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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. JERRY SORRELS et al., Defendants and Appellants.	B224166 (Los Angeles County Super. Ct. No. BA321479)

APPEAL from judgments of the Los Angeles County Superior Court. William C. Ryan, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Jerry Sorrels.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant Daymon C. Garrett.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant Roderick A. Jenkins.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, only the following parts are certified for publication: the Facts, part II.A of the Discussion on Defendant Jenkins's Appeal, and the Disposition.

In this appeal, three defendants—Jerry Sorrels, Daymon C. Garrett, and Roderick A. Jenkins—challenge their convictions for the murder of Laura Sanchez. The defendants individually and collectively contend the trial court committed error during voir dire, in giving jury instructions and committed judicial misconduct during the trial. We affirm their convictions.

FACTS

Laura Sanchez was shot as she stopped her blue Astrovan in front of her home on Long Beach Avenue on March 18, 2007. Her son, Jose B., was sitting in the passenger seat and saw a white car stop on the other side of the van. Sanchez told Jose to "duck down." As he got out of the van, he heard two sets of gunshots, the first set very loud and the second set less so. He dropped to the ground and began to crawl towards the driveway.

Sanchez's nieces, Sandy and Jeanette C., were sitting inside their mother's SUV, which was parked in Sanchez's driveway. Both girls heard a set of very loud gunshots coming from a white passenger car and a second set that was not as loud coming from a gray truck. Sandy saw gunshots come from a white four-door car that had stopped behind her aunt's van. She and Jeanette also saw gunshots come from a gray SUV that had pulled up next to their car. The cars drove away after the shooting. A 911 caller reported that a gray Chevrolet Trailblazer with two male Hispanics in it were involved in the shooting.

Sanchez died from a gunshot wound to her left lung and heart, which caused massive hemorrhaging and death within two minutes. The bullet entered the left side of Sanchez's back and exited her right upper chest. Forensic testing showed it would have been unusual for a small caliber bullet, such as a .25-caliber bullet, to pass through a human body, but not a larger caliber bullet.

Los Angeles Police Detective Daniel Gersna arrived on the scene shortly before 1:00 a.m. He recovered two .25-caliber bullets from the Astrovan and two larger bullets on Long Beach Avenue and from the driver's seat. There was another bullet found underneath the van. The .25-caliber bullets were found to have been fired from a handgun later recovered from Deon Harper, a member of the Pueblo Bishop gang.

The two larger caliber bullets were found to be most likely .44-caliber bullets from a revolver. Investigators used trajectory rods to determine the path the bullets took when they entered Sanchez's Astrovan. It was determined that the larger caliber bullets were fired from the rear of the Astrovan towards the front while the .25 caliber bullets were shot from the front of the van towards the back.

J.K. Gray, an admitted Pueblo Bishop gang member, testified at the preliminary hearing that on the day Sanchez was shot, he and his "homeboys" Jamal "PJ" Payne, Damon "D-Dog" Garrett, Roderick Jenkins and Jerry "KO" Sorrels, among others, were outside the Pueblo Del Rio Housing Projects located at 55th Street and Long Beach Avenue in Los Angeles. The group discussed "going and doing something down in Athens" though Gray denied there was any talk of shooting anyone. Gray was aware that another Pueblo Bishop gang member named "Pancho" had been shot by an Athens Park gang member. The group left in three cars, a gray Chevrolet Trailblazer, a black Cadillac Escalade and a white Chevrolet Impala. Payne drove the Trailblazer, Garrett drove the Escalade and Anthony "Baby Damu" Lowe drove the Impala. Gray sat in the back of the Trailblazer with Arthur Maiden and Jenkins sat in the front passenger seat, which had a firearm with him. Sorrels rode with Garrett in the Escalade and Marquez "Oozie" Edwards rode with Lowe in the Impala.

Gray testified that the caravan drove south on Avalon Boulevard but did not see any Athens Park gang members. They turned back towards the Pueblo Del Rio Housing Projects when Garrett stopped the Escalade at Long Beach Avenue and 48th Place. Gray saw Sorrels reach out of the Escalade's front passenger window and fire a gun. Payne stopped his Trailblazer behind the Escalade and Jenkins fired a handgun from the car. They then drove away. Gray was granted immunity for his testimony, which he believed meant that no charges would be filed against him even if he was the shooter. At trial, however, Gray refused to answer any questions and invoked his Fifth Amendment privilege. As a result, the trial court found Gray was unavailable to testify and admitted his preliminary hearing testimony into evidence.

Detective Gersna reviewed photos of Pueblo Bishop gang members together, including Gray, Payne, Marquise Edwards, Garrett, Pancho Shepherd, Arthur Maiden,

Sorrels, and Jenkins. When Detective Gersna spoke with Pancho Shepherd on March 18, 2007, he noticed that one of his hands was injured.

Detective Gersna viewed footage from a video surveillance camera located in a tow yard at the corner of Long Beach Avenue and Vernon called Lara's Tow. The video showed a caravan consisting of a black Escalade, a white Chevrolet Impala, and a gray Chevy Trailblazer driving on Vernon Avenue from Long Beach Avenue. During his investigation, Gersna spotted a white Chevy Impala at the Pueblo del Rio Housing Project. Anthony "Baby Damu" Lowe, an admitted Pueblo Bishop gang member, was driving the Impala at the time and fled when Detective Gersna and his partner made the stop. The Impala was later discovered to be registered to Lowe's mother.

Detective Gersna, who had also personally searched a black Cadillac Escalade belonging to Garrett's grandmother and a gray Chevy Trailblazer belonging to Jamal Payne, opined the Escalade in the Lara's Tow video was the same as the one driven by Garrett, the white Impala in the video was the one driven by Lowe and the Trailblazer was the one belonging by Payne. Sanchez's son identified the white Impala in the video as the same one he saw during the shooting. Sanchez's niece, Sandy C., also identified the white Impala and gray Trailblazer in the video as the vehicles she saw during the shooting. Sanchez's other niece, Jeanette C., identified the gray Trailblazer in the Lara's Tow video as the car from which she saw gunfire originate.

Dario Salazar Moreno was interviewed by Detective Gersna on April 5, 2007. Moreno identified Payne, Gray, Jenkins and Maiden from photographs. Moreno also identified a .25-caliber semi-automatic handgun that another Pueblo Bishop gang member, Deon Harper, had in his possession at the time of his arrest. Moreno told Detective Gersna that he saw Harper holding the same gun approximately a month before Sanchez's murder. In the early morning after Sanchez's murder, Payne, Gray, Jenkins and Maiden arrived at Moreno's home. Gray told Moreno that, "We just shot someone, and you need to take the guns because the heat is coming." Jenkins threatened to hit him if he did not take the guns. The next day, Moreno heard them talking about killing a woman while they were trying to shoot a 38th street gang member. Moreno identified Gray and Payne as the shooters and Maiden and Jenkins as passengers, but refused to

explain how he came by this information. At trial, Moreno denied a detective interviewed him on April 5, 2007, and denied ever hearing of Sanchez's murder. He also testified that he lived at the Pueblo Del Rio Housing Project and that he knew snitches that testified against gang members were killed.

Detective Gersna interviewed Sorrels on April 22, 2007. Sorrels waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Sorrels told Gersna that his moniker was "KO." His cousin, who had been killed, had also been known as KO. Sorrels denied any involvement in the shooting, telling Detective Gersna that he went to church that evening and then went home. When Sorrels continued to deny any involvement in the Sanchez shooting, Detective Gersna and his partner left the interview room. In a conversation with Detective Richard Arciniega after Detective Gersna had left, Sorrels said he believed the 38th Street gang was responsible for killing his cousin KO. When Gersna returned, Sorrels admitted that he was driving a black SUV to a strip club in Torrance when someone approached his car near 48th Street and Long Beach. He fired his revolver several times in the air to scare him off.

On April 27, 2007, Garrett and Sorrels were placed in a monitored cell together and their recorded statements were admitted into evidence at trial. Sorrels told Garrett that he suspected Gray was snitching because the police showed him "every picture [ex]cept for this nigga picture, Blood." Sorrels told Garrett that he had erased Garrett's phone number as well as "Baby Damu" Lowe's. While in the cell, Garrett spoke with someone on his mobile phone. He told that person that he had been "booked [] 187."[1] He later noted, "They still can't prove nothin[g]. Maybe we was passin' by." He also said, "They got everybody who was ridin' with us."

On May 2, 2007, Detective Gersna interviewed Jenkins, who waived his *Miranda* rights. Jenkins told Gersna that he was going towards Vernon when he heard gunshots on the passenger side of the car. Jenkins was arrested and placed in a monitored cell inside Parker Center with Arven Kemp on May 4, 2007. In the recording, which was also admitted into evidence at trial, Jenkins and Kemp discussed what the police had told

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[1] California Penal Code section 187 defines the crime of murder.

them about Sanchez's murder. Jenkins told Kemp he did not believe that the police had any photographs of him because his windows were tinted and he thought the only camera on Long Beach Avenue faced oncoming traffic. He suspected that "someone is really snitching" and described an altercation between an Athens Park gang member and a Pueblo Bishop gang member that resulted from someone snitching. He stated he did not care that a Pueblo Bishop gang member had been shot in the hand because he was a snitch.

