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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN CARDENAS, JESUS VASQUEZ TRUJILLO and ISABEL IRENE VARELA, Defendants and Appellants.	A122243 (Solano County Super. Ct. Nos. FCR-240620, FCR240621, FCR240622)

Isabel Irene Varela, Jesus Vasquez Trujillo, and Jonathan Cardenas (collectively defendants) were convicted, following a jury trial, of first degree murder. Among the many issues raised on appeal, both Trujillo and Cardenas contend the trial court improperly denied a *Wheeler/Batson*[1] motion challenging the prosecutor's peremptory challenge of a potential juror, improperly denied a defense challenge for cause of a potential juror, and improperly denied a motion to sever their trials from that of codefendant Varela.

Both Cardenas and Varela raise several contentions regarding evidence related to the criminal street gang enhancement. These include claims that the jury's true findings on the gang enhancement allegation are not supported by substantial evidence, as well as

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

that the trial court abused its discretion when it barred cross-examination on the factual basis for a gang expert's opinion and then refused to strike that testimony. We agree that the barring of such cross-examination and refusal to strike was an abuse of discretion, but find the errors harmless. Cardenas also contends the gang expert improperly offered his opinion on ultimate issues in the case; however, there was no objection and also no prejudice.

Varela further contends the trial court erred in denying her request for a pinpoint instruction on prior threats and violence as they related to her duress defense, and that the prosecutor committed misconduct in closing argument by misstating the law of duress. Trujillo contends the prosecutor committed misconduct in closing argument by saying that Trujillo's counsel would rather be trying the prosecution case. Cardenas contends the trial court erred in failing to instruct the jury sua sponte that an oral admission of a defendant should be viewed with caution, and that the court erred in calculating his presentence credits. Each defendant also claims that the cumulative effect of the errors raised on appeal require reversal of the judgment.

In addition, Cardenas and Varela both contend their prison sentences constitute cruel and unusual punishment under both the California and United States Constitutions. Finally, each defendant has stated that he or she joins in each codefendant's arguments on appeal.

We conclude that Cardenas is entitled to one additional day of presentence custody credit. We shall otherwise affirm the judgments.

PROCEDURAL BACKGROUND

Defendants were each charged by information with one count of murder of Gerardo Castillo Ramirez (Pen. Code, § 187, subd. (a)).[2] The information further alleged that the offense was one in which a principal personally and intentionally discharged a firearm, a handgun (§ 12022.53, subds. (c), (e)(1)), and was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)).

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

As to Trujillo, it was alleged that he personally and intentionally discharged a firearm that caused great bodily injury and death (§ 12022.53, subd. (d)), that he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and that he personally used a firearm (§ 12022.5, subd. (a)(1); § 12022.53, subd. (b)). The information also alleged that Trujillo had suffered two prior convictions or juvenile adjudications for serious or violent felonies (§ 1170.12, subds. (a)-(d); § 667, subds. (b)-(i)), and that Cardenas has suffered two prior convictions for which he had served prison terms (§ 667.5, subd. (b)).

At the conclusion of a jury trial, the jury found defendants guilty of first degree murder[3] and found the gang and firearm enhancement allegations true. Following a court trial, the trial court found that Trujillo's two juvenile priors were not strikes. Also following a court trial, the trial court found Cardenas's prior convictions true, but found that he had served only one prior prison term.

On July 18, 2008, the trial court sentenced Varela to 50 years to life in prison, including 25 years to life for murder and a consecutive term of 25 years to life for the gun use enhancement. The court stayed a sentence for the gang enhancement. On July 28, 2008, Varela filed a notice of appeal.

On September 9, 2008, Cardenas was sentenced to a total term of 51 years to life, including 25 years to life for murder and a consecutive term of 25 years to life for the gun use enhancement, plus one year for a prior prison term. The court stayed a sentence for the gang enhancement. On September 17, 2008, Cardenas filed a notice of appeal.

On September 22, 2008, the court sentenced Trujillo to 50 years to life in prison, including 25 years to life for murder and a consecutive term of 25 years to life for the gun use enhancement. The court stayed a sentence for the gang enhancement. On September 23, 2008, Trujillo filed a notice of appeal.

[3] Trujillo was found guilty of first degree murder; Varela and Cardenas were found guilty of first degree felony murder.

FACTUAL BACKGROUND

Prosecution Case

At approximately 2:20 a.m. on March 10, 2007, Fairfield police officers were dispatched to a shooting at an apartment complex on Dana Drive in Fairfield. At the scene, they found Gerardo Castillo Ramirez[4] lying on the ground with a gunshot wound to the face or neck; he was already dead.

According to the forensic pathologist who performed the autopsy, Castillo Ramirez died of a single gunshot wound to his neck. The absence of soot or stippling indicated the barrel was at least one and one-half to two feet from his neck when the gun fired. Autopsy results indicated the presence of methamphetamine, amphetamine, and alcohol in his blood.

At the scene, police found a black ski cap containing Trujillo's DNA. No shell casings were found at the scene, but a single bullet recovered from Castillo Ramirez could have been .38-caliber or nine-millimeter. The absence of casings suggested that the weapon was a .38 revolver.

Robert Miller testified that, on the night of March 9, 2007 into the morning of March 10, he was homeless and was staying in a carport on Dana Drive, along with his girlfriend, Catherine Wheeler, and a man named Tony. He and Wheeler had used $10 worth of methamphetamine that night. Shortly past midnight, he heard a "scuffle" in the apartment complex across the street from the carport. It was dark, but he saw the silhouettes of two or three people, or possibly more. The sound of rocks being thrown and people fighting lasted a couple of minutes. He then heard someone say, "He's got a gun" and "Run," and the victim ran into the middle of the street. Someone then grabbed him by his shoulder, turned him around, and shot him in the face. The victim fell in the street and the man who shot him ran off. The shooter was smaller than the victim, who was big. Another man, who might have been wearing a dark plaid button-up, short-

[4] We will refer to the victim as "Castillo Ramirez" in this opinion even though some witnesses at trial referred to him as "Castillo" or "Ramirez."

sleeved shirt, ran into some bushes. Miller and Tony then ran up to Wheeler, who was closer to the front of the carport, and got her onto the ground. At that point, Miller did not see anything else, but heard three more gunshots.

After that, Miller saw the man who had gone into the bushes get into a silver Chevy Impala automobile with big rims. He also heard the voices of another man and a woman in the car. He heard the female voice say, "Get in. Get in." Miller then ran to the hospital to report the shooting.

Police subsequently showed Miller several photo spreads, and he identified one photo as that of the man who ran from the scene and later got into the car. He identified that man at trial as defendant Cardenas.

Miller's girlfriend, Catherine Wheeler, testified that, while in the carport on the early morning of March 10, 2007, she heard a scuffle and rocks being thrown or kicked; the sound was coming from the apartments across the street. During the scuffle, she saw a Mexican woman with blond hair come out from a driveway of the apartment complex and get into a Silver Malibu automobile with rims and tinted back windows, which had stopped to pick her up. At trial, Wheeler identified Varela as the woman she saw on March 10, 2007.

After that, Wheeler saw two males emerge from the courtyard of the apartments onto Dana Drive. She heard someone say to run because he saw a gun. The bigger man was running in Wheeler's direction when the smaller man grabbed him from behind, turned him around, and shot him in what appeared to be the chest area. She saw the victim fall to the ground, but did not see anything else because her boyfriend threw her onto the ground. She did hear about five more gunshots about five seconds later. When she looked again, she saw a big Mexican man trying to help the victim, who was still lying in the street. After reading a copy of the police report from March 10, Wheeler recalled identifying Cardenas as someone who was at the scene and was associated with the shooter.

Jedadiah Vineyard, who lived on Dana Drive, testified that early on the morning of March 10, 2007, he heard about three gunshots. He looked out the window and saw a

silver Malibu speed off. He then saw two people running down the street to the hospital. He was later shown a car by police that he identified as the same one he saw driving away.

Daniel Ponce testified that, on the evening before his friend Gerardo Castillo Ramirez was killed, Ponce, Castillo Ramirez, and another friend, Rolando Rodriguez, were together at the Mexico Lindo Bar in Fairfield, relaxing and drinking beer and other alcohol. Ponce had known Rodriguez since childhood and had known Castillo Ramirez for about five years. Ponce had smoked a joint of marijuana and also had had five shots of tequila before he got to the bar. He was at the bar for about two hours, during which time he drank eight to 10 beers and had about six more shots of tequila. After he left the bar, Ponce had a conversation with a woman who had previously been inside the bar. They talked about "going to a spot and just . . . kicking back with some other girls." The woman said they would go to her place to keep partying. Ponce identified Varela at trial as that woman.

At some point, Castillo Ramirez and Rodriguez joined Ponce and Varela outside the bar and, at Ponce's suggestion, they all walked to nearby George's Liquor to buy some more beer. Around that time, Ponce called and ordered a cab, which picked all four of them up outside of a Food Max store and took them to the back of some apartments on Dana Drive. Once there, the men followed Varela, who led them between two apartment buildings, where it was "pretty dark." None of the three men were armed. There had been no discussion with Varela about a dope deal; they were there to party.

As Varela led them into a courtyard area, Ponce saw a man walking toward them. He heard Rodriquez say, "Watch out. He has a gun." Ponce then saw another man who had come up from behind them. Castillo Ramirez was struggling with the first man, who had a gun. Ponce started hitting the man with the gun, and all three tripped on rocks and fell to the ground. Castillo Ramirez had grabbed the man's hands and was pointing the gun away from them. The other man started kicking Ponce in the head and back, and then moved away and threw rocks at him. Ponce got up and threw rocks back at that man.

Castillo Ramirez got away from the man with the gun, told Ponce to run, and started running himself. Just after Ponce started to run, he heard gunshots. After the second shot, Ponce turned around and saw Castillo Ramirez lying in the street. He also saw a tan car with chrome rims pull up and saw two people get into the car; he believed they were both males. Ponce then went to Castillo Ramirez and stayed with him until the police arrived. Police later took Ponce to a location at which he identified Varela as having been involved in the incident. He could not identify two males as having been at the scene because it had been dark there.

Rolando Rodriguez testified that on the night of March 9, 2007, after drinking about six beers at home with family members, he went to the Mexico Lindo Bar, where he saw Castillo Ramirez and Ponce. He drank at least 12 to 18 beers at the bar, and maybe some shots of Tequila. By the end of the night he was "pretty intoxicated." After leaving the bar, the three men and a girl walked over to George's Liquor and then to Food Max to catch a taxi. The female was using a phone while they walked. Rodriguez wanted to be dropped off at home, but his friends convinced him to continue to party with them. The taxi dropped them all off behind some apartments on Dana Drive. The three men followed the girl toward the front of the apartment complex. They went into a dark area near some stairs and Rodriguez asked the girl where they were going because he needed to use the restroom. But she just ran off. He then saw two people creeping over from the right. One of them hit Rodriguez in the back of the head and he went unconscious.[5]

As he started to regain his senses, Rodriguez felt someone either patting him down or going through his pockets. He pushed the person away and ran off. He did not see his friends and thought they had just left him there. As he ran in the direction of Dana Drive, he heard some shots. When he got to Dana Drive, he saw yellow police tape and police officers; Castillo Ramirez was lying in the street bleeding and Ponce was yelling at him.

[5] Rodriguez was later found to have a short, straight laceration on the back left side of his head. Police found a pry bar in the courtyard of the apartment complex.

Rodriguez was taken to the hospital where he received staples to close the gash in the back of his head.

On cross-examination, Rodriguez denied having any drugs with him at the bar that night. He also denied that the Mexico Lindo Bar was a hangout for Sureno gang members. He said it was a Mexican bar where everybody is welcome. He acknowledged that he was on probation for possession of marijuana in March 2007, but denied asking a nurse at the hospital to get rid of some drugs for him.[6]

Steven Young testified pursuant to a plea bargain in this matter. Under the terms of the agreement, he was to testify truthfully, the initial charges against him of murder and conspiracy were dropped, and he pleaded guilty to being an accessory after the fact to murder. Young was 29 years old at the time of trial and had been in prison for a total of about nine years as a result of multiple felony convictions.

Young used to be a member of the criminal street gang known as the Nortenos, but was not presently a member. In early March 2007, he had been out of custody for about a month. He had known Trujillo, whose nickname was "Shadow," a short time before March 10, 2007. Trujillo was a Norteno. Young had known Cardenas, whose nickname was "Creeper," for quite a while before March 10, 2007. Cardenas was also a Norteno. Young did not commit any crimes with either Trujillo or Cardenas after he was released from prison in February 2007. Young also knew Varela in March 2007. He had seen her four or five times, but had only "kicked it" with her twice. He knew she was a "home girl," which meant she associated with members of the Norteno gang. Whenever he saw her, she was in the presence of Norteno gang members.

[6] Fairfield Police Officer Joshua Cohen testified that he interviewed Rodriguez while he was in the hospital on March 10. Rodriguez admitted to Cohen that he had had methamphetamine residue in some plastic bags and had asked a nurse to ditch it for him. He said the methamphetamine was for his own personal use, but he was afraid of getting in trouble for having it.

In March 2007, Young was living with his girlfriend, Nicole Luna, and her two children at Luna's mother's house. Luna had a 2005 or 2006 silver Malibu automobile, which Young sometimes drove.

On March 9, 2007, Young and Luna went out to dinner and a movie, and then went home. At Luna's request, Young went out around midnight in Luna's car to get some cough syrup for her son. He first went to a friend's sister's house to see if she had cough syrup. He got some methamphetamine from someone who was there. After that, he went to someone else's house and got some cough syrup from her. Young then went to George's Liquors because a friend had asked him to pick up a bottle of vodka for him. While there, he thought he recognized Varela in the parking lot by George's Liquor. She was with two males who looked Hispanic. He tried to call her to see if she needed a ride, but he got her voice mail and hung up.

Young dropped the vodka off at his friend's house and then went to Dana Drive to attempt to pick up Cardenas, who had called him earlier and asked to be picked up there. During the phone conversation, they had talked about "dope" and maybe about getting high. Cardenas also had said something about Varela "going with some guys," that she was taking her time, and that she was "pulling some bullshit."

