it, and Mejorado (who was scared and shaking) told him that Ramirez had shot Flores. Adan also said David was asleep, and Adan did not remember David's getting up or coming to the door. Adan went out on the porch, saw Ramirez in the car, and then went back to sleep.

After Adan gave this testimony to the court, the parties contended as follows as to the admissibility of Mejorado's statement that Ramirez shot Flores: Mejorado's counsel argued it was admissible as an excited utterance. Ramirez's attorney argued it was inadmissible hearsay that was also not credible (because of Adan's expressed intention not to testify unless Mejorado was released from custody), and Ramirez would be unable to cross-examine Mejorado. Mejorado's counsel pointed out that Adan had consistently told the police that Mejorado said Ramirez had killed someone, and Adan's bias was for the jury to decide. The prosecutor indicated he was "ready to deal with it either way."

The trial court -- in one of many rulings made in the course of its sound handling of a particularly complex criminal case -- refused to allow the statement, observing:

> "My question is trustworthiness and bias before and during the trial, the affect of this is to eliminate [Mejorado] from the equation. [¶] I just can't let it in. It seems to me contravening the right to cross-examination by the defense for Mr. Ramirez, and I've never seen a clearer case of bias. I mean he [Adan] admits it. He wouldn't be here if he had a choice. He was not going to come in unless we cut [Mejorado] loose. I just can't let it in."

Mejorado's counsel moved for a mistrial, observing that the jury had heard David's testimony that Mejorado said "we" killed someone, but was being denied the opportunity to hear a different and contradictory version of what occurred, denying Mejorado a

defense. The trial court denied the motion, observing that Adan's version of what occurred was a challenge to David's earlier testimony (as it would mean that David never went to the door and never talked to Mejorado). The court concluded that "it seems to me it's one of those situations, in spite of the fact that I believe strongly that the prior testimony [David's] was validly admitted, got to keep this out."

During Adan's testimony before the jury, Mejorado's counsel again objected, claiming that the entire encounter between Adan and Mejorado should be excluded, because it omitted the "the one thing that tends to be exculpatory." After further argument, the trial court observed:

> "The unreliability I'm concerned with was the fact that this witness has refused to testify against . . . Mejorado, has had to be arrested and brought to court involuntarily because of that, and has on the witness stand under oath said he is biased in favor of . . . Mejorado because he's his cousin, and in this statement, the only thing he's doing is different is leaving [Mejorado's] name out of the statement. [¶] It does condemn again Mr. Ramirez, and it doesn't really exonerate . . . Mejorado to the extent of the declared bias of the witness."

The prosecutor then stated his understanding of the court's ruling, namely that "under *Cervantes* and the whole *Aranda/Bruton* law, it's got to be reliable," and the court said, "That's correct." The prosecutor said, "so this court is finding it's not reliable and therefore would be a violation of Mr. Ramirez' *Aranda/Bruton* rights," and the court stated, "That was the point."[19]

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19 The trial court raised the issue with counsel again, stating that (1) David's testimony that Mejorado and Ramirez were at the door and Mejorado said they had just killed somebody was a declaration against interest by Mejorado and an adoptive admission by Ramirez, so "it's easy to bring it in." In Adan's version, Mejorado was alone (with Ramirez in the car), and the statement that Ramirez killed someone was not a declaration against interest. The court wondered about the possibility that Mejorado made two different statements, one to Adan and one to David, but concluded that even so, the one to Adan "[did] not condemn [Mejorado], and it's not admissible [under *Cervantes*]."

The issue was raised yet again during the prosecutor's closing statement (after the prosecutor argued that, when Mejorado knocked on the door and said, " 'We just killed somebody,' that's exactly what it is, 'we just killed somebody.' Not I, not [Ramirez], 'We.' [¶] [Mejorado] says numerous times, 'We murdered someone, we murdered somebody, hurry up.' " Mejorado's counsel argued he was "troubled" by the prosecutor's argument because the prosecutor knew Adan told police that Mejorado said that Ramirez killed Flores. The trial court ruled that the prosecutor was "entitled to argue the evidence that he knows that was offered," and again observed that Adan's bias was "so clear that I don't think it's a jury issue as to whether [Mejorado] made that -- made the statement in the manner that Adan would have testified to."