He also told Kemp that one of his "homies" had been arrested in possession of his "strap" or gun and he was concerned the other gang member would snitch on him. He said, "That was the strap they said murdered the bitch. But now all the sudden, they tryin' to say that the other strap murdered the bitch. You feel me? They ran forensics and shit like that and the other strap murdered the bitch. You feel me? They say that like they already know."

An August 30, 2007 information charged Payne, Sorrels, Garrett and Jenkins with murder. (Pen. Code, § 187, subd. (a).)[2] It also included allegations that a principal personally used a firearm (§ 12022.53, subds. (b) & (e)), that a principal personally discharged a firearm (§ 12022.53, subds. (c) & (e)), that the discharge caused great bodily injury and death (§ 12022.53, subds. (d) & (e)), and that the offense was committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). Sorrels, Garrett and Jenkins were tried together.[3]

At trial, Officer Anthony Saenz testified as the prosecution's gang expert. He testified that Pueblo Bishop was a primarily African-American gang with approximately 350 members, some of whom live in the Pueblo Del Rio Housing Projects. The Pueblo Bishop gang's primary activities included murder, attempted murder, carjacking, robbery, extortion, witness intimidation, criminal threats, possession and sale of firearms and drugs and vandalism. Given a hypothetical with circumstances identical

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[2] All further section references are to the Penal Code unless otherwise specified.

[3] Jamaal Payne was convicted in a separate proceeding.

to this case, Officer Saenz opined that the murder was committed for the benefit of the Pueblo Bishop gang.

Defendants were first tried in 2008. A mistrial was declared when the jury failed to reach a unanimous verdict. At the retrial in 2009, the second jury found them guilty of first degree murder. The jury found true all of the gang and firearm enhancement allegations as to Sorrels; it found true the gang enhancement allegation as to Garrett but none of the firearm enhancement allegations. As to Jenkins, the jury found true the gang enhancement allegation and the allegations that a principal used a firearm and that a principal discharged a firearm, but found not true that a principal personally and intentionally discharged a firearm which proximately caused great bodily injury and death to Sanchez.

Sorrels was sentenced to 25 years to life, plus 25 years for the section 12022.53, subdivision (d) firearm enhancement. Garrett was sentenced to 25 years to life and Jenkins was sentenced to 25 years to life, plus a determinate term of 20 years for the section 12022.53, subdivision (c) firearm enhancement. All three defendants appealed.

DISCUSSION

Each of the defendants has filed separate briefs. We therefore address the defendants' appeals separately below. Additionally, each specifically joins in the others' briefs. Since we find no reversible error in any of the defendants' appeals, those issues to which relief is denied to one are denied to all.

Defendant Sorrels's Appeal

I. The Prosecutor Provided Race-neutral Reasons for Excusing Two African-American Venire Members

Sorrels contends the trial court committed error when it denied his two *Batson*/*Wheeler* motions during voir dire.[4] As a result, he was denied his federal and state constitutional right to trial by a jury drawn from a representative cross-section of the

[4] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

community and his federal constitutional right to equal protection of the law. We find no error.

A. The Governing Law

No party may use a peremptory challenge to remove a prospective juror based on race. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson*, *supra*, 476 U.S. at pp. 84-89.) The usual remedy for a violation of *Batson*/*Wheeler* is to dismiss the jury venire and start jury selection anew. (*Wheeler*, *supra*, at p. 282; but see also *People v. Willis* (2002) 27 Cal.4th 811, 818-824 [a court may invoke alternative remedies with the consent of the complaining party].) When a defendant makes a *Batson*/*Wheeler* motion, he or she has the initial burden to establish a prima facie case that the prosecutor based a peremptory challenge on a prospective juror's race; a prima facie case is established by a showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).) When the defendant makes a prima facie case, the burden shifts to the prosecutor to offer permissible race-neutral justifications for the peremptory challenge. (*Ibid.*) When a race-neutral explanation is tendered, the trial court must decide whether the defendant has proved purposeful racial discrimination; i.e., the court must decide whether the prosecutor's stated reasons for a peremptory challenge are the "real" reasons the prosecutor challenged the juror. (*People v. Phillips* (2007) 147 Cal.App.4th 810, 818.)

A prosecutor's explanation of reasons for a peremptory challenge need not justify a challenge for cause because a juror may properly be excused based on hunches, or even arbitrary disfavor and trivialities. For this reason, a trial court may accept any explanation provided it is not based on impermissible group bias and the court is satisfied that the explanation is not a pretext to cover over what is, in fact, actual bias. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122; see also *People v. Reynoso* (2003) 31 Cal.4th 903, 917 (*Reynoso*).) In the end, the *Batson*/*Wheeler* inquiry focuses on the subjective genuineness of a race-neutral reason given for a peremptory challenge, not on the objective reasonableness of those reasons. (*Reynoso*, *supra*, at p. 924.) Accordingly, it is not relevant whether another prosecutor would have chosen to leave the prospective juror on the jury. (*Ibid.*) In short, a " 'legitimate reason' " for a challenge within the meaning

of the *Batson*/*Wheeler* inquiry does not mean " 'a reason that makes sense;' " it means " 'a reason that does not deny equal protection.' " (*Ibid.*)

On appeal, we review with restraint and deference a trial court's decision on whether the prosecutor's stated reasons for a peremptory challenge were race-neutral. (*People v. Ward* (2005) 36 Cal.4th 186, 200 (*Ward*).) Determining the genuineness of the stated race-neutral reasons for a peremptory challenge often depends upon viewing demeanor and assessing the credibility of the attorney who offers the reasons, and a determination of an attorney's state of mind based on such factors is best left to the direct observer, i.e., the trial judge. (*People v. Stevens* (2007) 41 Cal.4th 182, 198; see also *Hernandez v. New York* (1991) 500 U.S. 352, 365.) Thus, a trial court's conclusion that a race-neutral reason is genuine will be upheld on appeal when it is supported by substantial evidence in the record. (*Ward*, *supra*, at p. 200.) In other words, a trial court's ruling on race-neutrality will be upheld unless the record shows it to have been clearly erroneous. (*People v. Hamilton* (2009) 45 Cal.4th 863, 901, 903.)

B. Voir Dire

At the beginning of voir dire, defense counsel[5] noted that all three defendants were African-American, yet there was only one African-American in the entire 65-person panel. The trial court agreed, although it noted that there were many other people of color, including Asians and Hispanics. The defense's motion to dismiss the venire and convene a new panel was denied. Additional prospective jurors were later called to the courtroom. The prosecutor subsequently sought to exercise his peremptory challenge on two of the approximately four to six[6] African-American venire-members and defense

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[5] Sorrels, Garrett and Jenkins were each represented by different counsel at trial. For the most part, counsel for each defendant cooperated and coordinated the defense at trial. Accordingly, we will refer to them collectively as defense counsel to the extent their objections or motions were coordinated. We will only refer to them individually when necessary.

[6] Of the approximately 125 venire members who participated in voir dire in this matter, the court noted there were only four to six venire members who appeared to be African-American. There was some discussion among the trial court and counsel concerning whether one of the challenged jurors was African-American or a mix of another ethnic group.

counsel made a *Wheeler* motion each time. The court asked the prosecutor to give his reasons for excusing the juror and found both times that race neutral reasons were given.

1. Prospective Juror No. 8475

Prospective Juror No. 8475 was a merchandise stocker for the American Greeting card company in Los Angeles and had no prior jury experience. Her son worked for the Fire Department, her niece was a federal public defender in Los Angeles and her brother-in-law was the Chief of Police for San Diego State University. Juror No. 8475 had lived in Jefferson Park, near Crenshaw, for 26 years. When asked what her general feelings were about criminal street gangs, she responded "I can't say—well I don't have the opinion about street gangs because they don't come from street gangs, I just think it's not the thing to do." She stated she had not "come in contact [or] attempt to connect with them and I don't know they want to be in a gang."

The prosecutor exercised a peremptory challenge on Juror No. 8475 with the explanation that "[t]his jury is what I consider a sleeper and I had, and I had a jury like this before. I asked her whether or not just in her area she thought gangs were a problem and she gave what I considered to be an evasive non-normal answer which is that she had no opinion because she had no contact and I don't think that's why I would have kept going, but I don't think you can say I don't have an opinion about gang members or whether gangs are a problem and even if you had no contact with lots of people, I think almost everyone had an opinion that gangs are a problem without having contact with them. I did not see a problem for her and I said a problem, generally. You know even [defense counsel] put her in [South Central] and she said people are trying to put her in [South Central]."

The prosecutor also noted that "every single juror that is left we have information about either has been a victim of crime or somebody close to them [has been a victim.]" He therefore found it "incredible" that Juror No. 8475 lived in or near Compton for 26 years and had never been a victim of a crime or known any close family members to be victims. He explained that he felt she was being "evasive" about whether she had a negative opinion of gangs and he did not "trust her credibility."

Defense counsel argued that he found the prosecutor's explanation to be pretext for racial discrimination. Defense counsel noted that at least one of the two jurors who deadlocked the first jury was a black woman. In addition, other venire members did not raise their hands when asked whether they are biased against gangs, but the prosecutor singled Juror No. 8475 out to question on the subject.