As Young drove down Dana Drive looking for Cardenas, he saw Varela running down the street. He called her name and, after looking in the window at him, she got into the car and sat in the rear behind the passenger seat. Varela said, "They're whipping on Shadow." Young turned the car around and drove back toward the front of the apartments on Dana Drive. He then saw three Hispanic males coming out from the apartments, including Trujillo and two other men he did not recognize. They were all wrestling over a gun that Trujillo had in his hands. He then saw the flash of the gun going off and one of the men fell onto the ground. A few seconds after the first gunshot, Young saw Trujillo aiming the gun in the direction of the other man and heard a couple more gunshots.

Trujillo ran to Young's car and called Varela's name. Varela said, "Shadow, get in" and opened the car door. Trujillo got in behind Young and Young then drove away.

Young asked Trujillo if he was all right and Trujillo said he got hit in the head with a rock a few times. He also said, "But I got that fool." Young thought Trujillo was boasting about the shooting when he said that. Young drove Varela and Trujillo to Nicole Luna's house, and then returned to a house near the scene of the shooting to pick up Cardenas, after speaking to him on the phone.

After picking up Cardenas, Young drove back to Luna's house to pick up Trujillo and Varela. He dropped Trujillo off at his house and, after getting gas, went to drop Cardenas off at his house. As he arrived, he got pulled over by police and he, Cardenas, and Varela were taken into custody.[7] While Young was in jail, Luna called him and said Shadow (i.e., Trujillo) had called and asked her to go and get the keys from his car, which was still on Dana Drive. Young told her to give the keys to the police.

Young did not know there was going to be a shooting on Dana Drive before going there to look for Cardenas. He did acknowledge telling the police after his arrest that he had assumed there was going to be a robbery or assault. He also acknowledged feeling bitter about getting caught up in this case that he had nothing to do with and being "lured into [the] situation basically blindly."

On cross-examination, Young acknowledged having been a member of the Northern Structure of the Norteno gang during the various periods he was in prison. The Northern Structure is the prison part of the Nortenos, and is a subset of Nuestra Familia. While at Pelican Bay State Prison, he was part of the gang leadership and was involved in the enforcement structure for the gang, which meant he let new inmates know how to function in prison.

Young denied being involved in a gang after his release from prison in February 2007, explaining that Nortenos in prison and Nortenos on the street were completely separate. At the time of the shooting, he was a "middle man" in the sale of methamphetamine. He was the connection between the dope dealer and the customer.

[7] Trujillo was arrested later that morning.

Nicole Luna, who was Steven Young's girlfriend in March 2007, testified that she knew Trujillo, Cardenas, and Varela at that time. On the night of March 9, 2007, she and Young got home from the movies at midnight, and she asked Young to go to the store to get cough medicine for one of her children. At about 3:00 a.m. on March 10, Trujillo called Luna and told her that Young had been arrested. He told Luna to go to his car on Dana Drive and get the keys, which were in the visor. He also said to lock the car. Luna then went to Dana Drive and got the keys out of the car, which was a blue Thunderbird, and locked it. That afternoon, Luna took the car keys to the Fairfield Police Department and gave them to Detective Wilkie.

Trujillo's sister, Enriqueta Vasquez Trujillo (Enriqueta), testified that the Thunderbird was her former stepmother's car and that Trujillo sometimes drove it. Trujillo did not live with her, but sometimes stayed with her when he babysat her children. Enriqueta let Varela stay briefly at her home in March 2007 as a favor to Enriqueta's half sister, who was also Varela's cousin and who wanted to clean Varela up and get her off the street. Enriqueta asked Varela to leave because Varela would not heed the rules in the house.

An employee of the Shooting Gallery gun store in Vacaville testified that on the afternoon of March 9, 2007, he sold a box of .38 caliber ammunition to a woman who was accompanied by a man. The man asked questions; the woman seemed quiet, with nothing out of the ordinary in her demeanor. She seemed like "someone who didn't want to be there" in the sense that "a lot of times you get women who are dragged there by men, 'Hey honey, go check this out,' so it's kind of a common thing." He was able to identify the man as Trujillo, but was unable to identify the woman. The shift supervisor at the Shooting Gallery that day was able to identify both Trujillo and Varela at trial. The parties stipulated that the ammunition Varela purchased that day was not the same brand of bullet found in Castillo Ramirez's skull.

Detective Robert Wilkie interviewed Steve Young shortly after his arrest. Young said he had no prior knowledge of what was going to happen on Dana Drive. He had driven there to pick up Cardenas, and the events started unfolding in front of him. He

told Wilkie that he saw Trujillo shoot the victim and also later heard Trujillo say, "I got that fool." Young also said, however, that, before driving to Dana Drive, he had talked on the phone with Cardenas, who said Varela "was supposed to bring him some guys" and "that he was getting some money." After talking to Cardenas, Young assumed, "based on his experience, that it would probably be to rob somebody or beat somebody."

Wilkie also interviewed Trujillo shortly after his arrest. Trujillo denied any involvement in the shooting and claimed that he was at his sister's house, babysitting her children, during the relevant time period. He also said that he had last driven his stepmother's Thunderbird two days earlier.

Cell phone records showed that, between 4:22 p.m. on March 9 and 3:45 a.m. on March 10, there were 10 phone calls between Young and Cardenas. Between 9:00 p.m. on March 9 and 11:38 a.m. on March 10, there were 20 calls between Trujillo and Varela, lasting between seven and 216 seconds. Near the time of the killing, both Young and Trujillo exchanged calls with Joseph Degros, an active member of Varrio Centro Fairlas (VCF) whose gang name was Solo.

William McCoy, a detective with the Fairfield Police Department, testified as an expert on criminal street gangs. He had been a deputy sheriff in Los Angeles County for 10 years before coming to Fairfield, where he had been a police officer for seven years. In both jobs, he had attended and offered numerous trainings related to gangs, including Nortenos and Surenos, and had worked for much of his law enforcement career in gang-related areas.

McCoy opined that the Nortenos are a criminal street gang that engages in criminal activities, primarily graffiti tagging, robbery, auto theft, murder and other assaults, and narcotics trading. Nortenos are associated with the color red and the number 14. He described the street gang of Nortenos as "street or foot soldiers for the Familia Nuestra prison gang." He explained that Fairfield had two Norteno subsets: VCF (Varrio Centro Fairlas) and Varrio War Zone. The Sureno street gang is a rival gang to the Nortenos.

McCoy was familiar with Fairlas Records, which he described as an underground rap recording studio in Suisun, which was founded and run by Nortenos. "Shadow" was identified as one of the artists on a CD from the studio. McCoy was also familiar with the Mexico Lindo Bar in Fairfield, which was known as a Surenos bar. The bar's sign had been tagged with the number "13," which is synonymous with the Sureno gang. However, Leticia Torres-Morales, bartender at the Mexico Lindo, was a Nortena.

McCoy had interviewed Steven Young at least four times and had had contact with him on the street prior to March 10, 2007. Young had admitted that he was an active Norteno, and McCoy believed that he was an active Northern Structure member of the Nortenos. McCoy believed that Young was a "shot-caller" for the gang, i.e., "the person who is in charge who has the ability to have others do things for him." Young had told McCoy that he was the third-ranking member of the Nortenos in Fairfield, and McCoy believed he exercised supervisory control over the VCF clique. If members of the gang were planning to commit a crime in Fairfield, they would be expected to inform leaders, such as Young, beforehand.

In fact, Young had said he was upset that he was brought into this situation without being told about it beforehand, although he did assume from what Cardenas had said to him on the phone shortly before the crime that there was going to be a set-up for a robbery or a beating. However, when a gang member commits a crime without informing the gang leaders, it could still be a gang crime, for example, if someone were trying to impress the leaders or if there was a miscommunication within the gang.

McCoy also opined that Trujillo was an active Norteno, based on the fact that Trujillo had the numbers one and four tattooed on his arms; the number 14 is significant to Norteno gang members and Nuestra Familia because "N" is the 14th letter of the alphabet. The prosecutor showed McCoy a photograph, which McCoy described as having been taken at Fairlas Records, in which the predominant color was red and Trujillo was pictured throwing gang signs. McCoy further opined that Cardenas was a Norteno gang member, given that he had freely admitted to police that he was a Norteno.

McCoy believed that Varela was a female member of the gang, called a Nortena, based on his interview with her, the people she hung with, and the type of activity in which she was involved. Nortenos is primarily a male gang, but female gang members sometimes carry weapons, hide drugs, and drive stolen cars. Varela's boyfriend in March 2007 was Gabriel Tafolla, who was a Norteno gang member. McCoy also saw images related to Norteno gang culture in Varela's cell phone.

McCoy believed that the shooting victim, Castillo Ramirez, and his friends, Ponce and Rodriguez, were Sureno gang associates, which meant they were not active gang members, but associated with Surenos. Ponce and Rodriguez were both involved in gang-related methamphetamine drug sales.

When a gang member commits crimes, it may or may not be for the benefit of or at the direction of the gang, depending on the circumstances. Outside of prison, it is possible for a gang member to commit crimes that are not gang-related. Gang members commit crimes "[f]or the benefit of the gang, and for, um, fear and reputation which, um, brings them esteem within the neighborhood and within their gang culture." McCoy believed that the offenses alleged in this case "were at the direction of, for the benefit of, or in association with the criminal street gang known as the Nortenos."

Based on his familiarity with the case, "and the way the Norteno, Northern Structure, Nuestra Familia conducts itself," McCoy believed a meeting took place at Fairlas Records in Suisun in which "something of this nature was planned" by "Northern Structure and Norteno members." He further believed that "[t]he individuals involved then went out and conducted that plan. They went and looked for the individuals that they wanted to assault, rob, and if it needed to be, killed [*sic*]. . . ." He believed this meeting occurred two nights before the shooting. He learned about the meeting from Varela and Leticia Torres-Morales. He had no other information about the meeting besides what they told him. This meeting was one of the reasons McCoy believed the crime was committed for the benefit of the gang.

Defense Cases

1. *Cardenas's Witnesses*

Cardenas testified that he had previously suffered two felony convictions and that, with one of those convictions, he had admitted an enhancement allegation that he was a gang member. He did so to avoid prison. Before those convictions, he associated with gang members in his neighborhood, specifically, "Northerners." When he was in prison, he told authorities he was a northerner because he had grown up with northerners. In March 2007, Cardenas had known Trujillo for about a year and had known Varela for a couple of months. Varela was a Norteno gang member. He had known Steve Young for about 10 years. Cardenas's nickname was "Creeper." Trujillo's nickname was "Shadow." Cardenas had most recently been released from prison on March 5, 2007. He and Trujillo had become friends in prison in 2006.

On the evening of March 9, 2007, Cardenas and Trujillo planned to get together and go to a party. Trujillo was going to drop Varela off before picking up Cardenas. Close to midnight, Trujillo picked him up in a blue Thunderbird and they went to Trujillo's sister's home in Dover Villa in Fairfield. While they were together, Trujillo had several phone conversations with Varela, during which Trujillo expressed upset and anger about his cell phone being taken. They then left Trujillo's sister's house and went looking for Varela. They did not find her and eventually returned to Trujillo's sister's apartment.

After another phone conversation with Varela, Trujillo told Cardenas that Varela knew someone who had some crystal methamphetamine for sale. Cardenas convinced Trujillo to buy the methamphetamine, so that they could make some money.[8] Trujillo and Varela discussed on the phone where to meet; Trujillo then drove Cardenas to Dana

[8] Cardenas explained that if they bought the methamphetamine at the price it was supposed to be sold for, they could sell it and double their money.

Drive in the Thunderbird. The plan was for Varela to come to Dana Drive in a taxi with a "Pisces border brother"[9] who was going to sell them the drugs.

Once on Dana Drive, Trujillo parked the car. Cardenas saw a group of people in a carport, across the street from some apartments. Cardenas talked to Steve Young on the phone and told him that he was "waiting on Isabel [Varela]. She was supposed to be coming to hook something up." He told Young about the plan to make money, and also said something about Varela's "bullshit" because she was taking a long time to arrive. Trujillo had gone across the street to see if his cousin was home. When he came back, the two men got back into the car, planning to leave since Varela was taking so long to arrive. They had been waiting 30 to 45 minutes.

Cardenas saw a taxi pull up into a driveway of the apartments. Trujillo left the car keys in the visor of the car and started walking towards the apartments, and Cardenas followed behind him. Trujillo was wearing a black beanie. They walked into a courtyard where Cardenas first saw Varela, who was with Ponce, Castillo Ramirez, and Rodriguez. He heard Rodriguez yell out, "Sur trece," a gang moniker that means "Southerners." He then saw Castillo Ramirez punch Trujillo in the face. Ponce then said, "Jump on him as well," and Ponce then punched Trujillo in the face. Cardenas saw Rodriguez walk towards where the fight was taking place and Cardenas hit him in the side of the head with his fist. Cardenas did not have a pry bar with him and did not recall seeing one at the scene. Cardenas then grabbed Rodriguez by his sweater, swung him around, and threw him to the ground. Varela ran out the back of the apartments after Cardenas hit Rodriguez.

Cardenas then ran over to where the fight was taking place in the center of the courtyard. Trujillo was lying face down on the ground. Castillo Ramirez was on top of him and was hitting him in the back with one of the rocks that were on the ground throughout the courtyard. Ponce was on his feet and was reaching underneath Trujillo.

[9] In his opening brief, Cardenas defines "Pisces" as "drunken Mexican national marks."

Cardenas ran over and picked up a rock, which he used to hit Ponce two or three times in the back in an effort to get him off of Trujillo. Ponce jumped up and picked up a rock. As Cardenas backed away, Castillo Ramirez and Trujillo got to their feet. Ponce started throwing rocks at Cardenas and Cardenas threw a rock back at Ponce.

Cardenas looked at Trujillo, who appeared dazed, and saw that Trujillo was pointing a gun at him. Trujillo had not told Cardenas that he had a gun. Ponce and Castillo Ramirez froze and Cardenas told Trujillo to run. Ponce then hit Trujillo over the head with a rock. Trujillo almost fell, but then started to run out of the courtyard toward Dana Drive. Castillo Ramirez and Ponce followed after him. Cardenas saw Castillo Ramirez catch up to Trujillo and reach out to grab him. He then saw a muzzle flash and heard a gunshot. Cardenas ran out the back parking lot, jumped two fences and got onto a bike trail. He ran down the trail until he stopped at a friend's house and knocked at the door. Young then called him on his cell phone, and he asked Young to come and pick him up.