(2) The trial court's ruling, whether error or not, was harmless beyond a reasonable doubt.

Mejorado contends that the trial court's refusal to allow him to question Adan about his statements to the police -- that Mejorado said Ramirez killed Flores -- violated Mejorado's Sixth Amendment right under the confrontation clause to cross-examine Adan, and further that his due process right to present a defense requires that he be allowed to introduce Adan's statement.

The question whether Adan's statement should have been admitted, under the circumstances presented to the trial court in this case, was not an easy one, as the trial court clearly recognized. On the one hand, the admission of the statement raised serious concerns arising from codefendant Ramirez's inability to cross-examine Mejorado about the statement, and on the other hand, the statement stood alone as the only evidence that might even potentially exculpate Mejorado in the face of David's damning testimony that Mejorado said "we" killed Flores. The trial judge resolved this conundrum in Ramirez's favor, subsequently explaining that he did so because:

> "[Adan] has declared himself to be biased in favor of [Mejorado], not only causing his [Adan's] arrest and put in incarceration during the trial, but also admitting it on the stand, and that

> the statement was made was in essence exculpatory by [Mejorado], and I've never seen a trial where a defendant's exculpatory statement comes in without the defendant testifying to it. [¶] It's not an admission, it's not an exception to the hearsay rule, and in effect what it does is emphasize again Mr. Ramirez' -- Mr. Ramirez' culpability, exonerating the -- his [Mejorado's] own culpability."

We need not decide whether the trial judge was right or wrong in excluding Adan's statement. Even if the exclusion of the evidence could be said to violate Mejorado's right to cross-examine Adan or his right to present a defense, our review of the record shows that the error, if error there was, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

First, the record fully supports the trial court's apparent conclusion that no reasonable juror would have believed Adan's testimony ("[Adan's] bias is so clear that I don't think it's a jury issue"). The jury knew that Mejorado was Adan's "favorite nephew": Adan testified that it was hard to be in court "because I got a nephew that -- that's -- that's my best nephew, my favorite nephew." He admitted before the jury that he was in custody because he had called Detective Martinez and told him he did not want to testify against Mejorado. (Detective Martinez testified that Adan told him that "unless you release [Mejorado], I'm not going to court.")

Second, the testimony that was excluded -- Adan's recounting of Mejorado's statement that Ramirez killed Flores -- was essentially cumulative. Adan also testified that, on the day after Flores was killed, Ramirez himself told him (Adan) that he (Ramirez) had shot Flores in the back of the head. (The jury apparently did not credit this testimony from Adan, as it could not agree on whether or not Ramirez was guilty of the Flores murder.)

Third, even if the jury had heard Adan's testimony that Mejorado said Ramirez had shot Flores, the overwhelming evidence showed that Mejorado was in any event liable for that murder as an aider and abettor, if not as the shooter. In addition to David's testimony that Mejorado told him "we" just killed somebody, a great deal of circumstantial evidence confirmed Mejorado's participation in the murder. Mejorado and

Ramirez were together that night. The following day, both David and Adan saw Mejorado and Ramirez taking the rims off Flores's green Impala. Both David and Adan saw Mejorado with burns on his face, and David testified Mejorado said he had been burned when he tried to set Flores's car on fire. David testified that, before the murder, a woman had told David and Mejorado (and perhaps Ramirez) that Flores had $18,000 in cash. After the murder, Ramirez and Mejorado would not let Sanchez (who was with them when they stripped and burned Flores's car) go anywhere without their authorization; David testified it looked as though they were not letting her leave.

In short, our review of the record convinces us that, if there was error in the exclusion of Adan's testimony recounting Mejorado's exculpatory statement, the error was harmless beyond a reasonable doubt.

b. The trial court did not err when it instructed the jury, under CALJIC No. 3.00, that each principal in a crime, regardless of the extent or manner of participation, is equally guilty.