When the trial court permitted the parties additional voir dire, Juror No. 8475 confirmed that she did not approve of gangs but had no contact with gang members:

> "[Jenkins's Counsel]: . . . Are there gangs in Jefferson Park?
>
> "Prospective Juror No. 8475: Well, okay.
>
> "[Jenkins's Counsel]: In the neighborhood [is] what I'm asking.
>
> "Prospective Juror No. 8475: I'm trying to make it clear as possible. I'm pretty sure there's gangs in the neighborhood, but I have never came up to anybody Spanish or Black and say are you in a gang, I don't have the contact.
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> "[Jenkins's Counsel]: See.
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> "Prospective Juror No. 8475: You want me to say?
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> "The Court: What I want is an answer that is accurate and there's nothing we want you to say and not say.
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> "[Jenkins's Counsel]: You're saying the question is are there gangs in the neighborhood and you're saying you personally have not had any problem with them, but the questions are there gangs in the neighborhood not whether or not I'm not asking if you had a problem with them.
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> "Prospective Juror No. 8475: Well I don't know the type of gang names in that neighborhood. What I am trying to say is there are gangs in the neighborhood but I don't know if they are Crypts [*sic*] or Bloods or Spanish and I don't know. All I know is there could be some gang bangers in that neighborhood but I have, I don't I know, I don't know the names, I don't know.
>
> "[Jenkins's Counsel]: Okay. But you had no problem with it?
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> "Prospective Juror No. 8475: With gang bangers, no.

"[Jenkins's Counsel]: If somebody said you're biased on crime in the streets and you support that, what would you say to that?

"Prospective Juror No. 8475: Come on, I mean I am talking about the . . . . [¶] First of all, when it comes to gang bangers it's not like I want to buy you some guns, you know. I mean by seeing young people I see them doing that. Okay. Pull [y]our pants off and you know. I don't, I don't, I don't, I don't, like impeachment, you know, and when I see young people I don't, I'm not scared of young who they are so—

"[Jenkins's Counsel]: You say you know when their pants are falling down you don't, you don't like that and you're telling them about it?

"Prospective Juror No. 8475: Well, if walking in the front and you got your pants down and looking like that, I mean I think I respect an adult so I treated them like I mean like I said, like I said I accept it but I don't like seeing people like that."

The defense pointed out that the prosecutor did not take issue with a white female juror sitting on the panel who was a daughter of a policeman, who was a gang expert in the Northeast division of Los Angeles, stated she knew nothing about gangs in that area. The prosecutor responded that the question was whether she had any contact with gangs and whether she or a family member had been victims of crime, neither of which would be relevant to her father's job. Defense counsel renewed their *Wheeler* objection when the prosecutor accepted a female Hispanic juror from a subsequent panel who gave the same responses as Juror No. 8475 did. Despite living near Normandie and Florence in South Central Los Angeles, a high-crime neighborhood, the Hispanic juror had never been a victim of crime, did not have any contact with gang members, and had not even seen any graffiti in her neighborhood. The prosecutor explained that though he did not like the Hispanic juror's answers, he "honestly just didn't get the same feeling from this juror" as from Juror No. 8475.

The trial court ultimately denied the *Wheeler* motion, finding the prosecutor's reasons were not pretextual.

Sorrels argues on appeal that the prosecutor's stated reasons for excusing Juror No. 8475 were insufficient as a matter of law to rebut the prima facie case of discrimination made under California and federal law. Accordingly, the trial court's finding cannot stem from a sincere and reasoned effort to evaluate the prosecutor's stated reasons.

In support of his position, Sorrels relies on a Ninth Circuit opinion, *U.S. v. Bishop* (9th Cir. 1992) 959 F.2d 820 (*Bishop*), overruled on other grounds by *U.S. v. Nevils* (9th Cir. 2010) 598 F.3d 1158, 1167. In *Bishop*, the prosecutor exercised a peremptory challenge to exclude a prospective black juror because he felt that "an eligibility worker in Compton is likely to take the side of those who are having a tough time, aren't upper middle class, and probably believes that police in Compton in South Central L.A. pick on black people. [¶] To some extent the rules of the game down there are probably different than they are in upper middle class communities. And they probably see police activity, which is, on the whole, more intrusive than you see in communities that are not so poor and violent." (*Bishop, supra,* at p. 822.) "In response to a question from the bench, he added that 'her primary sympathy . . . is likely to lay with people whom she comes into contact with every day.' " (*Ibid.*)

The Ninth Circuit found "the government's explanation is not sufficient to satisfy *Batson* because 'a discriminatory intent is inherent in the prosecutor's explanation.' " (*Bishop, supra,* 959 F.2d at p. 827.) "[T]he proffered reasons (that people from Compton are likely to be hostile to the police because they have witnessed police activity and are inured to violence) are generic reasons, group-based presuppositions applicable in all criminal trials to residents of poor, predominantly black neighborhoods. They amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant." (*Id.* at p. 825.)

The court continued, "This is not to say that residence *never* can constitute a legitimate reason for excluding a juror, even after a prima facie showing of intentional discrimination has been made. On the contrary: What matters is not *whether* but *how* residence is used. Where residence is utilized as a link connecting a specific juror to the facts of the case, a prosecutor's explanation based on residence could rebut the prima

facie showing. A trial judge need not believe the explanation to be wise; she need only believe it to be non-pretextual. For example, in *United States v. Mitchell*, 877 F.2d 294 (4th Cir. 1989), the government struck five black jurors on account of their residence. Although acknowledging that 'this reason could be pretextual because [the] areas are . . . predominantly black,' [citation], the trial court found no discriminatory intent. Critical for our purposes is the fact that the government did not use residence as a surrogate for racial stereotypes. Rather, it pointed to the 'political prominence and . . . remarkable popularity' of the defendant's family in the districts where the prospective jurors lived." (*Bishop, supra,* 959 F.2d at p. 826, fn. omitted.)

The reasons given for excusing Juror No. 8475 are distinguishable from those in *Bishop.* Here, the prosecutor did not seek to excuse Juror No. 8475 simply because she lived in a predominately African-American area but because she was evasive about whether she held a bias about gang members and he felt she was not truthful in her answers. While other potential jurors very clearly stated their opinions about gangs,[7] Juror No. 8475's answers appeared to be incomplete and rambling. The trial transcript supports the prosecutor's explanation of why he sought to excuse Juror No. 8475. Unlike in *Bishop*, there is not a similar discriminatory intent inherent in the prosecutor's explanation in this case.

Sorrels argues, however, that the prosecutor's reasons were insufficient here because the prosecutor did not challenge other non-African American jurors who displayed similar attitudes or views. In particular, a female Hispanic juror had similarly never been a victim of crime, did not have any contact with gang members, and had not even seen any graffiti in her neighborhood despite living in a high-crime neighborhood. The prosecutor explained that he was more concerned at the time with questioning another potential juror whom he considered "an interesting character," and he felt he was "running out of time" with the Hispanic juror. Though he did not like the Hispanic

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[7] For example, prospective jurors stated that gangs posed a "real burden on the communities in which they operate" and often resulted from "a breakdown in social fabrics, single parents, lack of economic opportunity, lack of an ability to see a future."

juror's answers, he "honestly just didn't get the same feeling from this juror" as from Juror No. 8475. The prosecutor ultimately excused the female Hispanic juror as well.

The California Supreme Court has observed that "the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1220.) Thus, at the beginning of voir dire a prosecutor may exercise his challenges freely against a person who appears to have difficulty understanding or communicating, and later be more hesitant with his challenges on the ground that if he exhausts them too soon, he may be forced to go to trial with an even more problematic juror. (*Ibid.*) Moreover, "the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar." (*Id.* at p. 1221.) The court previously rejected a procedure that places an "undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor," noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial. (*Id.* at p. 1220.) In this case, the prosecutor was more concerned with the potential bias shown by another potential juror than with the Hispanic juror whom defense counsel claimed was similar to Juror No. 8475. Moreover, the record shows the Hispanic juror provided clear and thoughtful answers to the questions presented to her. She was not evasive or inarticulate.

Substantial evidence supports a finding that the trial court made a sincere and reasoned effort to evaluate the prosecutor's explanation and we defer to its conclusion. The trial court conducted a thorough examination of Juror No. 8475, allowing voir dire to be reopened so that Juror No. 8475 could be further probed about her views, and heard extensive argument on the issue. Sorrel's argument on appeal essentially invites us to evaluate the voir dire independently, and to reach a different conclusion regarding group bias than did the trial court. Absent a showing of an exceptional circumstance for doing

so, we will not substitute our assessment of the voir dire for the trial court. (*Reynoso, supra,* 31 Cal.4th at p. 919, citing *People v. Johnson, supra*, 47 Cal.3d at pp. 1220-1221.)

2. Prospective Juror No. 2599

Prospective Juror No. 2599 had no previous jury experience and lived in the San Gabriel Valley. Her spouse is a construction worker and she is a research project director for a university. Juror No. 2599 had a cousin, with whom she was "sort of" close, who had been in a Los Angeles gang 15 years ago and ended up in the witness protection program. She did not believe that would affect her ability to be fair to both sides. She had a bachelor's degree in social work and a master's degree in public administration. She had been a social worker for pregnant women and senior citizens for four years. When the prosecutor exercised a peremptory challenge against Juror No. 2599, the defense brought a *Wheeler* motion and the trial court found there was a prima facie case of group bias. After discussing whether the juror was African-American or Hispanic, the prosecutor explained that "her cousin's in the Playboys . . . I don't know any Playboys that are black. I also do not believe that I have ever kept a social worker. I couldn't keep my own mother and sister on the jury, and they're social workers. That's really it." The trial court found these were race neutral reasons and denied the *Wheeler* motion.