Young picked up Cardenas in a Chevy Malibu and they went to the house of Young's girlfriend, Nicole. Trujillo and Varela were already there and they got into the car. Cardenas saw a gun in Trujillo's lap. Young drove to Trujillo's sister's house and Trujillo got out. Young then drove to Cardenas's mother's house, where Cardenas, Young, and Varela were arrested.

An emergency room nurse, who was Rolando Rodriguez's primary nurse at the hospital on the night of the shooting, testified that Rodriguez told her he was on parole and he needed to go to the bathroom to get rid of some drugs. Another nurse told Rodriguez to give him the drugs. Rodriguez pulled three or four very small plastic packages out of his pants and gave them to the other nurse, who went into the bathroom and there was a flushing sound.

A former police officer who testified as an expert in possession of methamphetamine for sale opined that the three or four bags of methamphetamine in Rodriguez's possession were possessed for sale.

Leticia Torres-Morales testified that, in March 2007, she had worked as a bartender at Club Mexico Lindo, a Latin bar in Fairfield, for more than a year and a half. The bar is "mostly Hispanic, but a lot of southerners go in there." During her time working there, Torres-Morales had seen about four northerners in the bar. Torres-Morales had relatives who were northerners and they gave her the option "to have them or my job." She stopped talking to them for a period of time, and she continued to work. Torres-Morales had been a member of a northerner gang in San Francisco when she was a minor, and would beat people up at the behest of the gang. Before March 9, 2007, Torres-Morales had met Varela one time. Varela had said she was associated with northerners in Fairfield.

On the night of March 9, into the early morning of March 10, Varela was in the bar. Rodriguez and Ponce were also present; they were at the bar every Friday, Saturday, and Sunday. Castillo Ramirez was also at the bar that night; Torres-Morales had only seen him there twice in all the time she had worked there. That night, Torres-Morales saw Rodriguez using methamphetamine. She had previously seen him sell methamphetamine to a friend of hers. She had never seen Ponce or Castillo Ramirez sell drugs. Rodriguez had previously told Torres-Morales that he was affiliated with the southerners—specifically San Marco Street in Fairfield—as a gang member. Ponce was "just a tag-along" with Rodriguez. Castillo Ramirez had never told her he had any gang affiliation.

On the night of March 9, Varela came to the bar alone. She talked on her cell phone three different times while she was there and it sounded like she was arguing with someone. Varela told Torres-Morales that she had been fighting with her boyfriend and wanted to set him up for an "ass beating." She asked if she could stay at Torres-Morales's house because she did not want to be with this boyfriend again. Torres-Morales turned her down. Varela also asked if Torres-Morales wanted to help her set him up and split the money they would get from him, and Torres-Morales turned her down again. Later that night, Varela talked to Torres-Morales about setting up Rodriguez, Ponce, and Castillo Ramirez, who were sitting nearby. She used the words,

"fuck them up," when she talked about setting them up. Torres-Morales said no, "That wasn't me," and also suggested that Varela ask her boss for a job. Varela asked Torres-Morales questions about the three men.

Torres-Morales was concerned that Varela's plan could be dangerous for the three men, so she then spoke to Rodriguez, who was conversing with Varela, "and told him that he shouldn't talk to [Varela], that he should back off and make sure not to leave with her." She also told the bar owner that Varela was trying to set them up. Rodriguez continued talking to Varela, and Torres-Morales made "sign gestures" to him to stop talking to her, but he did not stop. He was paying attention to Varela in a "romantic way." Later, Torres-Morales also saw Ponce talking to Varela, but Castillo Ramirez kept to himself. Later still, she saw Varela outside; Ponce and Rodriguez were outside also. While at the bar, Varela did not act scared. In fact, she seemed very confident.

After the shooting, Torres-Morales spoke to police about what had happened in the bar. She initially did not tell everything that had happened on the night of March 9, because she was afraid for her safety. She had started receiving phone calls from people asking if she had something to do with the killing, and also from people identifying themselves as part of San Marcos, a southerner affiliation, threatening her life and the lives of her children. She ultimately left her job at Mexico Lindo.

2. *Varela's Witnesses*

Isabel Varela, who was 26 years old at the time of trial, testified that, due to drug problems, she was homeless from July 2006 until March 2007, when she began living at Trujillo's sister's house. She had two children, ages five and seven, who lived with her mother after she became homeless.

In late 2006 and early 2007, Varela had a boyfriend named Gabriel Tafolla who was a Norteno gang member. Tafolla was arrested in January 2007, one day after Varela was released from custody after having stolen two cars. She stole the cars because Crazy David, a Norteno gang member, asked her to do so. She had never done anything like that before. She was, however, an alcoholic and "smoked weed and did

methamphetamines." She had been in special education through most of her school years because she was "slow at comprehending stuff."

Varela and her boyfriend, Tafolla, hung out with members of VCF, a gang in Fairfield that is related to the Nortenos. After Tafolla was arrested, gang members asked Varela to participate in a robbery of a 7-Eleven, but she argued about it because she did not want to help them.

Shortly before the shooting in this case, perhaps the week before, Varela was at Fairlas Records with about seven VCF gang members when there was a conversation about a gun. Varela was accused of losing a gun, which was not true. She had been kept hostage the day the gun went missing and she was hit with another gun and told she would be killed if she did not make up for the missing gun. Crazy David told her she would have to "[p]ut in work," which meant to help them do whatever they wanted her to do. In the past, when she was told she needed to do work for the gang, Tafolla had done the work for her. There was no discussion of a particular crime on the day of the meeting at Fairlas Records.

Varela knew Trujillo, Cardenas, and Steve Young before March 9, 2007. She knew that Trujillo and Young were Nortenos, but did not initially know Cardenas very well and did not know that he was also a Norteno. As of March 9, she had been staying with Trujillo's sister, Enriqueta, for about two weeks. She was never kicked out of the house, and her purse was found there after her arrest on March 10. She had been homeless and Trujillo let her stay there. At one point during those two weeks, Trujillo grabbed her arm, pushed her to the bed, and had sex with her; she did not want to have sex with him. She did not call the police about it because she "wasn't thinking."

Varela and Trujillo spoke on the phone on March 9, 2007, and Trujillo said he wanted her to go to the store for him. He also said he had her cell phone and if she could do something for him, he would give it back to her. She agreed and he picked her up in a Thunderbird automobile. They drove to the Shooting Gallery in Vacaville and Trujillo said he needed her to use her identification because he was on parole. Trujillo gave her $30 and they both went inside the store. Trujillo asked for .38 caliber bullets, which she

eventually bought. Outside the store she gave the bullets, receipt, and change to Trujillo. They then returned to Fairfield.

Varela later went to a party with a girl she knew named Rochelle, where she drank some alcohol. She called Trujillo to pick her up because she did not feel comfortable at the party. He picked her up and they went back to Enriqueta's house. Enriqueta's two sons were there, as well as Cardenas. Eventually Varela left the house with Trujillo and Cardenas, after Trujillo said she could not stay there because he was not going to be there. Trujillo was driving the same Thunderbird car. They ended up going to the Mexico Lindo Bar, arriving a little bit after midnight. She said she did not want to go inside, but Trujillo told her "to go into the bar and pick up some guys that have money." She did not know if Cardenas, who did not participate in the conversation, heard what Trujillo said to her.

Varela stayed in the bar until around closing time. Trujillo had given her his nephew's cell phone to use while in the bar, and she had several conversations with Trujillo while there. During one call, he said to pick up some guys and to make sure they had money. When she said she did not want to, he got mad and told her she was taking too long to do what he told her. Trujillo did not specifically say he was going to rob them, but she believed that was the plan.

While at the bar, Varela drank three Coronas. She recognized Leticia Torres-Morales, the bartender, as someone she had met, and they talked for a while. Varela never said anything about setting anybody up. She asked Torres-Morales about getting a job at the bar, and asked if she could stay with Torres-Morales, but Torres-Morales said no. Varela also talked to the bar owner about a job. She did not talk to Ponce, Rodriguez, or Castillo Ramirez inside the bar. She did not know that the Mexico Lindo was a Sureno bar.

When she left the bar, Varela was alone. Ponce came out behind her and they started talking. They also smoked marijuana together. Castillo Ramirez and Rodriguez came outside at some point as well. She had never talked to any of the three men before. While outside, Varela called her friend Tonya to ask Tonya to pick her up because she

wanted to get out of the situation she was in. Varela and Trujillo called each other "back and forth."

Varela went with the three men to George's Liquor because Ponce wanted to get a beer before 2:00 a.m. She bought a bag of chips. She went because she knew Trujillo wanted her to "bring some guys." They also went to a nearby Food Max store. In one call from Trujillo as she came out of Food Max, he indicated he was waiting for her, and asked what she was doing, now that he had seen her with "three Pisces guys." He also told her she was risking her life because she was taking too long. Varela felt scared for her life, so she asked where he wanted her to take the guys. He gave her an address on Dana Drive. Varela did not try to get away or warn the men because she did not believe she had a choice. She was not thinking of what could happen to the three men; she was thinking of her life.

Varela and the three men got into a cab and she gave the address on Dana Drive to the cab driver. She told the men they were going to party at an apartment on Dana Drive. The driver stopped in the driveway behind the apartment complex. Varela walked to the inside of the apartment complex and through a courtyard. She was on the phone with Trujillo, who was telling her where to walk. She then saw Trujillo on the right side and Cardenas coming from the left side. Cardenas had something black and long in his hands. Trujillo went up to one of the men and they started fighting. She saw Trujillo get hit in the head. She was scared, and when she heard someone yell, "Run," she ran. She did not hear anyone yell out gang words or slogans.

Varela ran toward the street, where she saw a car and heard Steve Young yell her name. She was not expecting to see him, but got inside his car and told him "that Shadow [Trujillo] was getting whipped on." She turned around and saw Trujillo running, with Castillo Ramirez and Ponce running behind him. She asked Young to help Trujillo, saying, "Do something to stop the fight. Someone is going to get hurt." She then saw the three men struggling over a gun. Trujillo was holding the gun and Castillo Ramirez had his hand on the barrel, trying to push the gun away from him. She then saw Castillo Ramirez get shot and fall to the ground. Trujillo ran towards the front of Young's car,

shooting over the hood of the car towards Ponce who was running on the other side of the car. Varela moved over in the backseat and told Trujillo to get in. She tried to open the car door, but it would not open because of a child lock. Trujillo then opened the car door from the outside and got in. Varela had said to get in because she was scared and wanted to get away from what had happened.

Young drove them to Nicole Luna's house. Varela and Trujillo went into the garage and Young went back to the scene to pick up Cardenas. Trujillo said that he was bleeding from his head and that he "got that fool." He also said he had left his car on Dana Drive and said not to say anything about what had happened or she would be risking her life. About five minutes later, Young came back and whistled, and she and Trujillo left the garage and got back into Young's car. Cardenas was in the car with Young. Young drove to Trujillo's sister's house. Varela remembered Trujillo responding to a question from Young, saying again, "At least I got that fool." After dropping Trujillo off, Young drove to a gas station, got gas, and drove towards Cardenas's house before getting pulled over by police. Once at the police station, Varela gave Trujillo's name and identified his photograph as the person who shot Castillo Ramirez.

On October 6, 2007, while Varela was in jail, she saw Trujillo's sister, Enriqueta, who was also in custody, in the visiting booth. Enriqueta said, "I have something from my brother, and . . . see how easy it is to get to you." Enriqueta then gave her a "kite," a paper wrapped up in a little red square with writing on it.[10] Later, while being

[10] According to Varela's counsel, who read the kite to the jury during closing argument, it said: " 'I picked you up. I picked you up around [*sic*], take you to the apartment so you can look for your phone. I tell you to hurry the fuck up. I got the cut. I drop you at the telly by 7-Eleven. I tell you, if anyone got some shit for five, hit me up. You get out of the car. This is important: You accidentally took my cell phone. When you realize this, you called my sister's number. No one answers, so you look through my numbers and call my nephews. No answers; it goes straight to voice mail.

" 'You leave the telly and walk to the bar. You're there for a minute. You go to the bathroom, see a missed call. You call it back, and no one answers.

transported between jail and the courtroom with Trujillo and Cardenas, Trujillo asked Varela if she had gotten the kite and tried to tell her what it said.

Detective Wilkie testified that, after Varela was arrested, he interviewed her for about two and one-half hours. Initially, she was untruthful, but later gave a statement that was similar to her testimony at trial.

Detective McCoy testified that he participated in two interviews with Varela; the first was on March 10, and the second was a couple of days later. The second interview was consistent with the first, although it was a little more detailed. What she said in the interviews was also consistent with her testimony at trial.

3. *Trujillo's Witnesses*

Detective Wilkie testified that he saw abrasions on Castillo Ramirez's hands that were consistent with, among other things, his having been in a fist fight. Wilkie did not notice any injuries on Trujillo's scalp and did not recall seeing any injuries on his face. Ponce had said he was involved in a fist-fight while wrestling for a gun.

Gabriel Tafolla, who was in custody and had recently been convicted of attempted murder with a firearm, with a gang enhancement, was arrested on January 17, 2007. Before that, Varela was his girlfriend since about mid-October. They moved together from place to place, mostly spending nights at friends' houses. Tafolla did not know of Varela associating with any gang members. He said he was not a gang member, but had admitted that he was as part of a plea bargain to serve less time.

" 'Couple minutes, I call you and start talking shit. Where are you at? I want my phone.

" 'During this call is when you start accusing me of stealing your phone, and you don't tell me where you are at because you are trying to hold my phone hostage.

" 'I hang up on you, call you back a little while later, and say, where you at? I need to check my messages, so don't pick up when I call.

" 'During this call is when you tell me about the pisces with the dope. You want to come to the apartment with him. I say, hell no, then you say go, to Terrible Tee's on Dana, then I say, where is that? On and on and on.' "

During her testimony, Enriqueta denied ever giving Varela a piece of paper in jail or telling her that it was easy to get to her.