Mejorado's jury was instructed, under CALJIC No. 3.00, that each principal in a crime, "regardless of the extent or manner of participation, is equally guilty."[20] Mejorado contends this instruction is legally incorrect and violated his constitutional right to a jury trial, because an aider and abettor may be guilty of a lesser-included crime. This claim avails Mejorado nothing.

First, Mejorado forfeited the contention by failing to raise it in the trial court. "Generally, ' "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested

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20 The court instructed: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime. [¶] Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of that crime. You need not unanimously agree whether a defendant is an aider and abettor or a direct perpetrator so long as you unanimously agree that he is guilty of that crime under either theory."

appropriate clarifying or amplifying language." ' [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*) ["CALCRIM No. 400 [to the same effect as CALJIC No. 3.00] is generally an accurate statement of law, though misleading in this case," and defendant "was therefore obligated to request modification or clarification and, having failed to have done so, forfeited this contention"].)

Second, as in *Samaniego*, even if Mejorado's contention had been preserved for appeal, we would find no prejudicial error.

The legal background for Mejorado's assertion of error is this. In *People v. McCoy* (2001) 25 Cal.4th 1111, 1120, 1122, the Supreme Court concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator. In *Samaniego*, the court found that *McCoy*'s reasoning "leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state." (*Samaniego, supra,* 172 Cal.App.4th at p. 1164.) Accordingly, *Samaniego* held that CALCRIM No. 400, which at the time stated that a person " 'is equally guilty of the crime . . . whether he or she committed it personally or aided and abetted the perpetrator who committed it,' " while "generally correct in all but the most exceptional circumstances," was misleading in the defendant's case and should have been modified.[21] (*Samaniego, supra*, at p. 1165, citation omitted.)

In *Samaniego,* as here in the Flores murder, there was no evidence as to which defendant was the direct perpetrator. And in *Samaniego,* as here, the trial court instructed the jury on both first and second degree murder. So, as the defendant argued in *Samaniego*, "[i]f the shooter committed premeditated, first degree murder, CALCRIM No. 400 required the jury to convict [the defendants] of first degree murder as aiders and abettors regardless of their mental state, thereby eliminating the need for the jury to make factual determinations regarding [defendants'] intent, willfulness, deliberation and

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21 CALCRIM No. 400 has since been revised, and now states that "[a] person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator."

premeditation." (*Samaniego, supra,* 172 Cal.App.4th at p. 1163.) The court agreed, observing that CALCRIM No. 400 "misdescribes the prosecution's burden in proving the aider and abettor's guilt of first degree murder" by eliminating its need to prove the mental states for murder (intent, willfulness, premeditation and deliberation). (*Samaniego, supra,* at p. 1165.)

In *Samaniego,* the error was harmless beyond a reasonable doubt because the jury necessarily found, under other instructions, the mental states for murder.[22] (*Samaniego, supra,* 172 Cal.App.4th at p. 1165.) The same is true here.

(1) The Flores murder

In addition to finding Mejorado guilty of the Flores murder, the jury found true the special allegation that the murder was committed by Mejorado while Mejorado was engaged in the commission of the crime of robbery. The jury was instructed that:

1. One who aids and abets another in the commission of a crime is not only guilty of that crime, but of any other crime committed by a principal which is a natural and probable consequence of the first crime.
2. To find Mejorado guilty of the Flores murder under this theory, the jury had to be satisfied beyond a reasonable doubt that the crime of robbery was committed, the defendant aided and abetted that crime, a coprincipal in the

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22 The court reached a different conclusion in *People v. Nero* (2010) 181 Cal.App.4th 504, finding the court misinstructed the jury with CALJIC No. 3.00 and that the error was not harmless. In *Nero,* the claim was not forfeited. (Although there was no objection when the instruction was initially given, during deliberations the jury asked if they could find the defendant, as an aider and abettor, guilty of a greater or lesser offense than her codefendant (the direct perpetrator). The court consulted with counsel by telephone, but when the jury asked follow-up questions, the trial judge, without consulting counsel, again read the instruction indicating that each principal was equally guilty.) (*Nero,* at pp. 507, 518, fn. 13.) The error was not harmless, as it was "clear that the jury was considering whether to impose a lesser degree or offense on the aider and abettor," and there was a "reasonable possibility that the trial court's response to their questions improperly foreclosed it." (*Id.* at pp. 519-520.)

robbery committed the crime of murder, and the murder was a natural and probable consequence of the robbery.