On appeal, Sorrels characterized the prosecutor's anti-social worker stance as "patently irrational" in light of the fact that she worked with women and senior citizens, not gangs, and that she was no longer a social worker. Peremptory challenges, however, may be made on an "apparently trivial" or "highly speculative" basis. (*Wheeler*, *supra*, 22 Cal.3d at p. 275.) Indeed, they may be made " 'without reason or for no reason, arbitrarily and capriciously.' " (*People v. Williams* (1997) 16 Cal.4th 635, 663.) That the prosecutor's bias against social workers may be patently irrational is therefore irrelevant to our analysis. Moreover, "[a] peremptory challenge based on a juror's experience in counseling or social services is a proper race-neutral reason for excusal." (*People v. Clark* (2011) 52 Cal.4th 856, 907.) This holding does not change simply because she is no longer working as a social worker. Here, the trial court found no impermissible bias in the prosecutor's decisions. Our review of the entire record satisfies us that there was evidence to support the rulings. There was no error.

II. The Trial Court's Failure to Instruct the Jury on Accomplice Testimony Was Harmless Error

Sorrels further contends that the trial court's failure to sua sponte instruct the jury to view an accomplice's testimony with caution requires reversal of his conviction. Gray's preliminary hearing testimony was read at trial when he was found to be unavailable by the trial court. Gray testified that he, along with the three defendants and others, discussed doing something against the Athens Park gang. Gray admitted he was a passenger in the Chevy Trailblazer that was part of a caravan of three cars that drove down Long Beach Avenue. Gray testified that Sorrels was in the front passenger seat of the Cadillac Escalade and that he saw a gun pointed out of the passenger window of the Escalade and then heard gunshots and glass shattering. Gray also testified he saw Jenkins fire a small silver handgun from the front passenger window of the Trailblazer.

Sorrels argues that Gray is an accomplice to Sanchez's murder and the trial court erred when it failed to instruct the jury to view his testimony with caution as stated in CALCRIM No. 335, which reads as follows:

> "If the crime of [murder] was committed, then [J.K. Gray] was an accomplice to that crime.
>
> "You may not convict the defendant of [murder] based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if:
>
> "1. The accomplice's testimony is supported by other evidence that you believe;
>
> "2. That supporting evidence is independent of the accomplice's testimony;
>
> "AND
>
> "3. That supporting evidence tends to connect the defendant to the commission of the crimes.
>
> "Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact mentioned by the

accomplice in the statement or about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"The evidence needed to support the testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

"Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

The relevant principles governing accomplice testimony are well settled. No conviction can be had upon the testimony of an accomplice unless such testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense, an "accomplice" being one who is liable to prosecution for the identical offense charged against the defendant on trial. (§ 1111.) To be chargeable with an identical offense, a witness must be considered a principal under section 31. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114.) An aider and abettor may be an accomplice since he is chargeable as a principal; his liability as such depends on whether he promotes, encourages, or assists the perpetrator and shares the perpetrator's criminal purpose. (*People v. Balderas* (1985) 41 Cal.3d 144, 193-194.) It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. (*Ibid.*; *People v. Beeman* (1984) 35 Cal.3d 547, 556-561.)

"[T]he aider and abettor must share the specific intent of the perpetrator. By 'share' we mean neither that the aider and abettor must be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and abettor must seek to share the fruits of the crime. [Citation.] Rather, an aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose

of facilitating the perpetrator's commission of the crime." (*People v. Beeman*, *supra*, 35 Cal.3d at p. 560.)

If the witness is an accomplice as a matter of law, as Sorrels contends Gray is, the trial court is required to instruct the jury to require corroborating evidence to support the accomplice's testimony. (*People v. Belton* (1979) 23 Cal.3d 516, 525.) The burden is on the defense to prove by a preponderance of the evidence that a witness is an accomplice. (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)

A. Gray Was an Accomplice

The People contend that defendants failed to prove Gray was an accomplice as a matter of law because the evidence did not "indisputably establish" that Gray shared the perpetrators' criminal purpose and was culpable as an aider or abettor. We disagree. The People appear to confuse the terms "undisputed" with "indisputable." The California Supreme Court has explained that whether a person is an accomplice may be a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed. (*People v. Fauber, supra,* 2 Cal.4th at p. 834.) That is not the same as establishing something indisputably.

Here, Gray's own statements are undisputed and prove his status. Gray admitted he was with his "homies" the night of Sanchez's murder and they discussed doing something in Athens Park. He got into the Chevy Trailblazer. He heard gunshots coming from the Escalade and saw Jenkins shoot a gun out of the Trailblazer's passenger window. He later told Moreno that "[w]e just shot someone, and you need to take the guns because the heat is coming." Moreno subsequently told Detective Gersna that Gray and Payne were the shooters, although he refused to explain how he knew. Even if Gray was not a shooter or a driver, the evidence is sufficient to show by a preponderance of the evidence that he shared the perpetrators' criminal purposes and gave aid with the intent of facilitating the commission of the crime.

None of the cases cited by the People persuade us to reach a different conclusion. Indeed, the People implicitly acknowledge the cases do not directly support their position by qualifying the citations with a "See" reference. (*People v. Sully* (1991) 53 Cal.3d 1195, 1228 [witness brought victim to scene of the crime to buy cocaine but left and was

told she did not need to retrieve him because "it was all taken care of"]; *People v. Lewis* (2001) 26 Cal.4th 334, 369 [although witness was at the scene of the crime, there was no evidence to show he was anything more than an eyewitness]; *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220 [witness expressly refused to become involved in the planned robbery].)

B. Any Error Was Harmless

Though we find there was sufficient evidence to support an instruction that Gray was an accomplice, Sorrels suffered no harm from the failure to instruct the jury that accomplice testimony must be corroborated. (§ 1111.) This is because there was sufficient corroborating evidence in the record to support Gray's testimony. (*People v. Miranda* (1987) 44 Cal.3d 57, 100; *People v. Williams* (2010) 49 Cal.4th 405, 456 ["Any error in failing to instruct the jury that it could not convict defendant on the testimony of an accomplice alone is harmless if there is evidence corroborating the accomplice's testimony"].) The question is whether it is reasonably probable that the error affected the verdict. (*Williams, supra,* at p. 456.)

Corroborating evidence " ' "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." ' " (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206.) "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*Fauber, supra,* 2 Cal.4th at pp. 834-835.)

Applying the foregoing principles, we are satisfied that Moreno's statements to the police provided sufficient corroboration of Gray's testimony. Moreno told Gersna that Payne, Gray, Jenkins and Maiden came to his home the night of the shooting. These were the same men Gray testified were in the Trailblazer when Sanchez was shot. According to Moreno, Gray said, "We just shot someone, and you need to take the guns because the heat is coming." Jenkins then threatened "to sock [him] in the face" if he

refused to take the guns. The next day, Moreno overheard the same four men talking about having killed a woman while attempting to shoot a 38th Street gang member. Moreno's statements were enough to connect Jenkins, Gray, Maiden and Payne with the killing and thus support his credibility. That Moreno did not personally witness the shooting is irrelevant since it has been held that eyewitness corroboration is unnecessary. (See, e.g., *People v. Washington* (1969) 11 Cal.2d 1061, 1093; *People v. Thurman* (1972) 28 Cal.App.3d 725, 728-729; *People v. Mardian* (1975) 47 Cal.App.3d 16, 43-44, disapproved on another ground by *People v. Anderson* (1987) 43 Cal.3d 1104, 1123, fn. 1.) Gray's testimony was further corroborated by Jenkins's and Sorrels's own statements to the police. Jenkins admitted he was present at the scene of the shooting and Sorrels admitted he fired a revolver several times from a black SUV near 48th Street and Long Beach.

III. The Jury Was Properly Instructed on Uncharged Conspiracy

Sorrels next contends that the trial court erred when it instructed the jury that he could be found guilty of murder under an uncharged conspiracy theory. While the Penal Code makes it a substantive offense to conspire to commit an unlawful act (§ 182), Sorrels contends California does not recognize conspiracy as a theory of vicarious liability. According to Sorrels, California law does not authorize the use of uncharged conspiracy as a theory of liability that would make one person vicariously responsible for a criminal act committed by another person. Because Sorrels was not charged with the substantive crime of conspiracy, it was improper to instruct the jury on an uncharged conspiracy. He contends his conviction must be reversed since the jury was also instructed on an aiding and abetting theory and the record does not show under which theory the jury convicted him.

He acknowledges, however, "there are cases that indicate conspiracy is a theory of vicarious liability." Nevertheless, he urges us to abandon those cases, which have "crept into California law even though it is unsupported by and in conflict with the Penal Code." We decline to do so.

It has long been held and affirmed by the California Supreme Court that "[f]ailure to charge conspiracy as a separate offense does not preclude the People from proving that

those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory (*People v. Washington* (1969) 71 Cal.2d 1170, 1174; *People v. Ditson* (1962) 57 Cal.2d 415, 447)." (*People v. Remiro* (1979) 89 Cal.App.3d 809, 842.) Sorrels's own analysis of the issue identifies a body of case law that holds uncharged conspiracy is a valid theory under which a defendant may be found guilty of murder. (*People v. Prieto* (2003) 30 Cal.4th 226, 249-250; *People v. Hardy* (1992) 2 Cal.4th 86, 188-189; *People v. Duran* (2001) 94 Cal.App.4th 923, 941; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842-843.)