After Tafolla's arrest, he and Varela talked on the phone almost daily, and he received a letter from her about four days a week. She also visited him two to three times a month. Varela never said anything to him about having to put in work for the gang, nor about any Norteno gang members threatening her, intimidating her, or physically abusing her in any way. She never complained to him about being held responsible for a gun that had been lost by some gang member.[11]

DISCUSSION

I. *Denial of* Wheeler/Batson *Motion*

Trujillo and Cardenas contend the trial court improperly denied their *Wheeler/Batson* motion challenging the prosecutor's peremptory challenge of a Hispanic potential juror, M.E.

A. *Trial Court Background*

The defense's motion regarding the prosecutor's peremptory challenge of potential juror M.E. came shortly after the defense brought the second of two *Wheeler/Batson* motions regarding peremptory challenges of four African American jurors.[12] The court initially expressed doubt that M.E. was Hispanic, stating: "I don't know . . . if that's her married name or that's her birth name. [¶] For the record, I—there was nothing distinctive about her in anything that the Court noted that would lead me to believe that she was of Hispanic descent, other than perhaps her name; maybe Hispanic, but I'm not even sure of that . . . ."

After further discussion, the court stated: "I'm going to find a prima facie basis, I think divided into two separate *Batsons* , the first one being . . . the challenges of the black females . . . ." After eliciting the prosecutor's reasons for challenging the two African American jurors, the court then said, "All right. Let's talk about this [M.E.]

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[11] Detective McCoy was thereafter questioned by Varela's attorney and testified that he was familiar with Tafolla, who was a Norteno associated with the BCF (Barrio Central Fairlas) and BSL (Brown Street Locals) out of Vacaville.

[12] The court ultimately denied both of the motions as to African American jurors. Those rulings are not at issue on appeal.

issue." The prosecutor responded: "Ms. [M.E.], she's a file clerk at Kaiser Hospital. She's 39 years old. Seems to me, she didn't have a heck of a lot of life experience. Pretty soft-spoken to me, and I have better jurors coming behind her, including Ms. [M.L.] and Ms. [M.A.], and I hit the next six or seven jurors are rated pretty good jurors to me too [*sic*]. [¶] So I have reasons that had nothing to do with whatever her ethnicity may be to get a better juror up here, and that's what I've got now, and both of her replacements are female."

Varela's counsel then responded to the prosecutor's reasons, stating: "Ms. [M.L.], who counsel says is a better juror, and has more life experience than Ms. [M.E.], who is a juror who said she's not sure she can remember what's being said. She's asked if she could have a tape recorder so she could help remember the testimony because she has difficulty following it. [¶] I don't know how to put it charitably, but I submit, that is not a genuine reason. I would note that Ms. [M.E.] is 39 years old. She was married. She has a daughter. She's a mother, a single mother. Her mother was involved in the Police Activities League.

"We have many other jurors who are file clerks, or similar jobs. They're certainly, um, nothing more experienced than her. She has several family members who their questionnaire reveals, are in law enforcement; several family friends she specifically mentioned. [¶] So I submit, there's no basis whatsoever for as the Court and counsel stated, reasons with regards to Ms. [M.E.]"

The trial court then stated, "Your *Batson* motion will be denied," without further explanation.

The record reflects that the jury in this case ultimately included two African Americans and a juror with a Hispanic surname, Mr. M.I., who was a member of the panel from the start of voir dire.

B. *Legal Analysis*

The California Supreme Court recently summarized the general principles to be utilized in considering a *Wheeler/Batson* claim. "Both the federal and state Constitutions prohibit an advocate's use of peremptory challenges to exclude prospective jurors based

on race. [Citations.] Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) As the *Lenix* court explained: "The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie case showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims. [Citations.]" (*Lenix*, at pp. 612-613.)

When asked to explain his or her conduct, a prosecutor "must provide a ' "clear and reasonably specific" explanation of his [or her] "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. [Citation.] Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

"At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.]" (*Lenix, supra,* 44 Cal.4th at p. 613.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

In the present case, the trial court found that the defense had made a prima facie case of discrimination based on the prosecutor's peremptory challenge of M.E., and asked the prosecutor to give his reasons for the challenge. (See *Lenix*, *supra*, 44 Cal.4th at p. 612.)[13]

According to Trujillo and Cardenas, the prosecutor's purported reasons for challenging M.E. were not credible. First, as to the comment that she "didn't have a heck of a lot of life experience," M.E.'s juror questionnaire and voir dire reflect that she was a 39-year-old divorced mother of a nine-year-old daughter. She was a high school graduate who had lived in Solano County for 35 years and had been employed full-time for Kaiser Permanente in Vallejo for 19 years as an inpatient medical records clerk, working with patient files. Her job did not include any supervisory responsibilities. She had never held another job. Her uncle was a retired probation officer and she had family friends who were in the sheriff's department or were retired police officers. Her ex-husband was an alcoholic, which "affected the whole family emotionally, financially, etc." She did not like drugs. M.E. stated that she had "no feelings" about prosecutors or defense lawyers. She had had very little contact with the criminal justice system and had formed no opinion about the guilt or innocence of the defendants.

Cardenas and Trujillo argue that all of these facts about M.E, along with her "striking" neutrality, demonstrate that the prosecutor's claim that M.E. lacked life experience was unsupported by the record and suggestive of pretext. Cardenas further avers that the prosecutor's comment that "this fully responsive juror was 'pretty soft-spoken' . . . says nothing about any concrete demeanor problems."

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[13] Although Trujillo and respondent assert that it is unclear whether the trial court found that the defendants had made a prima facie case, the record reflects that the court did so find.

We disagree with the assertion that the prosecutor's reasons for challenging M.E. were obviously pretextual. The record reflects that M.E. had worked at the same clerical job for the same employer for 19 years, since she was approximately 20 years old. These facts certainly support the prosecutor's conclusion that M.E. did not have a great deal of life experience. We note that the focus of the prosecutor's questions to M.E. during voir dire was on her job description and work experience, which suggests that he considered them important.

Also, that M.E. had friends who had worked for the police or sheriff's department did not necessarily add greatly to her life experience. The facts that M.E. had been married and had a child, and that her ex-husband was an alcoholic, obviously added some additional depth to her life. However, these facts clearly are not so staggeringly demonstrative of life experience such as to undermine the prosecutor's stated reason for striking M.E. In addition, the prosecutor's comment that M.E. was "pretty soft spoken" further reflects his impression that she was not a particularly dynamic potential juror.

Cardenas and Trujillo also find inexplicable the prosecutor's statement that he had "better jurors coming behind" M.E., especially when her characteristics are compared with one of the two prospective jurors named by the prosecutor or with another prospective juror who was a long-time hospital employee.

In *Lenix*, *supra*, 44 Cal.4th 602, 607, our Supreme Court held, based on the recent United States Supreme Court opinions of *Miller-El v. Dretke* (2005) 545 U.S. 231 and *Snyder v. Louisiana* (2008) 552 U.S. 472, that "[c]omparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below." The *Lenix* court noted, however, that "[d]efendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent. [Citation.] Additionally, appellate review is necessarily circumscribed. The

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." (*Lenix*, at p. 624.) Finally, the *Lenix* court observed that comparative juror analysis is a form of circumstantial evidence, and as such is subject to the principle of appellate restraint applicable to circumstantial evidence: " ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' [Citation.]" (*Id* . at pp. 627-628.)

Here, a comparative juror analysis was not undertaken in the trial court.[14] Now, on appeal, Trujillo compares one juror, M.L., with M.E., while Cardenas compares M.L. and another juror, S.T., with M.E. We will therefore compare M.E. with these two jurors who were not challenged by the prosecutor. (See *Lenix*, *supra*, 44 Cal.4th at p. 624.)[15]

M.L. was one of two prospective jurors the prosecutor mentioned by name as some of the "better jurors coming behind" M.E. M.L. ultimately served as a juror in this case. She was 59 years old, was born in Hong Kong, but was a naturalized United States citizen and had lived in Solano County for the past 31 years. She had a husband and an adult daughter. She was self-employed as a digital artist. She had previously worked for

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[14] Varela's attorney asked "for leave to go through the questionnaires to make an affirmative comparative juror analysis showing." However, counsel made this request as he was discussing one of the challenged African-American jurors in the context of the second *Wheeler/Batson* motion. He had made a similar request during the first motion, when discussing the African-American prospective juror who was challenged first. The court denied both requests. Both of those requests apparently involved comparing the challenged jurors with other jurors who purportedly also had had problems with police or the criminal justice system, an issue not relevant to the peremptory challenge of M.E.

[15] We will not engage in a comparison of the several additional jurors Trujillo touches on very briefly in his reply brief (see, e.g., *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2 [issues raised for first time in reply brief generally will not be considered on appeal].) Nor will we address those jurors raised only by respondent in its brief. (See *Lenix*, *supra*, 44 Cal.4th at p. 624 ["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"].)

a chemical company, and had supervised two employees. She had attended college as a chemistry major, and had received training in digital art work. Given M.L.'s background, education, and employment history—that is, her life experience—there is support in the record for the prosecutor's expressed belief that M.L. would be a better juror than M.E.

Cardenas and Trujillo both note that M.L. told the trial court during voir dire that she had a problem recalling what was being said and needed to take notes. She also said she would prefer a tape recorder because she was afraid she would miss something if she was taking notes. The court told her she had raised an excellent point, and then explained that a tape recorder was not permitted but, in addition to jurors being allowed to take notes, the court reporter would take down every word that was said during the trial. As respondent points out, the statement by M.L. does not demonstrate a flawed juror so much as a conscientious one concerned about missing anything said during the lengthy trial. We also observe that no attorney challenged M.L. and she served on the jury.[16]

Cardenas also discusses S.T., who ultimately served on the jury as well. He observes that S.T. was also a hospital employee and claims that M.E. "presented exactly the same profile" as S.T. S.T., however, had several characteristics that were distinctive from those of M.E. She was 53 years old, was married, and had five adult children. She had worked as a phlebotomist for 31 or 32 years; for 23 of those years she had worked at Kaiser in Vallejo. Her job duties included drawing and processing blood samples, data entry, and billing. S.T. also had attended community college and had been certified as a phlebotomist. It is not surprising that the prosecutor would believe that a trained phlebotomist, who had had more than one job and who performed medical procedures and interacted regularly with patients, had more life experience than a long-term clerical worker with only one employer.

In addition, S.T. had been a juror in a criminal case involving robbery and kidnapping, in which the jury had reached a verdict. She had not had any trouble with, as

[16] On her juror questionnaire, M.L. responded that she did not have any "health, hearing or language problems that might limit [her] ability to concentrate on the evidence during trial."

the prosecutor put it, "the concept of working your facts against the standard of proof . . . beyond a reasonable doubt." It was also reasonable for the prosecutor to believe that S.T.'s successful jury experience distinguished her from M.E., in terms of life experience and desirability as a juror.[17]

Other circumstances that support the trial court's finding of no racial bias include the fact that a second Hispanic juror, Mr. M.I., was a member of the jury panel at all times when the prosecutor was using his peremptory challenges and the prosecutor did not challenge him, even though, as respondent notes, the prosecutor used only some 10 of his 20 available peremptory challenges during jury voir dire (see Code Civ. Proc., § 231, subd. (a)). (See *Lenix*, *supra*, 44 Cal.4th at p. 629 ["prosecutor's acceptance of the panel containing a Black juror strongly suggests that race was not a motive in his challenge of" another Black prospective juror]; *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["The circumstance that the prosecutor challenged one out of two African-American prospective jurors does not support an inference of bias, particularly in view of the circumstance that another African-American juror had been passed repeatedly by the prosecutor from the beginning of voir dire and ultimately served on the jury"].) In addition, while Cardenas and Trujillo point out that M.E. was of the same race as defendants, they fail to note that both the victim and two prosecution witnesses (Ponce and Rodriguez) were also Hispanic, which arguably would make a Hispanic juror more desirable for the prosecutor. (See *Hernandez v. New York* (1991) 500 U.S. 352, 369-370 [finding that trial court could credit prosecutor's race-neutral explanation for challenge to Latino jurors where "the ethnicity of the victims and prosecution witnesses tended to undercut any motive to exclude Latinos from the jury"].)

Cardenas further argues that the prosecutor's questioning of M.E. was "at best desultory," citing *People v. Crittenden* (1994) 9 Cal.4th 83, 115, in which our Supreme

[17] The prosecutor at one point described S.T., "the phlebotomist," as "a good, strong juror" who "doesn't have any problems with cops or the system." S.T. was also one of two jurors Varela's attorney identified as being African-American.

Court stated that a prosecutor's desultory or nonexistent voir dire may contribute to an inference of group bias. The prosecutor in this case, however, explored on voir dire the length and type of M.E.'s employment, which presumably related to at least part of his concern about her lack of significant life experience. He also noted that she had answered "basically all the other questions," and asked if there was anything she had been asked that would create a problem for her as to whether she could be fair. Given both that defense counsel had already asked M.E. about several additional issues and that there is no suggestion that the prosecutor's voir dire of M.E. was noticeably different from his voir dire of other prospective jurors, we do not find merit in Cardenas's assertion that desultory voir dire provides additional evidence of the prosecutor's group bias.

Finally, Trujillo argues that the prosecutor's comment that there were "better" jurors coming after M.E. was not an adequate explanation because the trial court and reviewing courts "cannot determine what characteristics made the other jurors 'better' in the eyes of the prosecutor than the excused juror, and cannot determine whether this was a 'permissible race-neutral justification' for the exclusion of the juror." (See *Johnson v. California* (2005) 545 U.S. 162, 168 [prosecutor is required " 'to explain adequately the racial exclusion' "].) Trujillo cites several opinions from other jurisdictions in support of this claim. (See *State v. Grandy* (S.C. 1991) 411 S.E.2d 207, 227-228 [prosecutor's stated reason that he struck a Black juror because he desired to seat other venirepersons who had not been presented was "the same as if no reason was given" for striking the Black juror]; *Kibler v. State* (Fla. 1989) 546 So.2d 710, 713-714 [prosecutor's reason for striking two African American jurors—that he liked two later jurors better—was insufficient]; *United States v. Horsley* (11th Cir. 1989) 864 F.2d 1543, 1546 [prosecutor's stated reason, "I just got a feeling about him," was not sufficiently specific to support peremptory challenge of Black juror]; *Weddell v. Weber* (D.S.D. 290 F.Supp.2d 1011, 1028-1029 [prosecutor's statement that he had a "gut feeling" that Native American juror would not be "fair" was insufficient to counter prima facie case].)