3. If a human being is killed by any one of several persons engaged in the commission or attempted commission of a robbery, "all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."[23]

Under these instructions, the jury necessarily found that Mejorado, whether he was the perpetrator or an aider and abettor, had the mental state required for first degree murder under the felony murder rule. Mejorado either "directly and actively" committed the robbery or he knew the perpetrator's unlawful purpose (and intended to and did aid in the commission of the robbery); in either case, he would be guilty of murder in the first degree, even if the killing were accidental. Consequently, any error in instructing the jury that "[e]ach principal, regardless of the extent or manner of participation is equally guilty" was necessarily harmless.

(2) The San Miguel and Sanchez murders

The jury also necessarily found that Mejorado had the necessary mental states -- intent, willfulness, premeditation and deliberation -- to convict him of the first degree

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[23] With respect to the robbery-murder special circumstance, the jury was also instructed: "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of Robbery which resulted in the death of a human being, namely Jose Raymundo Flores."

murders of San Miguel and Sanchez, because the jury found Mejorado guilty of conspiracy to commit those murders. The jury was instructed that:

1. A conspiracy is an agreement between two or more persons "with the specific intent to agree to commit the crime of Murder and with the further specific intent to commit that crime, followed by an overt act . . . by one or more of the parties for the purpose of accomplishing the object of the agreement."
2. "As to each defendant you must determine whether he was a conspirator by deciding whether he willfully, intentionally and knowingly joined with any other or others in the alleged conspiracy."
3. "Before you may return a guilty verdict as to any defendant . . . you must unanimously agree and find beyond a reasonable doubt, that (1) there was a conspiracy to commit the crime of murder, and (2) a defendant willfully, intentionally and knowingly joined with any other or others in the alleged conspiracy."

The guilty verdicts on the conspiracy counts thus establish Mejorado's specific intent to kill San Miguel and Sanchez. "Willful" was defined for the jury to mean "intentional." And, an agreement to commit murder necessarily entails premeditation and deliberation. (Cf. *Samaniego*, *supra*, 172 Cal.App.4th at p. 1166 ["[i]t would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required"].)[24]

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[24] Mejorado's jury also found the multiple murder allegation to be true, as well as the witness-murder allegation with respect to San Miguel. As to those allegations, the jury was instructed that, if it found a defendant was not the actual killer (or was unable to decide whether the defendant was the actual killer or an aider and abettor or a coconspirator), "you cannot find the special circumstance to be true as to that defendant *unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, or assisted any actor in the commission of the murder in the first degree . . . .*" (Italics added.)

In short, any error in instructing that the aider and abettor and the perpetrator were "equally guilty" of the murders of San Miguel and Sanchez was necessarily harmless.

c. Sufficient evidence supported Mejorado's conviction for the murders of San Miguel and Sanchez and the true findings on the related gang allegations.

We review a claim of insufficient evidence by determining whether, viewing the whole record in the light most favorable to the prosecution, the record discloses substantial evidence -- evidence which is reasonable, credible, and of solid value -- from which a reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid.*) The same standard applies to allegations that a crime was committed for the benefit of a gang.

(1) The murders

As Mejorado points out, he was convicted of the San Miguel and Sanchez murders as an aider and abettor, as the evidence showed Arceo and Sergio to be the actual shooters. A person aids and abets the commission of a crime when he, " ' "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." ' [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 136.) Whether the defendant aided and abetted a crime is a question of fact. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*).)

Mejorado contends there is no evidence "as to what [he] actually did" on the night of the murders, and therefore insufficient evidence to conclude beyond a reasonable doubt that he aided and abetted the murders. Mejorado misapprehends the principles relevant to aider and abettor liability.