IV. The Sentencing Enhancement Under Penal Code Section 12022.53, Subdivision (e), Does Not Violate Equal Protection

Sorrels further contends that section 12022.53, subdivision (e), violates the equal protection clause of the federal and state Constitutions because it singles out gang members for additional punishment in cases involving the vicarious discharge of a firearm causing death. Under section 12022.53, subdivision (e), aiders and abettors in gang cases are subject to a 25-year-to-life sentence enhancement for vicarious discharge of a firearm causing death while in all other cases not involving gang members, the sentence enhancement is only applied to those who personally discharge a firearm causing death. Sorrels argues that aiders and abettors of shootings committed for the benefit of a criminal street gang are no differently situated than aiders and abettors of shootings committed for the benefit of other organizations or groups not specifically defined as criminal street gangs such as a racist hate group, a terrorist organization, or "just a group of thugs."

Division Seven of our court addressed this precise issue in *People v. Hernandez* (2005) 134 Cal.App.4th 474 and held that the sentencing scheme under section 12022.53, subdivision (e), did not violate equal protection guarantees. Reviewing the statute for a rational basis, the *Hernandez* court concluded, "Clearly the Legislature had a rational basis for imposing a 25-year-to-life enhancement on one who aids and abets a gang-related murder in which the perpetrator uses a gun, regardless of the relationship between the aider and abettor and the perpetrator. . . . [T]he purpose of this enhancement is to

reduce through punishment and deterrence 'the serious threats posed to the citizens of California by gang members using firearms.' One way to accomplish this purpose is to punish equally with the perpetrator a person who, acting with knowledge of the perpetrator's criminal purpose, promotes, encourages or assists the perpetrator to commit the murder." (*Id.* at p. 483, fn. omitted.) We agree and need not say anything further on the matter.

Defendant Jenkins's Appeal

I. Comparative Juror Analysis Does Not Reveal Discriminatory Intent in the Prosecutor's Challenge of Two African-American Jurors

Like Sorrels, Jenkins contends his convictions must be reversed for *Batson/Wheeler* error. For the reasons explained in our analysis of Sorrels's *Batson/Wheeler* argument, we reject Jenkins's contention as well. Jenkins also makes a comparison between Juror No. 8475's answers to those given by Potential Juror No. 9025 an African-American man who was ultimately sworn into the jury as Juror No. 12. Jenkins notes that Juror No. 9025 also lived in South Los Angeles, near 54th Street and Crenshaw Boulevard, and had little experience with crime or gangs. As both Juror No. 8475 and Juror No. 9025 are African-American, there would not appear to be a *Wheeler* issue. Indeed, the sworn jury was ultimately comprised of one African-American woman and one African-American man. "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection." (*Turner, supra,* 8 Cal.4th at p. 168.)

To the extent that Jenkins argues the prosecutor was discriminating against Juror No. 8475 for her race *and* gender, he provides no legal support for the proposition that the prosecutor must give race-neutral and gender-neutral reasons. In any event, we are not persuaded to find *Batson/Wheeler* error. Juror No. 9025, unlike Juror No. 8475, had very strong opinions about gangs. He believed they were "like cancer" and stated his son would have to move out if he ever got gang tattoos. By contrast, Juror No. 8475 was never so forceful in her opinion about gangs, only stating that "it's not the thing to do."

II. The Trial Court Did Not Commit Judicial Misconduct

Jenkins contends that the trial court's bias and misconduct undermined his due process right to a fair trial. He relies on two incidents to support his contention—a statement of the case read by the trial court to the prospective jurors at the beginning of voir dire and a heated exchange between the trial court and Jenkins's trial counsel during examination of one of the witnesses. We conclude neither incident, alone or combined, amounted to misconduct.

A. Trial Court Statement to Prospective Jurors

At the beginning of voir dire, the trial court read the following statement[8] to the prospective jurors over defense objections:

> "Now I'm going to read a brief statement of the case to you to tell you a little bit more about the case.
>
> "The purpose of reading this statement is to give you a general idea about what the case is about and is not a substitute for evidence. None of the things in the statement are evidence, and you may not consider what's in the statement in deciding what happened.
>
> "It remains to be seen whether the evidence would prove any of this. This case involves one count of murder. There's also an allegation that the crime was committed for the benefit of a criminal street gang and that it was committed using handguns. The crime allegedly occurred in 2007 on Long Beach Avenue between Vernon and Slauson in the southeast are of the City of Los Angeles.
>
> "The prosecution contends that all of the following occurred. These are just contentions at this point.
>
> "That on March 18, 2007, three vehicles containing eight Pueblo Bishop gang members left in a caravan from the Pueblo Del Rio Housing Project, which is located at 55th and Compton.

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8 The trial court made this statement – as he must – to each of three different panels of potential jurors. While the wording to each differed slightly, the statement was essentially the same to all three. We reproduce the statement as it was read to the first panel.

"The first vehicle was a black Cadillac Escalade containing two Pueblo Bishop gang members. The second was a silver gray Chevrolet Trailblazer with four gang members. The third was a white Chevrolet Impala with two gang members.

"All three vehicles drove south on Avalon Boulevard to 135th Street, allegedly seeking to retaliate for the shooting of a fellow gang member before. Locating no Athens Park gang members, the three vehicles drove back on Avalon Boulevard to the Pueblo Del Rio Housing Project and then to a rival gang's territory, north of the project on Long Beach Avenue.

"There, they observed a person they suspected of being a 38th Street gang member entering a blue Chevrolet Astrovan.

"The caravan pulled alongside the Astrovan. The passenger in the black Escalade fired a large caliber handgun into the Astrovan, striking Laura Sanchez and causing her death.

"The Escalade then drove forward. The Chevy Trailblazer pulled up next to the Astrovan, and the front passenger fired a small caliber handgun into the Astrovan. The caravan then drove northbound on Long Beach Avenue to Vernon and made its way back to the Pueblo Del Rio Housing Project.

"Laura Sanchez was transported by paramedics to County U.S.C. Medical Center where she died. Thereafter, the police investigation commenced.

"The defense disputes all of the People's contentions. The People's contentions are not evidence. Although the defendant has no burden of proof, the defense may introduce evidence to rebut the People's contentions.

"You're going to hear from civilian eyewitnesses about what they claim they observed. You'll hear from a deputy medical examiner from the Los Angeles County Department of Coroner, who examined the body of Laura Sanchez and made a determination as to the cause and type of death.

"You'll also hear from police detectives who investigated the crime. You'll also hear from police gang expert. As I've stated at the beginning, the purpose of reading this statement is to give you a general idea about what the case concerns.

None of the things in the statement are evidence, and you may not consider what is in this statement in deciding what happened. It remains to be seen whether any of the People's contentions can be proven beyond a reasonable doubt."

Jenkins contends that the statement amounted to a second opening statement on behalf of the prosecution because it focused on the details of the case that were favorable to the prosecution and allowed the jury to prejudge the evidence. Further, the trial court demonstrated a bias in front of the prospective jurors which severely prejudiced the defendants and warrants reversal of their convictions. We disagree.

The trial court's reading of a brief overview of the facts before conducting voir dire is commonplace in modern-day trial courts. In fact, judges are encouraged to give such statements to the juries for a number of reasons. First, it serves as a means of giving the jurors an introduction to the case. This assists both the court and the parties in their subsequent questioning of jurors to determine if the jurors have some previous knowledge of the facts of the case, live in the area where the crime occurred, know the victims, defendants or gangs involved, or have some affiliation with the responding police, governmental agencies, and businesses. Second, an overview of the facts in a case such as this may help a trial judge encourage jurors to serve, a not insignificant fact in the current environment where jurors will make every effort to avoid jury service. In addition, the statement also serves to introduce or remind jurors of important legal principles underlying a criminal case – that statements by the judge are not evidence, that the prosecution's contentions are not evidence, that the defense does not have to prove anything or produce any evidence, and the all important burden on the prosecution to prove its case beyond a reasonable doubt.

Indeed, the California Standards for Judicial Administration, Standard 4.30, subdivision (b)(8), direct a criminal trial judge during voir dire to inform the jury of the

charges against a defendant, and the section of the Penal Code alleged to have been violated. Most importantly, the standard directs the trial judge to "describe the offense[s]." Further, the trial judge is to inform the jury that "the defendant has pleaded not guilty, and the jury will have to decide whether the defendant's guilt has been proved beyond a reasonable doubt." (*Ibid*.)

The trial judge here did nothing more than follow these rules. He even changed his description of the offenses to accommodate specific objections to the proposed description of the offenses made by defense counsel. He began and ended his brief comments with admonitions that properly directed the jury on how to consider his comments. In the beginning and at the end of the statement, the trial judge told the jury that "[n]one of the things in the statement are evidence, and you may not consider what's in the statement in deciding what happened. . . . It remains to be seen whether the evidence would prove any of this." He also noted, "[t]he defense disputes all of the People's contentions. The People's contentions are not evidence." There was no error.