In presenting his argument and supporting authority, Trujillo completely ignores the fact that here, unlike in his cited cases, the prosecutor's statement that he had "better jurors behind her" was not offered by the prosecutor as his sole reason for striking M.E., but was plainly a follow-up to his initial comments that M.E. lacked significant life experience and was soft-spoken. The prosecutors in Trujillo's cited cases, on the other hand, did not include any reasons beyond the vague statement of preference for other jurors, and thus are distinguishable from the present circumstances.

In sum, because the prosecutor's race-neutral reasons for his peremptory challenge of prospective juror M.E. were supported by the record and were not implausible, Cardenas's and Trujillo's *Wheeler/Batson* claim cannot succeed. (See *Lenix*, *supra*, 44 Cal.4th at p. 613.)[18]

II. *Denial of a Defense Motion to Discharge a Potential Juror*

Trujillo and Cardenas contend the trial court improperly denied a defense challenge for cause of a potential juror.[19]

A. *Trial Court Background*

At the start of proceedings on Wednesday, May 21, 2008, after the jury had been sworn but before alternates had been selected, the court called in juror number eight,

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[18] Although, for the reasons discussed, we reject Cardenas's and Trujillo's claim that the trial court improperly denied the *Wheeler/Batson* motion as to M.E., we must nonetheless observe that the trial court's failure to provide any explanation whatsoever for its ruling certainly has not assisted us in making this determination. (See *Lenix*, *supra*, 44 Cal.4th at p. 614; cf. *Green v. Lamarque* (2008) 532 F.3d 1028, 1030-1031.) Because we conclude that, even on this cold record, there is no showing of group bias, the trial court's failure to evaluate the prosecutor's reasons is not determinative in this case. Still, we remind the trial court of its obligation to fully engage in the third stage of the *Wheeler/Batson* inquiry. (See *Lenix*, at pp. 613-614.)

[19] Respondent correctly points out that, because the jury had already been sworn at the time the hearing with A.P. took place, the defense's purported "challenge for cause" (see Code Civ. Proc., § 225, subd. (b)(1)) was actually a mislabeled request to discharge a juror under section 1089 (see Code Civ. Proc., § 226, subd. (a) ["A challenge to an individual juror may only be made before the jury is sworn"]). We will therefore treat the defense's request as one to discharge a juror, rather than as a challenge for cause.

A.P., whom the court understood to have "an issue." A.P. said that the previous Friday, he thought he remembered Trujillo's attorney saying that his client was "charged because he's the one who pulled the trigger." When Trujillo's attorney denied saying anything like that, A.P. said, "maybe I misheard him, and then I am of the opinion this weekend that if he was the one that pulled the trigger, then he might be guilty. [¶] Also, my next concern is that because it's a gun-related case, I'm . . . concerned about the safety of my family, and that's all, your Honor."

After reminding A.P. that he was under oath, the court questioned him as follows:

"THE COURT: Are you telling this Court and these parties that you have formed an opinion already as to the guilt of one of these people based on what they're charged with?

"THE PROSPECTIVE JUROR: Um, maybe because, Your Honor, that if—if I heard it right Friday, that one of the defendants was the triggerman, maybe, maybe I misheard it. That's why I formed the opinion."

After reminding A.P. that he had said during voir dire that he could follow the law relating to evidence of guilt, A.P. again said he had formed the opinion after mishearing the lawyer. The following exchange then took place between the court and A.P.:

"THE COURT: When you put [that opinion] aside, are you going to sit as a fair juror in this case?

"THE PROSPECTIVE JUROR: I'll try my best, Your Honor, because I guess I misheard the lawyer about it.

"Well, my second concern, Your Honor, is that because it's a gun-related [*sic*], I'm concerned about the safety of my family. That's my next concern."

When the court asked if anyone had threatened A.P., he responded, "Well, I just have a feeling right now, Your Honor. [¶] . . . [¶] That maybe, you know, if because it's a gang-related case, you know I have this wild imagination that maybe in the afternoon, someone would follow me to my house and everything, you know, something like that."

Trujillo's attorney then questioned A.P., first asking if he could have gotten the impression that Trujillo was the "triggerman" from the clerk reading the information in

which Trujillo was described as someone who used a firearm in the commission of the offense. A.P. said he was not sure, and the following exchange took place between counsel and A.P.:

"MR. COFFER [Trujillo's counsel]: But it is a fact that after you heard this Information [*sic*] from whatever source you received it, you began to think about that fact, the fact that a gun was allegedly used and that my client used it; is that correct?

"THE PROSPECTIVE JUROR: Yes.

"MR. COFFER: And you've been thinking about that fairly continuously or continually over the weekend; is that true?

"THE PROSPECTIVE JUROR: Yes.

"MR. COFFER: And now you come in here and its been, um, weighed on your mind to such an extent that you now believe you cannot be a fair juror and that's why you've asked to see the Judge?

"THE PROSPECTIVE JUROR: Yes.

"MR. COFFER: Do you really think you can give my client a fair trial now that you had to think about it in the way you described [*sic*]?

"THE PROSPECTIVE JUROR: Well, not that if now that I think I misheard the statement, then I'll probably do my job; still in the back of my mind, but I'll try my best.

"MR. COFFER: Well, you'll try your best. Previously, you had sworn that you would be able to give my client a fair trial. Now you have some doubts about that; is that what you are saying?

"THE PROSPECTIVE JUROR: Um, a little bit, you know, I—I have to be—I have to tell the truth, maybe a little bit, yes."

Trujillo's counsel told the court that he was challenging A.P.: "Well, [A.P.] hasn't a solitary fact in this case. He already told us he's somewhat prejudiced against my client at this point." Then, outside the presence of A.P., counsel said he was moving for a mistrial, explaining: "It appears to me quite clear that [A.P.] has formed an opinion about my client in particular. It's not just an opinion; that would be bad enough, but it's an opinion that's accompanied with a level of fear of my client, that apparently, at least as I

interpret [A.P.'s] comments, that my client might hunt him down or trail him or track him to his home and harm him or his family.

"So [A.P.] is not only concerned about himself in relation to my client, but he's also concerned about his family in relation to my client. He knows . . . that this is a gang-related case, and even if Mr. Trujillo could not give him harm, he might well fear that his gang friends might . . . come to his home and harm him.

"These are thoughts he's been having, he tells us, throughout the weekend, since Friday, and I don't know how we can rehabilitate [A.P.] at this point to make him a fair juror, to have the kind of open mind we want, the kind of impartiality that we have in a case as serious as this, so I am asking for a mistrial."

Both Cardenas's and Varela's attorneys joined in the motion for a mistrial. The prosecutor said he opposed the motion for a mistrial. The trial court then denied the purported challenge for cause and the motion for a mistrial.

B. *Legal Analysis*

Section 1089 provides in relevant part: "If at any time, . . . a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty . . . the court may order the juror to be discharged and draw the name of an alternate . . . ." (Accord, Code Civ. Proc., § 233.) "When a court is informed of allegations, which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*." [Citations.] [¶] A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge. [Citation.]" (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 (*Barnwell*).)

"While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (*Barnwell*, *supra*, 41 Cal.4th at p. 1052, fn. omitted.) In *Barnwell*, our Supreme Court discussed the standard of review in juror removal cases, explaining that "a juror's disqualification must appear on the record as a ' " ' "demonstrable reality." ' " ' [Citations.] . . . . This standard 'indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror.' [Citation.]" (*Ibid.*; accord, *People v. Jablonski*

(2006) 37 Cal.4th 774, 807 [“ ‘Before an appellate court will find error in failing to excuse a seated juror, the juror’s inability to perform a juror’s functions must be shown by the record to be a “demonstrable reality” ’ ”].)

“The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was [or was not] established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court’s conclusion is manifestly supported by evidence on which the court actually relied.” (*Barnwell*, *supra*, 41 Cal.4th at pp. 1052-1053.)[20]

Here, Trujillo and Cardenas argue that the answers provided by A.P. during the hearing demonstrate that he was biased against them and that, therefore, he should have been discharged. They express particular concern that A.P. never wholeheartedly said he would be able to give defendants a fair trial and that the level of fear he expressed would likely remain an issue throughout the trial.[21]

After he realized he had misheard Trujillo’s attorney, A.P. told the court, “I’ll try my best” to sit as a fair juror in the case. He then moved on to his second concern about safety, explaining that he just had “a feeling” and that he had “this wild imagination” that

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[20] As with its denial of the defendants’ peremptory challenge of prospective juror M.E., the trial court did not give reasons for denying the defense’s motion to discharge A.P. As we shall discuss, *post*, the record is such that we are able to determine that the court’s ruling was appropriate. Nonetheless, we again remind the trial court that it “facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that the juror was failing [or, as here, *not* failing] to follow the oath.” (*Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

[21] Cardenas claims that A.P.’s fear of gang retaliation could only have increased after hearing the evidence in this case and that his fears “apparently carried over to another sitting juror,” a nurse who worked in the state prison system, who expressed concern at the end of trial about the defendants being housed at any institution where she worked. The concerns of a nurse whose job could quite possibly bring her into contact with the defendants in prison, however, is not comparable to A.P.’s situation.

someone would follow him home. Upon questioning by Trujillo's counsel, A.P. said that once he understood that he had misheard the statement about Trujillo, "I'll probably do my job; still in the back of my mind, but I'll try my best." He also acknowledged that he had "a little bit" of doubt about being able to give Trujillo a fair trial.

We do not agree that A.P.'s inability to serve as a juror was shown by a demonstrable reality. Although he never gave a guarantee that he would be unbiased, once his misapprehension was corrected and despite his safety concerns, his responses to the court and counsel's questions reflect that he intended to do his best to give Trujillo a fair trial.

In *People v. Hillhouse* (2002) 27 Cal.4th 469, 488, the trial court denied a challenge for cause of a prospective juror who had said he would try to be impartial, although, if he had to "make a judgment today," he would find the defendant guilty. Our Supreme Court stated: "On this record, the trial court could reasonably conclude the juror was trying to be honest in admitting to his preconceptions but was also sincerely willing and able to listen to the evidence and instructions and render an impartial verdict based on that evidence and those instructions. Indeed, a juror like this one, who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so." (*Ibid.*; accord, *People v. Kaurish* (1990) 52 Cal.3d 648, 675 [prospective juror said she might give greater credence to testimony of police officers but also said she would " 'try to be an impartial juror' "].)

Similarly, in this case, A.P.'s candid statements reflect his attempt to come to terms with his preconceptions, his fear, and his desire to be an impartial juror. Indeed, that he voluntarily disclosed his concerns reflects an effort to honestly address the issue. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488; cf. *People v. Ray* (1996) 13 Cal.4th 313, 344.) In addition, the record reflects that A.P.'s concern about possible bias was not a long standing issue. He had expressed no doubt about his ability to be fair either in his juror questionnaire or in voir dire. Nor had any actual safety issues come up. Rather, his

concerns, as he acknowledged, had only recently arisen from having misheard an attorney and from his "wild imagination."[22]

In sum, in light of A.P.'s statement that he would "try his best" to be impartial, we conclude that his inability to perform his duties as a juror has not been shown by the record to be a demonstrable reality and the court therefore did not abuse its discretion when it refused to discharge him. (See *Barnwell*, *supra*, 41 Cal.4th at p. 1052; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 807.)[23]

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[22] Respondent observes that both during jury voir dire and again just after being sworn as a juror on May 16, 2008, A.P. had asked the court whether the trial would be over before June 14, when he would be going out of town to help his daughter move into an apartment. In response to the latter inquiry, the court responded that it expected the trial to be complete by June 14. Respondent suggests that the trial court could reasonably have concluded that A.P.'s concerns were based in part on his desire to avoid jury service in an extended trial. Since the record of the hearing contains no references to this issue, we will not assume that A.P.'s travel plans played a role in the court's ruling.

[23] Cardenas cites *United States v. Nelson* (2d Cir. 2002) 277 F.3d 164, as support for his claim that the court erred. In that case, the Second Circuit Court of Appeals explained that it "is important that a juror who has expressed doubts about his or her impartiality also *unambiguously* assure the district court, in the face of these doubts, of her willingness to exert truly best efforts to decide the case without reference to the predispositions." (*Id*. at p. 202.) In *United States v. Nelson*, unlike in the present case, "[t]he most [the juror] said was that he would 'like to think' that he could be impartial, but that he 'honestly [didn't] know.' " (*Id*. at p. 203.)

Trujillo cites *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111, in which a prospective juror three times responded, "I'll try" when asked if she could view the case fairly. There, however, the main issue was whether the prospective juror's life experience left her unable to give the defendant a fair trial. As the Ninth Circuit Court of Appeals explained: "The activities of [the prospective juror's] husband which led to her divorce and the break-up of her family resembled the fact pattern at issue in the case in which she served—a case in which, if the government's charges were true, the defendant had endangered his family's safety and security in order to traffic in cocaine. Her responses to the repeated questions about her ability to be impartial in light of her own traumatic experiences were consistently equivocal, and she displayed some discomfort during the questioning. In light of these facts, we are compelled to conclude that in this case 'the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.' [Citation.]" (*Id*. at p. 1114.) Here, there was no

III. *Motion to Sever*

Trujillo and Cardenas contend the trial court improperly denied their motion to sever their trials from that of Varela.

A. *Trial Court Background*

Before trial, counsel for Cardenas filed a motion to sever Cardenas's trial from that of Varela. Trujillo's counsel joined in that motion, which the prosecutor opposed. At a hearing on the motion, Cardenas's counsel stated that, based on evidence presented at the preliminary hearing, it appeared that Varela was planning to offer a duress defense and that such a defense would be antagonistic to Cardenas's defense. He further stated, "the power of their duress defense is related in an inversely proportional manner to mine. [¶] The more my client looks like a violent criminal and a gang member, the stronger Mr. Ogul's [Varela's counsel's] duress defense . . . ."

Cardenas's counsel then explained that his defense theory at trial "would be that this was a drug purchase gone bad that turned into a shooting that was self-defense. [¶] And so my defense theory in that regard would be directly contradicted by Ms. Varela's that this was a gang thing, and these guys were lured out there to exact gang vengeance, and she was forced to do so by my client and other gang members." Trujillo's counsel then stated that, for purposes of the court's ruling, "we would ask the Court to assume it would be the same defense."