" '[A]ccording to our Supreme Court, " '[t]o be an abettor the accused must have instigated or advised the commission of the crime or been present for the purpose of

assisting in its commission.' " [Citations.] " '[T]he test is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures.' " [Citations.]' [Citation.]" (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1255, italics omitted.) In short, "one *can* be guilty as an accomplice (if he shares the goal of the perpetrator) without having actually assisted the commission of the offense, e.g., by 'instigating,' or 'advising' the perpetrator to commit it or by having been 'present for the purpose of its commission.' [Citations.]" (*Id.* at p. 1256.) Here, there was evidence from which the jury could conclude beyond a reasonable doubt that Mejorado "share[d] the goal of the perpetrator" and instigated or advised the commission of the crimes (in addition to having been present when they were committed).

First, the evidence showed that the victims were killed because, according to David, they "knew too much"; Ramirez told Adan that they killed the girls "because they were afraid she was going to snitch on them." This could only refer to the Flores murder, which the evidence showed was committed by Mejorado and Ramirez. (Sanchez was, according to David, present when Mejorado and Ramirez stripped the car Flores had been driving, and, according to Adan, was in the car with Ramirez when he drove off after stripping it.) Thus Mejorado had ample personal motive for instigating or advising the killings. He also had a motive to protect Ramirez, as they were close friends: they lived together in the Lopez garage for several months and later, while in custody, Mejorado gave Ramirez money and toiletry items.

Second, during the period between the Flores murder and the murders of San Miguel and Sanchez, the evidence showed that Sanchez's freedom of movement was restricted by Ramirez and Mejorado. David was asked whether, after the Flores killing, there was anything unusual about the relationship between Sanchez (on the one hand) and Mejorado and Ramirez. David testified that "[s]he couldn't go nowhere without -- without them being with her or without their authorization," and "[s]he would go to the alley, you know, they had to be aware of it. She couldn't just go off anywhere." David testified he had seen them run after her, and described an incident in which "[s]he tried to go to the alley, and I think [Mejorado] ran after her and then asked her where she was

going." David said it was not a polite question. It looked to David like "they weren't letting her leave."

Third, Mejorado was present in the garage on the night San Miguel and Sanchez were murdered. David testified that "[e]veryone that was there" was "acting funny" that night. Borjas was "hanging out with" Mejorado during the evening. Mejorado (who had recently been shot in the leg) was lying on the bed in the garage most of the evening, resting his leg. Several of the others (Arceo, Sergio, Ramirez and Borjas) went into the bathroom; after Sergio and Ramirez walked out of the bathroom, Borjas said, "We're going to tie these bitches up."

Fourth, after the murders, Mejorado asked to borrow David's car, helped Ramirez load the bodies into the trunk, and cleaned up the blood and "stuff" in the shower where the victims were killed. Mejorado moved out of the Lopez house and never came back, tried to get David to go to Mexico with him and Ramirez, gave a false name and date of birth to the police when he was arrested and, in a taped jailhouse conversation, tried to fabricate a false alibi.[25]

The evidence just recited, together with the reasonable inferences that may be drawn from that evidence, support the conclusion that Mejorado knew about and shared Arceo's and Sergio's intent to kill San Miguel and Sanchez, and that, by his acts or advice, affirmatively facilitated those murders. We are well aware that presence at the scene is not enough to establish aiding and abetting, and neither is knowledge of (but failure to prevent) the crime. (*Campbell*, *supra*, 25 Cal.App.4th at p. 409.) But presence at the scene is a factor that may be considered, and so are " 'companionship, and conduct before and after the offense.' [Citation.]" (*Ibid.*) These factors are present in ample measure. In short, as in *Campbell*, "the evidence, in our view, reasonably indicates that

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25 In a taped jailhouse conversation with Cristal Vasquez, a transcript of which was given to the jury, Mejorado said (telling his visitor what to tell her aunt to say), "Just that I got there like at 7:00, a day before like at 7:00 at night. Tell her to say," and, recounting to his visitor his conversation with someone else, " 'Yeah, her mom and our sister-in-law. I was at their house at the time that supposedly all that shit happened . . . .' "

[Mejorado] played an affirmative supportive role" in the murders and "was not simply an innocent, passive, and unwitting bystander." (*Id.* at pp. 409-410.)