Neither has Jenkins presented us with any case that leads us to find anything wrong with the trial court's statement. *People v. Rodriguez* (1986) 42 Cal.3d 730, provides guidance. There, the question was whether the trial court erred when it commented on the evidence after the jury announced it was deadlocked. The California Supreme Court explained "[t]he trial judge's privilege not only to summarize the evidence, but to analyze it critically, is rooted in English common law." (*Id.* at p. 766.) The trial court has sound discretion to summarize the evidence with no limitations on its content or timing so long as it is "accurate, temperate, nonargumentative, and scrupulously fair." (*Ibid.*, citations omitted.) Because a trial court's commentary "may sometimes invade the accused's countervailing right to independent jury determination of the facts bearing on his guilt or innocence . . . [t]he trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact finding power." (*Ibid.*) The court further stated that judicial comments may be drafted by counsel if careful scrutiny is provided by the trial judge. (*Id.* at p. 774, fn. 13.)

None of the cases cited by the defense contradict these principles. Neither does the trial court's statement match the conduct which these cases have found objectionable. Unlike the trial court in *People v. Campbell* (1958) 162 Cal.App.2d 776, 787, this court did not question witnesses inappropriately. In *Campbell*, the trial court "[i]n 15 or more instances, [] interrupted the examination of the People's witnesses by the deputy district attorney by questions which were calculated to and did elicit testimony seriously adverse to the defendant." (*Id*. at p. 786.) By contrast, "the court cross-examined witnesses for the defendant in a manner that was abrupt and critical." (*Ibid.*) There was no such bias exhibited by the trial court here. As described above, the trial court was very careful to preface and conclude the statement with the admonition that it was not evidence and the prosecution had the burden of proving the things stated.

Though *People v. Foster* (2010) 50 Cal.4th 1301, 1323 and *People v. Tate* (2010) 49 Cal.4th 635, also relied upon by defendants, address issues raised during voir dire, they are distinguishable. In *Foster*, the trial court presented potential jurors with a 29-page questionnaire that defendant conceded on appeal was adequate. The trial court did not conduct any oral questioning of the venire. (*Foster, supra,* at p. 1323, fn. 11.) The question presented in that case was whether the examination of the prospective jurors was sufficient to ensure any bias was revealed. (*Id*. at p. 1322.) There was no challenge to the statements made by the trial judge. The case is inapplicable to the facts presented here. In *Tate*, a defendant's proposed script for death qualification voir dire included various admonitions against prejudgment but also included specific details of the case, including that the victim was stabbed and hit with blunt instruments and her ring finger was severed and her wedding rings taken. (*Tate, supra,* at p. 655.) The Supreme Court found that the trial court did not abuse its discretion when it omitted the detail regarding the severed finger. Despite the admonitions, the defense statement "would nonetheless have invited prospective jurors to focus on specific details about the case at the outset, and to begin to form judgments and opinions about the appropriate penalty in advance of hearing the trial evidence." (*Id*. at p. 660.) Unlike *Tate*, this case does not involve a questionnaire in a death penalty case where jurors are questioned about their ability to keep an open mind on the decision of whether or not to impose that ultimate penalty. The

issues that come into play in such a case are entirely different. In addition, there were no similarly outrageous details which would have invited prejudgment in this case. Each of the cases cited by Jenkins is distinguishable from the facts at hand. Jenkins has presented no case which holds that a trial court's summary of the allegations at the beginning of voir dire amounts to misconduct. For all of these reasons, we decline to find error in the trial court's reading the overview of the facts of this case.

B. Trial Court's Demeanor Toward Counsel

The second basis for Jenkins's contention that the trial court committed misconduct rests on the following colloquy during the prosecutor's redirect of Sanchez's niece, Sandy C.:

"[The Prosecutor]: Would it help to refresh your recollection if you were to look at a copy of your testimony?

"[Sandy]: Maybe.

"[The Prosecutor]: May I approach, Your Honor?

"The Court: Yes.

"[Jenkins's Counsel]: Do we have the parameters of the reading?

"The Court: What are you showing her?

"[The Prosecutor]: Page 32, lines 21 through 28.

"The Court: Okay.

"[The Prosecutor]: If you could read these to yourself, lines 21 through 28, if you would read that to yourself, and then see if that refreshes your recollection.

"[Sandy]: Maybe I got confused.

"[Garrett's Counsel]: Excuse me, Your Honor. I'm going to object to the manner in which her memory was just refreshed. There's additional testimony that took place that puts it in the correct context.

"The Court: Overruled.

"[The Prosecutor]: Actually, I don't mind if she reads the next page.

"The Court: [Prosecutor], this is your examination, not mine.

"[The Prosecutor]: Thank you.

"The Court: Go ahead and examine the witness.

"[The Prosecutor]: Thank you, Your Honor.

"[Sandy]: Did you hear several shots and then turn around?

"[Jenkins's Counsel]: I object. Has her memory been refreshed?

"The Court: Overruled, and no speaking objections.

"[Jenkins's Counsel]: Well, that's the objection - -

"The Court: I won't tell you again.

"[Jenkins's Counsel]: That the objection I'm making.

"The Court: Well, that's not a legal ground.

"[Jenkins's Counsel]: It's improper - -

"The Court: Overruled.

"[Jenkins's Counsel]: It's improper impeachment.

"The Court: Overruled. [¶] Go ahead, [Prosecutor].

"[The Prosecutor]: What happened when you heard the first shots?

"[Sandy]: I turned around.

"[The Prosecutor]: Then, when you heard the second group of shots, was that when the gray truck cut off your aunt's van?

"[Sandy]: Yes.

"[Sorrels's Counsel]: Objection to the second group of shots.

"The Court: Overruled.

"[Sorrels's Counsel]: Assuming a fact not in evidence.

"[The Prosecutor]: I have no further questions of this witness."

After Sanchez's other niece, Jeanette C., testified and the jury had left for a brief recess, Jenkins's trial counsel moved for a mistrial. He explained that "[the prosecutor] had this witness resummoning or refreshing her memory. He never asked her if her memory was refreshed[?] I simply said—asked, is her memory refreshed? I felt that he was doing it [] procedurally incorrectly. [¶] The court said angrily at me, 'Overruled.' I then said it's improper impeachment. You then snapped at me with a great deal of hostility, anger and bitterness in your voice, raised your voice, 'Overruled.' One or more of the jurors even gasped, 'Oh.' " The trial court denied the motion for mistrial.

After another break, the court stated, "I want to talk about what happened just before we broke. The reason you got snapped at by me, [Jenkins's Counsel], I've explained to you, is because I felt you were stepping on [the prosecutor's] questions and wouldn't let him get his question out. [¶] It makes an incomplete record and it's very problematic for the court reporter, and occasionally, you would argue with me after I've ruled on the objection—okay?—and I don't like it. I told you not to do it. However, I will try not to snap at you in the future."

Jenkins's trial counsel subsequently moved for a mistrial based on the preliminary statement read by the court and the incident described above. We find neither incident, taken together or alone, provide a valid basis for a mistrial. As discussed above, we find no misconduct based on the trial court's statement at the beginning of voir dire. Neither do we find misconduct in the brief and isolated incident described above. In each of the cases cited by the defense, the trial court exhibited bias by its "persistent" and "frequent" comments. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Sturm* (2006) 37 Cal.4th 1218, 1233.) This was one incident that lasted at most, a few minutes during the course of a lengthy trial. There is no indication the trial court "snapped" at counsel at any other time or displayed "negative personal views concerning the competence, honesty, or ethics of the attorneys . . . ." (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1175.) Indeed, the trial court did nothing more than rule on counsel's objection. There was no misconduct even if the trial court was frustrated while doing so.

III. Certain Hearsay Testimony Was Properly Admitted

The trial court admitted three statements which Jenkins contends are inadmissible testimonial hearsay under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). "*Crawford* . . . held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination." (*People v. Geier* (2007) 41 Cal.4th 555, 597.) "Testimonial statements are 'statements, made with some formality, which, viewed objectively, are for the primary purpose of establishing and proving facts for possible use in a criminal trial.' [Citation.] An 'informal statement made in an unstructured setting' generally does not constitute a

testimonial statement." (*People v. Garcia* (2008) 168 Cal.App.4th 261, 291, quoting *People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14.)

Evidence Code section 1291 also provides that "[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." "When the requirements of Evidence Code section 1291 are met, 'admitting former testimony . . . does not violate a defendant's right of confrontation . . . . [Citation.]' " (*People v. Wilson* (2005) 36 Cal.4th 309, 340, discussing *Crawford, supra,* 541 U.S. at p. 59.) With these principles in mind, we review each of the statements challenged by Jenkins below.

A. Detective Gersna's Statement

In an interview with Detective Gersna, Moreno identified Gray as one of the shooters. When asked why he did not confront Gray with this information, Gersna testified at trial that he "had additional information. It was corroborated by what J.K. Gray was telling us." Jenkins posits that this "additional information" known by Gersna must have been testimonial hearsay taken for the purpose of learning the truth about Sanchez's shooting. As a result, it violated *Crawford.* We disagree. The defense failed to establish what the additional information was and from whom or what it was derived. There was no evidence that the "additional information" referred to by Gersna was a testimonial statement or something else, such as video from Lara's Tow, or the shooting reconstruction performed by the police or a statement by a witness whom Jenkins had the opportunity to cross-examine at trial, such as Sanchez's nieces or her son. Jenkins has failed to meet his burden of establishing the evidence was even a statement and if so, that it was testimonial hearsay under *Crawford.*

B. Payne's Statement

Jenkins next challenges Payne's admission to Detective Gersna that the gray Trailblazer at issue belonged to him. At trial, Gersna was asked how he knew Payne drove the Trailblazer. He responded, "He told me he drives that vehicle." Jenkins argues

that this statement was inadmissible testimonial hearsay. Moreover, it was prejudicial in that it tended to support Gray's version of events—that Payne drove the Trailblazer and Jenkins and Sorrels were the shooters.