The trial court ultimately denied the severance motion.

B. *Legal Analysis*

" 'Section 1098 provides in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Our Legislature has thus "expressed a preference for joint trials." [Citation.] But the court may, in its discretion, order separate trials "in the face of an incriminating confession, prejudicial association

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question that A.P. had any of the historical baggage that affected the prospective juror in *United States v. Gonzales*.

with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." [Citations.] [¶] We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion. [Citation.] If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder " 'resulted in "gross unfairness" amounting to a denial of due process.' "' [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 149-150 (*Letner and Tobin*).)

In the present case, Cardenas and Trujillo each assert that Varela's defense was so antagonistic to their defenses that the court's refusal to order separate trials was both an abuse of discretion and resulted in such gross unfairness as to deny them of the their due process right to a fair trial. (See *Letner and Tobin*, *supra*, 50 Cal.4th at pp. 149-150.)

Initially, we note that defendants were charged with having committed " 'common crimes involving common events and victims.' [Citation.] The court accordingly was presented with a ' " 'classic case' " ' for a joint trial. [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 452-453.) In addition, a joint trial at which defendants present "different and possibly conflicting defenses" is "not necessarily unfair." (*People v. Hardy* (1992) 2 Cal.4th 86, 168 (*Hardy*).) "If the fact of conflicting or antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.' [Citation.]" (*Ibid*.) Indeed, courts have observed: " ' "That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than *against* a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together." ' [Citations.]" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 674-675, quoting *Hardy*, at p. 169, fn. 19; see also *Zafiro v. United States* (1993) 506 U.S. 534, 538, 540 [mutually antagonistic defenses are not prejudicial *per se*; indeed, "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"].)

"Accordingly, [our Supreme Court has] concluded that a trial court, in denying severance, abuses its discretion only when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty. If, instead, 'there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.' [Citations.]" (*Letner and Tobin, supra*, 50 Cal.4th at p. 150.)

Here, Varela's duress defense undoubtedly was antagonistic to the defenses of Cardenas and Trujillo. Nonetheless, abundant evidence of both men's guilt, independent from that presented by Varela, was presented at the preliminary hearing, from which the court could conclude severance was not required. (See *Letner and Tobin*, *supra*, 50 Cal.4th at p. 150.)

With respect to Trujillo, his car was found at the scene. Young testified that he saw Trujillo in the street on Dana Drive wrestling with three men over a gun he had in his hands. Young then saw one man get shot and saw Trujillo shooting at the other man, and later heard Trujillo say "in a nonchalant way" that he "got that fool." Ponce, Miller, and Wheeler's testimony provided evidence that the shooter was the aggressor.

As to Cardenas, Young testified that, at Cardenas's request, he picked Cardenas up near the scene and eyewitness Miller identified Cardenas in a photo spread as the man he saw who ran from the scene. Young also testified that, from what Cardenas told him on the phone before the shooting, Young assumed that "they were setting someone up to be robbed."

There was additional evidence relating to both men. Ponce and Rodriguez both described an unprovoked attack by the two men who arrived at the scene, and Rodriguez described someone patting him down as he regained consciousness. In addition, there was testimony from Steven Young and Detective McCoy that Trujillo, Cardenas, and Varela were Norteno gang members. McCoy also testified that Mexico Lindo was a Sureno bar.

In sum, there was strong evidence—apart from that introduced by Varela—that Varela, a Norteno gang member, took three men she met at a Sureno bar to a secluded

place where Trujillo—armed with a gun—and Cardenas, both Norteno gang members, were waiting. There was additional independent evidence that Trujillo and Cardenas then assaulted all three men, that one of them attempted to rob one of the men, and that Trujillo fatally shot another one.

Thus, there was sufficient independent evidence against Cardenas and Trujillo to establish that it was not the conflict with Varela alone that demonstrated their guilt. (See *Letner and Tobin*, *supra*, 50 Cal.4th at p. 150.)[24] We therefore conclude that the trial court did not abuse its discretion in denying the severance motion based on the facts as they appeared at the time the court made its ruling. (See *id.* at p. 150; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 42 ["although Coffman's defense centered on the effort to depict [her codefendant] as a vicious and violent man, and some evidence that would have been inadmissible in a separate guilt trial for [codefendant] occupied a portion of their joint trial, the prosecution presented abundant independent evidence establishing both defendants' guilt"; hence severance was not required], fn. omitted (*Coffman and Marlow*).)[25]

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[24] Cardenas argues that, without Varela's testimony, there was more evidence that this was a drug deal gone bad than that this was a planned robbery, in light of the evidence that Rodriguez had a small amount of methamphetamine in his possession and that, according to Cardenas, the other men shouted Sureno gang slogans. Cardenas's argument is not persuasive, given the substantial amount of evidence showing that this incident was a planned robbery/assault by gang members, as compared with the meager evidence of a drug deal gone bad. We also find unpersuasive his claim that, without Varela's evidence, evidence of Cardenas's knowledge of Trujillo and Varela's intent was sparse. As stated, there was independent evidence that Cardenas told Young enough of what was supposed to happen that Young surmised that a robbery or assault was planned. Moreover, based on Ponce and Rodriguez's accounts, both Trujillo *and* Cardenas snuck up on them and immediately began to assault the three men.

We also note that the jury, in convicting Varela, indicated that it did not believe her defense and did not find her to be a reliable witness.

[25] Cardenas cites *United States v. Troiano* (D. Hawai'i 2006) 426 F.Supp.2d 1129 and both Cardenas and Trujillo cite *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078 and *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895 in support of their claim that the level of antagonism between their proposed defenses and that of Varela mandated

Trujillo nonetheless argues that the admission of certain evidence that would not have been admissible against him in a separate trial demonstrates prejudice. He also argues that, in light of that evidence, even if the court did not abuse its discretion when it denied the pretrial severance motion, joinder ultimately " 'resulted in "gross unfairness" amounting to a denial of due process.' " ' [Citation.] (*Letner and Tobin, supra,* 50 Cal.4th at p. 150.) This evidence includes Varela's testimony that Trujillo "took her to the Mexico Lindo bar against her will and forced her to pick up men and lead them to a place where they would be robbed and beaten," as well as her testimony that he called her repeatedly on her cell phone to monitor her progress and to direct her regarding where to take the men. It also includes her claims that he threatened her with her life on the night of the shooting as well as via a "kite," which Trujillo's sister delivered to Varela while she was in jail after her arrest. Finally, the allegedly prejudicial evidence includes Varela's testimony that, a short time before the night in question, Trujillo forced her to have sex with him, against her will.

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severance. Trujillo acknowledges that lower federal court decisions are "persuasive but not controlling" (*In re Tyrell J.* (1994) 8 Cal.4th 68, 79, overruled on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 139), but asserts that they should be entitled to great weight. First, *United States v. Troiano* is a case in which the trial court, as was its prerogative, simply exercised its discretion to sever the trials of codefendants with conflicting defenses. Second, as both of the cited Ninth Circuit cases observed, that circuit has always required that defendants " 'demonstrate that clear and manifest prejudice did in fact occur' " before a failure to sever is held to be error. (*United States v. Mayfield*, at p. 903, quoting *United States v. Tootick*, at p. 1083.)

Here, because we have concluded that sufficient independent evidence existed to show that the conflict alone did not demonstrate guilt, the defendants' antagonistic defenses did not compel severance. (See *Letner and Tobin, supra,* 50 Cal.4th at p. 150.) Moreover, we note that much of Varela's evidence would have been relevant and admissible at a separate trial to identify Cardenas and Trujillo as having planned and executed the charged offense. (See *Zafiro v. United States, supra,* 560 U.S. at p. 540 ["A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant"].)

In *People v. Keenan* (1988) 46 Cal.3d 478, 500 (*Keenan*), our Supreme Court discussed utilizing the analysis from the analogous issue of severance of counts to determine the degree of potential prejudice. The court identified three relevant factors for evaluating a trial court's decision to hold a joint trial: "whether (1)consolidation may cause introduction of damaging evidence not admissible in a separate trial, (2) any such otherwise-inadmissible evidence is unduly inflammatory, and (3) the otherwise-inadmissible evidence would have the effect of bolstering an otherwise weak case or cases." In *Keenan*, the trial court admitted a codefendant's testimony in a joint murder trial that he had participated in the murder because he needed the money and was afraid of the defendant. (*Id*. at p. 493.) To support his claim of fear, the codefendant presented evidence of a prior incident in which the defendant beat up and abducted a mutual acquaintance with whom he had become upset, and the acquaintance, who had survived the attack, further testified that the defendant had shot him in the back and left him for dead. (*Id*. at pp. 493-494.)

The *Keenan* court concluded that the trial court had not abused its discretion in ordering a joint trial both because the uncharged conduct evidence was not unduly inflammatory and because, when the evidence was admitted, there was already very strong evidence of the defendant's guilt. (*Keenan*, *supra*, 46 Cal.3d at p. 501.) The court also found, in any event, that the defendant was not prejudiced because of the unlikelihood that admission of the evidence altered the verdict. (*Ibid.*)

In the present case, we are doubtful of Trujillo's claim that evidence that he took Varela to the Mexico Lindo Bar, told her to pick up men with money, and called her multiple times while she was there would have been inadmissible in a separate trial, in light of its relevance to his intent in committing the charged offense.[26] (See *Keenan*, *supra*, 46 Cal.3d at p. 500; see also *Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 42-43.)

[26] Moreover, the call logs, which listed the calls between the defendants and which were admitted at trial to provide evidence of the planned acts, would also almost certainly have been admissible at a separate trial.

In addition, in light of both the jury's rejection of Varela's defense that she acted out of fear caused by Trujillo's threats against her and the very strong independent evidence of his guilt, Trujillo cannot show the court's admission of this evidence was prejudicial. (See *Keenan*, at p. 501; see also *Letner and Tobin*, *supra*, 50 Cal.4th at p. 150; *Coffman and Marlow*, at pp. 42-43.)

With respect to the kite, Varela testified that it was delivered by Trujillo's sister, Enriqueta, along with the comment, "See how easy it is to get to you." As previously discussed, there was already an immense amount of solid evidence showing that Trujillo was involved in the offense. Hence, the kite's implication that Trujillo was telling Varela how to explain their many phone calls and their trip to Dana Drive could not have resulted in such gross unfairness as to deprive Trujillo of due process or a fair trial. (See *Letner and Tobin*, *supra*, 50 Cal.4th at p. 151.)[27] As to the implied threat in what Enriqueta said to Varela when she gave her the kite, again, as with the other alleged threats, the jury disbelieved Varela's testimony showing duress and the evidence of Trujillo's guilt was extremely strong. There was, therefore, no due process violation. (See *Letner and Tobin, supra*, 50 Cal.4th at p. 151; see also *Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 42-43.) As to Varela's testimony that Trujillo had forced her to have sex with him, assuming that this evidence would not have been admissible if Trujillo had been tried alone, we do not believe this testimony was unduly inflammatory, when

[27] Cardenas claims he too was prejudiced by admission of the kite at trial, noting that the prosecutor said in closing argument that the kite was a "script for Mr. Cardenas['s] testimony" that this was a drug deal gone bad. ~(RT 2970, 3007-3010)~ The kite, however, mainly focused on the calls between Trujillo and Varela and, more importantly, Cardenas's defense centered on his own belief that the plan was to go to Dana Drive to make a drug deal, regardless of what Trujillo and Varela knew. The kite thus does not undermine Cardenas's defense theory. Rather, it was the lack of evidence to support that theory that hurt Cardenas. In any event, as with Trujillo, Cardenas has not shown that admission of the kite into evidence resulted in such gross unfairness as to deprive him of due process or a fair trial. (See *Letner and Tobin*, *supra*, 50 Cal.4th at p. 151.)

compared to the offense with which Trujillo was charged and the extremely strong evidence of his guilt. (See *Keenan, supra*, 46 Cal.3d at pp. 500, 501.)

Cardenas asserts that the prosecutor's closing argument demonstrates the prejudice resulting from the joint trial. For example, the prosecutor told the jury, "I thought [the defense attorneys] looked like a pack of rabid wolves biting at each other yesterday . . . ." He further remarked, "If [Varela's] telling the truth, then there's no doubt that Jesus Trujillo is guilty, and Jonathan Cardenas is guilty," adding that Cardenas's counsel had to "attack Ms. Varela too because she also buries his client . . . ." In addition to the fact, already discussed, that there was sufficient independent evidence presented at trial against Cardenas and Trujillo (see *Letner and Tobin*, *supra*, 50 Cal.4th at p. 150), the jury plainly did not accept Varela's story as to what took place on the night in question, given that she too was convicted of first degree murder. The joint trial allowed the jury to assess defendants' conflicting versions of what happened as it attempted to determine the truth. (See *People v. Morganti*, *supra*, 43 Cal.App.4th at pp. 674-675.)

Cardenas nonetheless avers that the prosecutor's argument, coupled with the argument of Varela's counsel, was particularly problematic due to the lack of adequate limiting instructions.[28] The court did, however, instruct the jury that nothing the attorneys said was evidence and that the attorneys' remarks in opening and closing arguments are not evidence. (CALCRIM No. 222.) Any possible prejudice from the closing arguments was cured by this instruction, which we presume the jury followed. (See *Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 43-44; cf. *Zafiro v. United States*, *supra*, 506 U.S. at p. 541.)[29]

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[28] Cardenas acknowledges that his counsel did not request additional instructions, but argues that, to the extent such a request was necessary, counsel's failure to do so deprived him of the effective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668.)

[29] Cardenas also mentions in passing that he was further prejudiced at trial by the "the denial of confrontation regarding the gang expert's claims of a 'meeting' " at which an assault and/or robbery was planned. We shall address the substance of this claim in

In sum, for the reasons discussed, we find no abuse of discretion in the trial court's denial of severance and further find that the joint trial did not deprive Trujillo and Cardenas of their federal constitutional rights to due process and a fair trial. (See *Letner and Tobin*, *supra*, 50 Cal.4th at pp. 150-151.)

IV. *Contentions Related to the Criminal Street Gang Enhancement*

All three defendants received a sentence enhancement, pursuant to section 186.22, subdivision (b)(1), a special gang allegation. Cardenas and Varela raise several contentions regarding evidence presented at trial related to this enhancement.