A finding of insufficient evidence is appropriate " 'only if it can be said that on the evidence presented no reasonable fact finder could find the defendant guilty on the theory presented. [Citation.]' [Citations.]" (*Campbell, supra,* 25 Cal.App.4th at p. 408.) We cannot say that here. (See *People v. Earp* (1999) 20 Cal.4th 826, 887-888 ["[w]here, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, 'but our opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial"].)

(2) The gang allegations

As with other claims of insufficient evidence, we review the claim by examining the record in the light most favorable to the judgment, to determine if substantial evidence exists for a reasonable trier of fact to find the gang allegations true beyond a reasonable doubt. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 660.)
To prove those allegations, respondent was required to show that the murders of San Miguel and Sanchez were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b).) Criminal penalties may be increased only if both prongs of the statute are satisfied, that is, the evidence must support an inference the crime was committed for the benefit of (or at the direction of or in association with) a gang, as well as an inference of specific intent to promote or assist criminal gang conduct. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.)

Mejorado first contends that there was insufficient evidence of the second prong, that is, his intent to further or promote the criminal activities of the gang. Then he asserts that the expert testimony, given by Officer Larry Oliande, was "standard rhetoric" and that membership in a gang cannot serve as proof of intent. Then he relies on a Ninth Circuit opinion in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, an opinion which

(since Mejorado's briefs were filed) has been definitively rejected by our Supreme Court. (*People v. Albillar* (2010) 51 Cal.4th 47, 66 (*Albillar*).) Then, Mejorado suggests that the evidence did not show he was a gang member. As will appear, there is no merit in any of these contentions.

We begin with *Albillar*, where the court resolved the conflict between *Garcia v. Carey* (and other Ninth Circuit cases) and various cases decided by California courts of appeal. *Garcia v. Carey*, as *Albillar* tells us, construed the statute "to require evidence that a defendant had the specific intent to further or facilitate *other* criminal conduct -- i.e., 'other criminal activity of the gang apart from' the offenses of which the defendant was convicted." (*Albillar, supra,* 51 Cal.4th at p. 65.) *Albillar* holds to the contrary: "[T]he scienter requirement in section 186.22(b)(1) -- i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members' -- is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*Albillar, supra,* at p. 66.)

Albillar also rejected a related argument that the statute requires the specific intent to promote, further, or assist a *gang-related* crime, explaining: "The enhancement already requires proof that the defendant commit a gang-related crime in the first prong -- i.e., that the defendant be convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang. [Citation.] There is no further requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*." (*Albillar, supra,* 51 Cal.4th at p. 67.) Further, "[t]he enhancement set forth in [the statute] does not risk conviction for mere nominal or passive involvement with a gang. Indeed, *it does not depend on membership in a gang at all*. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*Id.* at pp. 67-68, italics added.)

Albillar concluded: "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury

may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, *supra*, 51 Cal.4th at p. 68.)

Here, both prongs of the statute are satisfied.

The first prong requires proof Mejorado committed a "gang-related" crime, that is, that the murders of which he was convicted were committed "for the benefit of, at the direction of, *or in association with* a criminal street gang." (*Albillar*, *supra*, 51 Cal.4th at p. 67, italics added; *id.* at p. 60 ["[n]ot every crime committed by gang members is related to a gang," but the sexual offenses in *Albillar* "were gang related in two ways: they were committed in association with the gang, and they were committed for the benefit of the gang"].) (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332 ["record supports a finding the crime was committed 'in association with' the gang with the intent to assist criminal conduct"; defendant who admitted gang membership committed the crimes with another admitted member]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1179, 1198 ["evidence that defendant knowingly committed the charged crimes in association with two fellow gang members was sufficient to support the jury's findings on the gang enhancements"; while "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang," there was "no evidence of this" and therefore "the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members"].)