We find any error in the admission of this statement to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cage, supra,* 40 Cal.4th at p. 991.) Payne's statement to Detective Gersna was cumulative to the Lara's Tow video showing a gray Trailblazer was part of a caravan in the area near Sanchez's home on the night of the murder. It was also corroborated by Gray's testimony that Payne drove a gray Trailblazer, Sandy's testimony that the second round of shots originated from a Trailblazer, and evidence that Payne's grandmother was the registered owner of a gray Trailblazer. Given the overall state of the evidence, omission at trial of Payne's statement to Detective Gersna would not have changed the outcome of the case.

C. Gray's Statement

At the time of his arrest, Gray was in possession of a nine-millimeter handgun and had told Detective Everts that he was afraid the Pueblo Bishops were trying to kill him. Jenkins believes that if the defense called Everts to testify about the circumstances surrounding Gray's arrest and his possession of the handgun, the trial court would have allowed the prosecutor to elicit testimony about Gray's fear of the Pueblo Bishop gang. As a result, the defense chose not to call Detective Everts to the stand.

The record shows the trial court had determined that Gray's statements to Everts were hearsay but were admissible as a hearsay exception for spontaneous or contemporaneous utterance. As a result, defense counsel stated that "in view of the Court's ruling regarding what the Court has indicated are hearsay statements and the Court believes is the exceptions to the hearsay rule, I'm not calling this witness." The prosecutor also declined to call Everts to the stand.

According to Jenkins, the defense should have been allowed to call Detective Everts without the threat that the prosecutor would be allowed to elicit testimonial hearsay in violation of *Crawford*. If the jury were made aware of Gray's fear of the Pueblo Bishop gang, the defendants would have been prejudiced because it "would have

been evidence [] to corroborate Mr. Salazar Moreno and would suggest to the jury that the issue of identity should be resolved in favor of the defense."[9]

Notably, Gray's statement to Detective Evert was not admitted because neither the defense or the prosecutor chose to call Evert to the stand. Thus, there was no *Crawford* violation. To the extent that Jenkins argues the trial court erred when it ruled that Gray's statements to Detective Everts were not testimonial and were admissible as hearsay exceptions, Jenkins provides no analysis as to why the hearsay exceptions did not apply in this case. However, we agree that the statement was not testimonial. The police were investigating an unrelated attempted murder when they went to Gray's home. When Gray opened the door for the police, he was nervous and his voice was shaky. The police discovered a nine-millimeter handgun in plain sight at his home. Without prompting, Gray told them that he was initially frightened because he thought that Pueblo Bishop gang members were pretending to be police when he heard the knock at the door. He only opened the door after he stepped out of the window in the back to confirm they were really the police. The circumstances surrounding Gray's statement to Detective Everts do not objectively indicate that they were testimonial under *Crawford.*

If Jenkins intended to argue that he was denied a right to present a complete defense under the Sixth Amendment, as the People surmise, he provides no analysis or argument for this proposition. Accordingly, we need not address an issue not raised or argued. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) Having found either no error or harmless error in each of Jenkins's *Crawford* challenges, we similarly reject his argument that the three statements taken together violated his Sixth Amendment right to confrontation.

IV. The Trial Court's Failure to Instruct the Jury on Accomplice Testimony Was Harmless

For the reasons explained in addressing Sorrels's appeal, we reject Jenkins's contention that his conviction must be reversed because the trial court failed to instruct

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[9] The firearms expert opined that the firearms used during the shooting were a .44-caliber firearm and a .25-caliber firearm. Thus, Gray's possession of a nine-millimeter handgun was unrelated to Sanchez's shooting.

the jury sua sponte on the law governing accomplice testimony as it related to witness J.K. Gray. There was sufficient corroborating evidence supporting Gray's preliminary hearing testimony.

V. Substantial Evidence Supported an Instruction on Uncharged Conspiracy

Jenkins also contends that it was error for the trial court to instruct the jury on an uncharged conspiracy theory of criminal liability. Unlike Sorrels, who makes the legal argument that the Penal Code does not support a conspiracy theory of vicarious liability, Jenkins bases his argument on factual grounds. Jenkins argues there was no evidence to support the instruction because there was no evidence that there existed an agreement to kill anyone that night. Jenkins discounts the evidence that showed at least two members of the group were armed the night of Sanchez's murder. According to Jenkins, possession of firearms by itself is not proof beyond a reasonable doubt of an agreement to commit a murder. We agree. Possession of a firearm alone is not evidence of a conspiracy to commit murder.

However, there was additional evidence to support a jury instruction on uncharged conspiracy to commit murder. Gray testified that the group discussed "going and doing something down in Athens" that night. Gray was aware that another Pueblo Bishop gang member named "Pancho" had been shot by an Athens Park gang member. Gersna noticed that Pueblo Bishop gang member Pancho Shepherd's hand was injured when he interviewed him. This is substantial evidence sufficient to support an instruction on uncharged conspiracy.

There was also substantial evidence to support an alternative theory of uncharged conspiracy against the 38th Street gang. Gray testified that Garrett stopped the Escalade at Long Beach Avenue and 48th Place in territory claimed by the 38th Street gang. Gray saw Sorrels reach out of the Escalade's front passenger window and fire a gun. Payne stopped his Trailblazer behind the Escalade and Jenkins fired a handgun from the Trailblazer. Moreno told Detective Gersna that Payne, Gray, Jenkins and Maiden came to his home in the early morning after Sanchez's shooting. Gray told Moreno that they "just shot someone, and you need to take the guns because the heat is coming." Jenkins then threatened to punch Moreno in the face if he did not take the guns. The next day,

Moreno heard the same individuals talking about having killed a woman while they tried to shoot a 38th Street gang member. Sorrels told Detective Arciniega on April 25, 2007, that he believed 38th Street gang members were responsible for killing his cousin, KO. Sorrels had a tattoo that read KO PIP. In light of this evidence, we find it was more than sufficient to support an uncharged conspiracy and appellant's contention to the contrary lacks merit.

VI. There Was Insufficient Evidence to Support an Instruction on Termination of a Conspiracy

At trial, Jenkins requested the trial court instruct the jury on termination of a conspiracy. The trial court denied the request, finding there was insufficient evidence to support a theory of termination. The trial court has a duty to give a requested instruction where it appears there is substantial evidence supportive of such a defense. (*People v. Panah* (2005) 35 Cal.4th 395, 484.) Once a conspirator withdraws from a conspiracy, he is no longer liable for any subsequent acts committed by the coconspirators. (*People v. Sconce* (1991) 228 Cal.App.3d 693, 701.) Jenkins argues that there was evidence the conspiracy to retaliate against the Athens Park gang terminated when the caravan of cars turned around on Avalon Boulevard to go back to the Pueblo Del Rio Housing Project. As a result, he argues CALCRIM No. 420, defining termination of the conspiracy, should have been given. We disagree.

Substantial evidence supports an alternate theory that the group conspired to shoot a 38th Street gang member.[10] Moreno told the police that he heard Maiden, Jenkins, Gray and Payne talked about shooting a woman in an attempt to kill a 38th Street gang member. Sorrels told Detective Arciniega on April 25, 2007, that he believed 38th Street gang members were responsible for killing his cousin, KO. Sorrels had a tattoo that read KO PIP. Sanchez's home was in 38th Street territory and her son was with her at the time she was shot. There was no evidence that Jenkins, or any other defendant, withdrew

[10] Jenkins asserts the People waived the issue below and are not free to argue it on appeal. We have reviewed the record, particularly the pages in the transcript to which Jenkins cites for this argument, and have found no waiver of the issue.

from that conspiracy. Accordingly, the trial court did not err in refusing to give CALCRIM No. 420.

Defendant Garrett's Appeal

I. Comparative Juror Analysis Does Not Apply to Jurors Who Were Not Compared Below During Voir Dire

Like Sorrels and Jenkins, Garrett contends his convictions must be reversed for *Batson/Wheeler* error in finding the prosecutor provided race-neutral reasons for excusing Juror No. 8475 and Juror No. 2599. In support of his position, Garrett compares the responses of many jurors who were ultimately excused with that of the two jurors in question. With the exception of the comparative jurors whose similarities were argued before the trial court, we need not consider the comparative juror analysis presented by Garrett on appeal. The Supreme Court in *Lenix, supra*, 44 Cal.4th at page 624, holds that a "reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." Garrett interprets this pronouncement to mean any panelist or seated juror who is identified on appeal. We disagree. We interpret the Supreme Court's statement to mean that the comparative juror must be brought to the attention of the trial court first before we must consider it. This is because "comparative juror evidence is most effectively considered in the trial court where the defendant can make an inclusive record, where the prosecutor can respond to the alleged similarities, and where the trial court can evaluate those arguments based on what it has seen and heard." (*Ibid.*) We also reject Garrett's *Batson/Wheeler* contention on the same grounds as set forth in our analysis of Sorrels's and Jenkins's arguments.