A. *Sufficiency of the Evidence to Support the Gang Enhancement True Findings*

Cardenas and Varela contend the jury's true findings on the gang enhancement allegation, pursuant to section 186.22, are not supported by substantial evidence.

"In determining whether the evidence is sufficient to support a conviction or an enhancement, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] . . . This standard applies to a claim of insufficiency of the evidence to support a gang enhancement. [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

"To prove the existence of a criminal street gang [under section 186.22], 'the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. [Citation.]' [Citation.]" (*In re Jose P.* (2003)

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part IV.B.1., *post*, of this opinion, but, for purposes of the severance issue, Cardenas does not aver that this evidence would have been inadmissible at a separate trial.

106 Cal.App.4th 458, 466-467, quoting *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*).)

Section 186.22, subdivision (b)(1), provides a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist any criminal conduct by gang members . . . ." According to Cardenas and Varela, the evidence in this case was insufficient to establish the elements of this enhancement. This is particularly so, they assert, in light of errors the trial court made in admitting testimony by gang expert McCoy, in which he improperly testified that the crime was planned at a gang meeting and that this meeting was part of the basis for his conclusion that the crime satisfied the benefit/direction/association element of the statute. (See pt. IV.B., *post*.) We conclude there was substantial evidence, independent of this allegedly improper testimony, that defendants committed the crime of murder, at least "in association with" the Norteno criminal street gang, "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (See § 186.22, subd. (b)(1).)

In *People v. Morales* (2003) 112 Cal.App.4th 1176 (*Morales*), the defendant and two fellow-gang members were convicted of robbery and attempted robbery with gang sentence enhancements. On appeal, the defendant argued the evidence was insufficient to support the gang enhancement under subdivision (b)(1) of section 186.22, specifically claiming that the mere fact that he committed the crimes with two other gang members was not enough to support the true findings on the enhancement. The appellate court disagreed, first explaining with respect to the benefit/direction/association element: "Defendant argues that reliance on evidence that one gang member committed a crime in association with other gang members is 'circular. . . .' Not so. Arguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the *benefit* of a gang. The crucial element, however, requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone,

commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*Id.* at p. 1198; accord, *People v. Albillar* (2010) 51 Cal.4th 47,67-68; *People v. Leon* (2008) 161 Cal.App.4th 149, 162; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332.)

With respect to the specific intent element of section 186.22, subdivision (b)(1), the *Morales* court also disagreed with the defendant's argument that there was insufficient evidence of this requisite intent: "Again, specific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members . . . .' Here, there was evidence that defendant intended to commit robberies, that he intended to commit them in association with Flores and Moreno, and that he knew that Flores and Moreno were members of his gang." (*Morales*, *supra*, 112 Cal.App.4th at p. 1198.)

In the present case, the following admissible evidence—assuming for present purposes that Detective McCoy's challenged testimony was improperly admitted into evidence—was sufficient to prove that defendants' actions in committing this offense satisfied the elements of subdivision (b)(1) of section 186.22. First, there was properly admitted testimony by McCoy that the Nortenos are a criminal street gang that engages in criminal activities, primarily robbery, murder, assault, and auto theft, among other things.[30] McCoy also testified that Surenos are a rival street gang to the Nortenos.

[30] In his opening brief, Cardenas "objects to overbroad use of 'Norteno' as a street gang," noting that an expert in a prior case had stated that Norteno and Sureno do not denote discrete street gangs. (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 508.) First, as Cardenas acknowledges, other more recent cases are to the contrary. (See, e.g., *People v. Williams* (2008) 167 Cal.App.4th 983, 987-988; *People v. Ortega* (2006) 145 Cal.App.4th 1344, 1356-1357.) More importantly, we must determine the sufficiency of the evidence based on the record in this case, not on expert testimony in a prior case. (See *In re Jose P.*, *supra*, 106 Cal.App.4th at p. 467.) Here, the gang expert

Second, there was a variety of evidence demonstrating that all three defendants were Norteno gang members. Both McCoy and Steve Young, whom McCoy described as part of the Norteno leadership, testified that Trujillo and Cardenas were Nortenos. McCoy testified that Cardenas had admitted to police that he was a Norteno. Cardenas testified that he had associated with northerner gang members in his neighborhood, had admitted a gang enhancement in a plea bargain to avoid prison, and had told authorities in prison that he was a northerner because he had grown up with northerners. Trujillo had the numbers one and four tattooed on his arms; as McCoy, explained, the number 14 is associated with Nortenos. At trial, McCoy was shown a photograph taken at Fairlas Records, a Norteno recording studio, in which red (also associated with Nortenos) was the predominant color and in which Trujillo was shown throwing gang signs.

McCoy testified that Varela was a "Nortena," a female member of the Norteno gang, based on his interview of her, the people she spent time with, and the type of activity in which she was involved, which had included stealing cars and holding a gun for a male gang member, both of which are activities in which female gang members participate. Young testified that Varela was a "home girl" who associated with Norteno members; whenever he saw her, she was in the presence of members of the gang. Torres-Morales, the Mexico Lindo bartender, also testified that she knew that Varela was involved with northerner gang activity. Cardenas testified that Varela was a Norteno

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testified without contradiction or objection that Nortenos are a criminal street gang, i.e., a group of three or more members, whose primary activities include robbery, assault, and murder. He also testified that Nortenos and Surenos are rival gangs and he described certain subsets or cliques of the Nortenos in Fairfield.

Furthermore, the testimony of many other witnesses, including two of the defendants, Young and Torres-Morales, presumed the existence of the Norteno and Sureno gangs. Finally, that the predicate offenses used to establish the primary activities of the gang (see § 186.22, subd. (f)), may have been committed by a different subset of the Nortenos does not negate the evidence that defendants were members of the Norteno gang when they committed the present offense. (Cf. *In re Jose P.*, *supra*, 106 Cal.App.4th at p. 467.)

gang member. Finally, Varela herself testified that she and her boyfriend Gabriel Tafolla, hung out with members of VCF, which is a Norteno subset.

Third, although the allegedly inadmissible testimony might have supported a finding that the murder was committed "for the benefit of" or "at the direction of" the gang, there was a great deal of significantly stronger admissible evidence showing that the murder was committed "in association with" the gang. (See § 186.22, subd. (b)(1); *People v. Albillar, supra,* 57 Cal.4th at pp. 67-68.) As previously discussed, admissible evidence showed that the three defendants were Norteno gang members who acted together in the commission of this crime. Furthermore, McCoy testified that robbery, assault, and murder are all primary criminal activities of Nortenos. In addition, Varela testified that Trujillo told her to go into the Mexico Lindo Bar—which both McCoy and Torres-Morales testified was frequented by Surenos—to "pick up some guys that have money." While Trujillo did not specifically mention robbery, Varela believed that was the plan. Torres-Morales testified that Varela talked about setting up Rodriguez, Ponce, and Castillo Ramirez that night. McCoy testified that all three men were Sureno gang "associates," with Ponce and Rodriguez involved in gang-related methamphetamine sales. Torres-Morales testified that Rodriguez had said he was a gang member of a southerner clique, and Ponce was a "tag-along" with Rodriguez.

Young testified that, shortly before the shooting, Cardenas had said something to him on the phone about Varela "going with some guys" and "pulling some bullshit." Young further acknowledged at trial telling the police after his arrest that he had assumed there was going to be a robbery or assault. The testimony of several witnesses, including Rodriguez, Ponce, and Varela, further showed that, at Trujillo's direction, Varela took the three men to a dark, isolated location in the apartment complex on Dana Drive, where Trujillo and Cardenas came up to them suddenly; Trujillo was holding a gun and Cardenas had, according to Varela, something "black and long"—presumably the pry bar—in his hands. Rodriguez also testified that, after he was knocked out and then began to regain his senses, he felt someone patting him down or going through his pockets. Finally, after the shooting, both Varela and Young testified that they heard Trujillo say

that he "got that fool," referring to his shooting of Castillo Ramirez. Young believed Trujillo was boasting about the shooting when he said that.

Moreover, this same substantial evidence supports the finding that each defendant specifically intended to assist fellow gang members in committing the planned assault and/or robbery. (See *Morales, supra,* 112 Cal.App.4th at p. 1198; § 186.22, subd. (b)(1).)[31]

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[31] Varela cites two cases in which the Ninth Circuit Court of Appeals interpreted the specific intent requirement of section 186.22 as requiring a defendant to commit the charged offense "with the intent to further other criminal activity of [the gang]." (*Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1104; accord, *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1079; but see *Emery v. Clark* (9th Cir. 2010) 604 F.3d 1102, 1113, fn. 8, 1120 [certifying question to California Supreme Court after noting that, in addition to three published cases, 40 unpublished California Court of Appeal cases have disagreed with interpretations of section 186.22, subdivision (b)(1) found in *Garcia v. Carey* and *Briceno v. Scribner*].) Our Supreme Court recently resolved this question, holding that "the scienter requirement in section 186.22(b)(1)—i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members'—is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*People v. Albillar, supra*, 51 Cal.4th at p. 66.)

We agree with the analysis in the recent case of *People v. Vasquez* (2009) 178 Cal.App.4th 347, 353-354, in which the Second District Court of Appeal explained: "While our Supreme Court has not yet reached this issue, numerous California Courts of Appeal have rejected the Ninth Circuit's reasoning. As our colleagues noted in *People v. Romero* (2006) 140 Cal.App.4th 15, 19 . . .: 'By its plain language, the statute requires a showing of specific intent to promote, further, or assist in "*any* criminal conduct by gang members," rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)' Thus, if substantial evidence establishes that the defendant is a gang member who intended to commit the charged felony in association with other gang members, the jury may fairly infer that the defendant also intended for his crime to promote, further or assist criminal conduct by those gang members. [Citation.]

"Like the *Romero* court, we reject the Ninth Circuit's attempt to write additional requirements into the statute. It provides an enhanced penalty where the defendant specifically intends to 'promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1).) There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing." (Accord, *People v. Hill* (2006) 142 Cal.App.4th 770, 773-774.)

In sum, admissible evidence showed that the three defendants, all Norteno gang members, acted together in targeting patrons of a Sureno bar who had Sureno ties for robbery and/or assault, with a murder resulting. The evidence also showed that robbery, assault, and murder are all primary criminal activities of Nortenos. As in *Morales*, this evidence plainly was sufficient to support the findings that the crime was committed "in association with any criminal street gang, with the specific intent to . . . assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); *Morales, supra,* 112 Cal.App.4th at p. 1198.)[32]

B. *Contentions Related to the Gang Expert's Testimony*

Under California law, a person with "special knowledge, skill, experience, training, or education" in a particular field may qualify as an expert witness and offer testimony in the form of an opinion. (Evid. Code, §§ 720, 801.) Pursuant to Evidence Code section 801, subdivision (a), such expert opinion testimony is admissible only if the subject matter of the proposed testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Expert opinion on the culture and habits of criminal street gangs meets this criterion and is therefore admissible. (*Gardeley, supra,* 14 Cal.4th at p. 617.) Expert opinion on a specific defendant's subjective knowledge and intent does not meet this criterion and is not admissible. (*People v. Killibrew* (2002) 103 Cal.App.4th 644, 647.)

Section 801, subdivision (b), further requires that expert opinion testimony be "[b]ased on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to

[32] This same evidence shows that the crime was not committed as part of "a frolic and detour unrelated to the gang." (*Morales, supra,* 112 Cal.App.4th at p. 1198.) In addition, that Young believed Trujillo was boasting about the shooting when he said he "got that fool" is evidence that the crime was committed, at least in part, for the benefit of the gang in that, as McCoy testified, such crimes are committed to gain the respect of others, including leaders in the gang. (See § 186.22, subd. (b)(1).)

which his testimony relates." So long as the material is reliable, "even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony." (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) This includes reliable hearsay. (*Ibid*.) An expert is permitted to render an opinion based on facts given in a hypothetical question that asks the expert to assume their truth, so long as the question is rooted in facts shown by the evidence. (*Gardeley*, at p. 618.)

"A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay. [Citation.] A trial court also has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.] This is because a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]" (*Gardeley*, *supra*, 14 Cal.4th at p. 619.) We review the trial court's rulings on the admissibility of expert testimony for an abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

1. *Trial Court's Curtailing of the Cross-Examination of the Gang Expert And Refusal to Strike his Testimony*

Cardenas and Varela contend the trial court abused its discretion when it barred cross-examination on the factual basis for the opinion of gang expert Detective McCoy, offered on direct-examination, that a robbery and assault were planned at Fairlas Records in the days before the crime was committed and was then carried out on March 9 to 10, 2007. They further contend the court abused its discretion when it subsequently refused to strike that testimony. They also assert that these errors violated their federal constitutional rights and amounted to a confrontation clause violation. (See *Davis v. Alaska* (1974) 415 U.S. 308, 318).[33]

[33] Cardenas also asserts in passing that these errors permitted the improper use of testimonial hearsay (see *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 ["When

a. *Trial Court Background*

Detective McCoy, the prosecution's gang expert, testified that, in his opinion, the present offense was committed "at the direction of, for the benefit of, or in association with the criminal street gang known as the Nortenos." When asked why he believed this, McCoy testified: "Being familiar with the case, and the way the Norteno, Northern Structure, Nuestra Familia conducts business, I believe my understanding is that there was a meeting that took place prior to this incident of Northern Structure and Norteno members at 93 Alexander Way in the City of Suisun [Fairlas Records], where something of this nature was planned.

"The individuals involved then went out and conducted that plan. They went and looked for the individuals that they wanted to assault, rob, and if it needed to be, killed; lulled into an area in the City of Fairfield, conducted the—an attempted robbery or robbery, and then during the commission of that, ended up killing one of the individuals." McCoy further testified that the meeting at Fairlas Records was one of the reasons he believed the crime was committed for the benefit of the gang. The defense did not object to any of this testimony.

On cross-examination by Cardenas's counsel, McCoy further testified that the meeting had occurred at Fairlas Records about two nights before the crime. McCoy learned of the meeting through Varela and Leticia Torres-Morales, although Torres-Morales did not say she was at the meeting. McCoy knew nothing about what took place at the meeting other than what Varela and Torres-Morales told him. He also testified that Cardenas was not present at the meeting. The meeting was one of the bases for McCoy's opinion that the crime was gang-related.