Here, as in *Albillar*, there was ample evidence that the San Miguel and Sanchez murders were committed *both* "for the benefit of" *and* "in association with" a criminal street gang. Officer Oliande opined that several of the persons involved in the murders and their aftermath -- Ramirez, Arceo, and Tommy as well as Mejorado himself -- were KAM gang members. Oliande further testified, based on hypothetical facts mirroring the facts in this case, that the San Miguel and Sanchez murders would benefit KAM. The hypothetical facts of the Sanchez murder would benefit the perpetrators' reputations, "basically for the same reasons" as the Flores murder (as to which Oliande testified that the perpetrators' activity would benefit their reputation within the gang, because the more

violent the crime, the more street credibility and respect the perpetrator gets, creating fear and intimidation in the community, and also helping to recruit youngsters for the gang). In addition, "one of the main reasons why they would kill a potential witness or potential rat is for them to keep free from being out of [*sic*] prison," and "it send[s] a message . . . about not snitching or not testifying and stuff like that." Likewise, killing the witness's friend would benefit the reputation of the gang. The murders would benefit KAM even if Mejorado were not a member of the gang.

In short, there was substantial evidence the San Miguel and Sanchez murders were "gang-related" in that they were committed both for the benefit of and in association with the KAM gang. (See *Albillar, supra*, 51 Cal.4th at pp. 61-63 ["[d]efendants not only actively assisted each other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation in committing these crimes and that they would benefit from committing them together"; court finds "substantial evidence that defendants came together *as gang members* to attack [the victim] and, thus, that they committed these crimes in association with the gang"; in addition, "[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' "].)

The second prong of the statute "requires that a defendant commit the gang-related felony 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*Albillar, supra*, 51 Cal.4th at p. 64.) Here, there was substantial evidence (recounted in part 2.c.(1), *ante*) that Mejorado aided and abetted the murders of San Miguel and Sanchez. There was likewise substantial evidence that the other participants in those murders -- Arceo, Sergio and Ramirez -- were "known members of a gang." Arceo had "KAM" tattooed on his person, was an admitted gang member, put gang graffiti in his jail cell, and had been served with a gang injunction. Sergio had "Florencia" tattooed across his stomach (which indicated to Officer Oliande that Sergio was a member of the Florencia 13 gang, one of the bigger gangs with larger territory), and also had other tattoos with gang significance. Ramirez had gang tattoos, was an

admitted gang member, and associated with Tommy, another admitted gang member. In short, all were gang members.[26]

Thus, there was ample evidence both that Mejorado intended to aid and abet the murders and that he did so with known members of a gang. Accordingly, the evidence fully supports the standard announced in *Albillar*, that is, "substantial evidence establishes that [Mejorado] intended to and did commit the charged felony with known members of a gang," and the jury may therefore "fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar, supra*, 51 Cal.4th at p. 68.)

DISPOSITION

The judgments are affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.

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26 Mejorado asserts the evidence was insufficient to show Mejorado himself was a gang member. We think not. Officer Oliande opined that he was. While Mejorado had no explicit KAM tattoos or gang moniker, Mejorado had contacts with the police in KAM territory, had a close relationship with admitted gang members including Tommy, who told police that Mejorado was a KAM member, and Mejorado was shot in driveby shootings at the Lopez house on two occasions. But in the end the point is irrelevant. As *Albillar* teaches, the gang enhancement "does not depend on membership in a gang"; it applies "when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*Albillar, supra*, 51 Cal.4th at pp. 67-68.)

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CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL ARCEO et al., Defendants and Appellants.	B218758 (Los Angeles County Super. Ct. No. TA079230) **ORDER MODIFYING OPINION and CERTIFYING OPINION FOR PARTIAL PUBLICATION** [NO CHANGE IN JUDGMENT]

IT IS ORDERED that the opinion filed April 13, 2011, be modified by adding, in the second paragraph of the Summary, a new sentence following the first sentence of the second paragraph of the Summary, as follows: "In the published portion of this opinion, we conclude there was no Sixth Amendment violation."

IT IS FURTHER ORDERED that, pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication, with the exception of the last sentence of the second paragraph of the Summary, the succeeding two paragraphs of the Summary, the introductory paragraph of part 1 of the Discussion, and parts 1.b., 1.c., and 2 of the Discussion.

There is no change in the judgment.

BIGELOW, P. J. RUBIN, J. GRIMES, J.