II. The Trial Court's Failure to Instruct the Jury on Accomplice Testimony Was Harmless

For the reasons explained in addressing Sorrels's appeal, we reject Garrett's contention that his conviction must be reversed because the trial court failed to instruct the jury sua sponte on the law governing accomplice testimony as it related to witness J.K. Gray. There was sufficient corroborating evidence supporting Gray's preliminary hearing testimony as to Garrett as well. Garrett's own statements recorded in the jail cell

provide the corroborating evidence. Indeed, while he was in the jail cell, he spoke on his mobile phone and said that he had been booked for murder. He later said, "They still can't prove nothing.' Maybe we was passin' by." He also said, "They got everybody who was ridin' with us." By his own admissions, Garrett placed himself in the caravan of vehicles who went to the murder scene, providing corroboration of Gray's testimony as to his actions on the night of the murder.

III. Any Error in Not Allowing Gray to be Impeached Was Harmless

At trial, the defense asked to impeach Gray's testimony with his two prior felony convictions—one for receiving stolen property and one for possession of an assault weapon. A witness may be impeached with evidence of a prior felony conviction if the underlying offense is a crime of moral turpitude. (Evid. Code, § 788; *People v. Castro* (1985) 38 Cal.3d 301, 317.)

The trial court permitted the defense to impeach Gray only on the stolen property conviction on the ground that possession of a firearm by a felon is not a crime of moral turpitude. On appeal, Garrett contends that the trial court erred and the error was prejudicial to the defendants. Garrett argues that it is reasonably probable the jury would not have convicted him if the trial court had permitted the defense to impeach Gray with his prior conviction for possession of an assault weapon, citing to *People v. Watson* (1956) 46 Cal.2d 818, 836. Garrett further argues the trial court's ruling was not harmless beyond a reasonable doubt under the standard articulated in *Chapman, supra,* 386 U.S. at page 24 for violation of a defendant's constitutional rights.

According to Garrett, the exclusion of Gray's prior conviction for possession of an assault weapon deprived the defense of a powerful tool to challenge Gray's credibility. Since the jury was aware of only one prior conviction, there was a "false aura of veracity" surrounding Gray since it suggested that he had generally lived a "legally blameless life" but for the receipt of stolen goods and his participation in the Sanchez shooting. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 927.) In the first trial, the jury heard about two prior convictions Gray incurred as a minor—possession of a firearm and possession of a deadly and dangerous weapon. The first trial resulted in a hung jury. "[C]ases have found it persuasive that the first trial ended in a hung jury when deciding

whether the error that occurred in the retrial was prejudicial." (*People v. Soojian* (2010) 190 Cal.App.4th 491, 520.)

The People concede the trial court erred in deciding possession of an assault weapon was not a crime of moral turpitude, but argue that the error was harmless. We agree.

As we have noted, Gray's credibility was already impeached by one prior conviction. It is not likely that impeachment with another prior felony would have added significantly to the jury's analysis of his truthfulness. Further, the jury had other reasons to suspect Gray's testimony since it knew he believed he received immunity from a murder charge for testifying.

Further, it seems unlikely the jury would determine that impeachment with a second felony conviction would undermine Gray's believability given that his testimony was supported by other evidence presented at trial such as the Lara's Tow video, the car registrations, photographs of the defendants together, Moreno's testimony, Jenkins's and Sorrels's own statements to the police, and the conversations between the defendants while they were held in custody. In addition, Gray was not seeking to testify against the defendants. In fact, he was reluctant to testify and this was reflected in the transcript of his testimony that was read to the jury.

Finally, we reject Garrett's argument that the fact that the first trial ended in a hung jury is proof that the error in the retrial was prejudicial. There is no contention that the two trials were identical, but for this one error.

DISPOSITION

The judgments of all three defendants are affirmed.

BIGELOW, P. J.

I concur:

GRIMES, J.

People v. Jerry Sorrels et al.

B224166

RUBIN, J.; Concurring

I concur in the affirmance of the convictions of all three defendants and specifically with the following parts of the Discussion in the majority opinion: Sorrels's Appeal – parts I, II, III, and IV; Jenkins's Appeal – parts I, II.B, III, IV, V, VI only; and Garrett's Appeal – parts I, II and III. I write separately to express my view that the trial court overstepped its bounds in detailing the prosecution's case to the panel of prospective jurors. For that reason, I do not agree with the majority's analysis in part II.A of the Jenkins's appeal. However, I acknowledge that the error was harmless.

"Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233 (*Sturm*).) As Justice Stanley Mosk wrote in his dissent in *People v. Proctor* (1992) 4 Cal.4th 499 (*Proctor*): "A judge must, of course, cleave fast to the judicial role and not adopt that of an advocate. . . . [¶] . . . ' "The influence of the trial judge on the jury is necessarily and properly of great weight," and jurors are ever watchful of the words that fall from him.' (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.)" (*Proctor*, *supra*, at p. 563 (dis. opn. of Mosk, J.), citations omitted.) Comments from the court should be made "with great care" (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 886 [com. on evidence]), and "with wisdom and restraint" (*People v. Shannon* (1968) 260 Cal.App.2d 320, 331 [com. on evidence]). " 'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.' [Citation.]" (*People v. Linwood* (2003) 105 Cal.App.4th 59, 73 [com. to clarify which acts referred to which counts].)

Notwithstanding these words of caution, I recognize that article VI, section 10 of the California Constitution authorizes the court to "comment on the evidence and the testimony and credibility of any witness" to assist the jury in reaching a just verdict. (See also Pen. Code, § 1093, subd. (f), § 1127; *Sturm, supra*, 37 Cal.4th at p. 1232; *People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) The rule applies equally to judicial comments

made during jury selection. (*Sturm, supra*, at p. 1232.) But the trial court's power to comment on the evidence has strict limitations. Its comments " 'must be accurate, temperate, nonargumentative, and scrupulously fair.' [Citation.]" (*Ibid*.) " 'The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]' [Citations.]" (*Proctor, supra*, 4 Cal.4th at p. 542 (maj. opn.).)

Sturm, supra, 37 Cal.4th 1218, is instructive. In that case, the defendant was convicted of first degree felony murder with special circumstances; the jury made no finding as to deliberate and premeditated first degree murder. After the jury could not reach a penalty verdict, a mistrial was declared. (*Id*. at p. 1222.) Although the first jury did not find the murders premeditated, the trial court told a prospective panel of jurors for the second penalty trial that premeditation was a "gimme" and that the issue of premeditation was "all over and done with." (*Id*. at p. 1231.) Our Supreme Court reversed the death sentence. It reasoned that, not only were the comments factually incorrect, they bolstered the prosecution's case and undercut the defendant's argument that lack of premeditation was a factor in mitigation. (*Id.* at p. 1232.)

I do not mean to suggest that the comments the trial court made here are anywhere near as egregious as what happened in *Sturm.* I have no doubt the trial court believed that he was assisting the jury in understanding the facts that likely would be adduced at trial. I certainly agree that the court's recitation in the voir dire process of the key events of a criminal prosecution may provide context for the questions put to the jury and may ferret out any information that a juror may have about a case or a juror's bias. I note the efforts the trial court made to state that what it was about to describe was only the prosecution's theory of the case, and that the defense disputed the prosecution's contentions.

Nevertheless, I see serious problems with the court's remarks and they are at least threefold:

1. Only the prosecution's facts are set out. This is not particularly surprising and reflects a reality of criminal procedure. The defense does not have the burden of

proof, counsel may not put on a defense, counsel may not decide whether to make an opening statement until much after voir dire has been completed. Thus, statements such as the one made by the trial court will almost always be from solely from the prosecution's perspective.

2. The individual factual statements are not immediately preceded by a warning that they are only the prosecution's contentions. Seven paragraphs appear on their face to be facts, all supporting the prosecution's case. For example, the seventh paragraph on page 26 of the majority opinion states, in part:

"The Escalade then drove forward. The Chevy Trailblazer pulled up next to the Astrovan, and the front passenger fired a small caliber handgun into the Astrovan."

Much earlier, the court advised the jury that what he was about to say were only contentions, but whether the jury took this statement (or others) as true – forgetting or not understanding "contentions" – cannot be ascertained with any degree of certainty.

3. Finally, it is particularly troubling that the court repeated these facts three times, once to each of three panels of prospective jurors. By the time the jurors heard the first piece of actual evidence, it is likely some of them had already heard the prosecution's theory of the case mentioned four times, three times by the court and once by the prosecution in its opening statement. The error was compounded by this repetition. (See *Taha v. Finegold* (1947) 81 Cal.App.2d 536 [trial rendered unfair by repetitive jury instructions].) I have great concerns that by the time the prosecution's actual evidence came in, the jurors were acclimated to this testimony and to its truth. After all, the jurors had heard it over and over, and "even the court told us this was what we were going to hear."

I agree there is room for the trial court to advise a jury in a neutral way what the case is about: the charges, where key events took place, some rudimentary identifying information about the people involved. In the present case, in my view, the court went

too far. The prosecution's opening statement was in effect given four times, raising the considerable concern that by the time the jury had heard the evidence, they were so inured to the prosecution's theory that its ability to assess the evidence objectively was impaired.

The error notwithstanding, the evidence supporting conviction was overwhelming, so there was no reasonable probability that the trial court's challenged comments affected the verdict. (*People v. Melton* (1988) 44 Cal.3d 713, 736.)

RUBIN, J.