When Cardenas's counsel asked McCoy if he had "any personal knowledge that what happened at Fairlas was told to [Cardenas] before the crime occurred," the

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the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements"]), but does not explain how this is so given that both declarants—Varela and Torres-Morales—did appear for cross-examination at trial.

prosecutor objected on the ground of speculation, and the trial court sustained the objection. When Cardenas's counsel asked McCoy whether Torres-Morales had heard about the meeting "third-hand," the prosecutor objected on hearsay grounds, the court agreed that the question called for hearsay, and McCoy did not answer it.

On cross-examination by Varela's counsel, McCoy testified that he believed the crime was gang-related partly because of what was said or implied at the meeting at Fairlas Records, and that Varela's description of what happened at the meeting was part of the reason for this conclusion. When counsel asked McCoy whether Varela had told him she was blamed at that meeting for losing a gun, the prosecutor objected on hearsay grounds and the trial court sustained the objection. Varela's counsel then moved to strike McCoy's "entire testimony because he has testified to the contents of what she said. I'm not offering—first of all, I'm not offering it for the truth. I'm cross-examining under Evidence Code Sections 802 and 804. We're entitled to go into the basis of the expert's opinion. [¶] He's testified that what she said, that the contents of what she said is one of the factors which led him to his conclusion. The jury is entitled to hear what that content was; otherwise, they cannot possibly evaluate the credibility of his opinion." The court responded: "I disagree. [¶] Next question."

Varela's counsel then asked McCoy, "What about the contents of what occurred at the meeting did you learn that caused you to form your conclusion?" The prosecutor made the same hearsay objection, and the court sustained it. Counsel again moved to strike McCoy's testimony and the trial court denied the motion, reminding the jury that only the witness's answers, not the questions, were evidence.

A short time later, Varela's counsel again attempted to raise what had been said at the Fairlas Records meeting, without success: "Specifically, as to this case, if people at that meeting at Fairlas Records believed that Ms. Varela had lost a gun, and directed her to put in some work to make up for that, and she didn't make up for it, do you believe they would either beat her or severely—or kill her?" The trial court sustained the prosecutor's objection on the grounds that the question called for hearsay and a

conclusion. The trial court similarly sustained a hearsay objection to counsel's question regarding what McCoy understood was planned at the meeting.

Varela's counsel then moved to strike McCoy's previous testimony regarding the basis for his opinion that the crime was gang-related and the trial court stated: "Well, that was testimony that was given without objection, so the Court didn't step in to object. There is a valid objection now, which I sustained. You're now asking me to strike his prior testimony under what grounds?" Counsel responded, "Confrontation clause; we're being denied our right to cross-examine the witness as to the full basis of that answer." The court then said, "I'm going to deny it. It's untimely. Had you objected at the time, I might have sustained the objection, as I am doing now, but you did not."

Subsequently, Varela testified that the meeting at Fairlas Records was more of a "[h]ang out" than a meeting and that there was no talk there about committing a crime. She testified that about seven people were there, all of them VCF members or associates, who said they had been told that she had lost a gang member's gun, although she also testified that this was not true. However, additional testimony from Varela was somewhat confused as to when she was threatened about needing to make up for the loss of the gun, and it appears that she never actually testified that she was so-threatened at the Fairlas Records meeting.[34]

b. *Legal Analysis*

According to Cardenas and Varela, McCoy's untested assertion that a robbery and/or assault was planned at a meeting at Fairlas Records was prejudicial because it constitutes the only real evidence that this was more than "a drug deal gone bad" rather than a gang-related robbery.

We agree with Cardenas and Varela that (1) the trial court improperly refused to permit defense counsel to cross-examine McCoy about the factual basis for his belief that a meeting had taken place shortly before the shooting at which a plan to commit robbery

[34] Varela did testify that Cardenas was not at the meeting, and never testified that Trujillo was at the meeting.

and assault was formed, and (2) the court should have granted the defense motion to strike McCoy's testimony on this subject. However, and assuming—as Cardenas and Varela assert—that the court's rulings rose to the level of constitutional error, we conclude, in light of the entire record, that the error was not prejudicial with respect to either the substantive offense or the gang enhancement. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) That is because there was other strong evidence presented at trial—including testimony that McCoy properly offered as well as a great deal of additional evidence—that demonstrates beyond a reasonable doubt that the murder resulted from a plan by these three Norteno gang members, acting "in association with the gang," to rob and/or assault men who were lured from a Sureno-associated bar. (See § 186.22, subd. (b)(1).)

We have already determined that the jury's true findings on the gang enhancement allegation are supported by substantial evidence as to all defendants. (See pt. IV.A., *ante*.) In light of the abundance of evidence, which plainly establishes that defendants, all Nortenos, committed this offense as part of a plan to "pick up some guys with money" at a Sureno bar and lull them to a secluded area to rob and/or assault them, any error by the trial court in refusing to allow cross-examination of McCoy regarding the basis of his opinion that the robbery and assault were planned in advance, or in refusing to strike his testimony on this point, was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386U.S. at p. 24.)[35]

[35] Cardenas asserts that McCoy's testimony implying that what occurred was a planned robbery undermined his defense that what took place that night was merely "a drug deal gone bad or haphazard confrontation on a Friday night, not a planned robbery . . . ." However, as our description of the other evidence presented at trial makes plain, there was a great deal of evidence showing the presence of a plan to rob and/or assault the three men. That the crime may have been planned on the night of March 9, 2007, rather than at a prior meeting, as McCoy testified, does not negate this additional evidence of a plan to commit robbery/assault that was put into effect on the night in question. On the other hand, the evidence that this was a "drug deal gone bad" was limited to (1) Cardenas's self-serving testimony, which was contradicted by the testimony

Our conclusion that McCoy's challenged testimony pales in comparison to other evidence presented at trial in support of the gang enhancement allegation is underscored by the fact that, in closing argument, the prosecutor did not even mention this testimony and, indeed, did not rely on either the "for the benefit of" or "at the direction of" language of section 186.22, subdivision (b)(1), but instead rested his argument solely on the theory that the offense was committed "in association with" the gang. Indeed, during his rebuttal, the prosecutor disparaged Cardenas's counsel's argument that there was no real evidence that the offense was committed "for the benefit of the gang," stating that counsel either "doesn't understand the gang law, or he just misrepresented it to you. Here's the real part of the gang enhancement that this case is all about. . . . [¶] You must decide whether the People have proved the initial allegations that the defendant committed the crime for the benefit of, that's what he's [counsel] argued, at the direction of, that's part of what he's arguing, here's what he didn't tell you: Or in association with the criminal street gang. [¶] This is 'in association with' a criminal street gang. This is a case where you have a gangbanger; you have Mr. Trujillo or Mr. Cardenas, who's doing a crime with fellow gangbangers; in association with them. [¶] You don't have to do this to see that the gang gets a direct benefit for it; that's not what the law says. Why did he leave out 'in association with' in his argument? Because it kills them on the gang enhancement."[36]

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of numerous other witnesses, and (2) perhaps also the evidence that Rodriguez dealt drugs and had a small quantity of drugs in his possession at the time of the attack.

[36] Cardenas notes that, in his closing argument, the prosecutor "stressed the gang expert 'laid the foundation for the rest of the gang enhancement'[citation]," apparently interpreting that statement as a reference to McCoy's testimony that the meeting at Fairlas Records demonstrated that the crime was committed at the direction or for the benefit of the gang. The prosecutor's comments in which this quoted phrase appears are as follows:

"Let's use our common sense in looking at this gang enhancement now that we know what this really is. That is, if you do a gang-like crime in association with your gang bangers, you're into the statute, so long as I put on all [the] other stuff: The

Finally, although the trial court apparently gave no instructions limiting the purpose for which the gang-related testimony was admitted, the court did instruct the jury with CALCRIM No. 332, which required the jury to, inter alia, "decide whether information on which the expert relied was true and accurate" and to "disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

2. *Expert's Opinion on Ultimate Issues*

Cardenas also contends the gang expert improperly offered his opinion on ultimate issues in the case. Specifically, he asserts that McCoy's testimony—that defendants

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predicate offenses, these prior Court documents, to establish that a gang is three or more people that engage in crimes.

"That's why you saw Detective McCoy. He lays the foundation for the rest of the gang enhancement.

"But remember, it's 'in association with.' I don't have to prove that it directly benefited the Nortenos or the Northern Structure. I don't have to prove that. It's just in association with other gang members."

In context, it is clear that the prosecutor was not referring to McCoy's testimony about the meeting at Fairlas Records, but instead was arguing that McCoy's testimony about gangs generally and the Norteno gang in particular proved the existence of a street gang in this case.

In his closing argument, Varela's counsel referred to the meeting once to support Varela's duress defense: "What do we know about the events leading up to this day? Well, we know about this meeting at Fairlas Records that Detective McCoy told you about, that Detective McCoy described as one of the reasons for his opinion that this homicide, this murder, was committed for the benefit of the gang, the Norteno gang. [¶] That confirms, corroborates Ms. Varela's description, the same description she's given from square one about what happened there, about her being blamed for losing a gang gun, and being told she would have to put in some work to make up for it. [¶] Now, as I said, and as you know from Detective Wilkie and Detective McCoy, it's the same thing Ms. Varela told them on March 10th, 2007."

Cardenas's counsel, on the other hand, disputed McCoy's testimony about what happened at the meeting during his closing argument: "[McCoy] says, 'Well, there's this meeting at Fairlas Records,' where he thinks this was planned. Well, first off, Detective McCoy says, 'I have no evidence Jonathan Cardenas is there, and nobody told me he was there,' and beyond that, Detective McCoy is speculating that they talked about this at Fairlas Records. He doesn't know that to be the case, and you have brought . . . not a single witness in from that meeting who said that was the plan, and this was authorized, at best. [¶] So no matter what happened at Fairlas, my guy is not even there . . . ."

carried out a plan to draw people "they wanted to assault, rob, and if it needed to be, killed" into a remote area where the offense occurred—constituted an improper opinion regarding defendants' intent. (See *People v. Killibrew*, *supra*, 103 Cal.App.4th at p. 647.)

a. *Trial Court Background*

During the prosecutor's direct-examination of McCoy, the following exchange took place:

"Q: Now, you're intimately familiar with the details of this particular crime as charged against these defendants, true?

"A: Yes, sir.

"Q: And do you have an opinion as to whether or not this crime, these crimes that are alleged in this case, were at the direction of, for the benefit of, or in association with the criminal street gang known as the Nortenos?

"A: Yes, I do, and I believe that it was.

"Q: Why do you say that?

"A: Being familiar with the case, and the way the Norteno, Northern Structure, Nuestra Familia conducts business, I believe my understanding is that there was a meeting that took place prior to this incident of Northern Structure and Norteno members at 93 Alexander Way in the City of Suisun [Fairlas Records], where something of this nature was planned.

"The individuals involved then went out and conducted that plan. They went and looked for the individuals that they wanted to assault, rob, and if it needed to be, killed; lulled into an area in the City of Fairfield, conducted the—an attempted robbery or robbery, and then during the commission of that, ended up killing one of the individuals." The defense did not object to this testimony.

b. *Legal Analysis*

Cardenas acknowledges that he failed to object to the testimony in question on the ground that McCoy offered an opinion on ultimate issues, but argues that it would have been futile to do so in light of the trial court's refusal to permit cross-examination

regarding the same testimony—i.e., regarding the basis for McCoy's opinion that the offense was planned at a gang meeting—and its refusal to strike that testimony. However, we do not believe an objection on the ground that McCoy was offering an improper opinion on ultimate issues would have been futile. This ground for objection, which arose during the prosecutor's direct examination of McCoy, was quite distinct from the cross-examination issue, which did not become an issue until *after* the prosecutor's direct examination was completed. For this reason, we conclude that Cardenas has forfeited this issue on appeal. (See *Coffman and Marlow, supra*, 34 Cal.4th at pp. 81-82.)

Cardenas nonetheless argues that the failure to object at trial was due to ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington, supra,* 466 U.S. at p. 688.) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id*. at p. 697.)

Here, we need not address whether counsel's representation was deficient in light of his failure to object to McCoy's testimony on the ground that it improperly constituted an opinion on ultimate issues in the case. That is because any such error was not prejudicial. (See *Strickland v. Washington, supra,* 466 U.S. at pp. 694, 697.) We have already concluded that error on the part of the trial court in failing to permit cross-examination of McCoy regarding his testimony that the crime was planned at a meeting was harmless beyond a reasonable doubt. (See pt. IV.B.1, *ante*.) Similarly, in light of the abundance of other evidence that the crime was committed in association with the Norteno gang (see pt. IV.A, *ante*), we conclude that it is not reasonably probable that the

result would have been different in the absence of the complained-of testimony. (See *ibid*.)

V. *Trial Court's Refusal to Give a Pinpoint Instruction on Duress*

Varela contends the trial court erred in denying her attorney's request for a pinpoint instruction on prior threats and violence as they related to her duress defense.

A. *Trial Court Background*

Varela's counsel requested that, in addition to the standard instruction on duress (CALCRIM No. 3402), the court give the jury an instruction relating prior threats and acts of violence on Varela by Trujillo and other gang members to Varela's fear of Trujillo. Varela's counsel proposed an instruction modeled on language from CALCRIM No. 505, a self-defense instruction.[37] According to Varela's counsel, the evidence that supported the giving of this instruction included Varela's testimony that Trujillo had sexually assaulted her and that other gang members associated with Trujillo had threatened her and hit her with a gun to punish her for supposedly losing a gun that belonged to the gang.

The prosecutor argued that such an instruction applied only to self-defense and should not be given in a case in which the defense was duress. The trial court ruled: "I'm not giving that. Deny that instruction. It goes to self-defense. . . ."

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[37] CALCRIM No. 505 provides in relevant part: "[If you find that <*insert name of decedent/victim*> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

"[If you find that the defendant knew that <*insert name of decedent/victim*> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

"[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]

"[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with <*insert name of decedent/victim*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]"

The trial court ultimately instructed the jury on duress, pursuant to CALCRIM No. 3402, as follows: "The defendant Isabel Varela is not guilty of aiding and abetting an attempted robbery resulting in felony murder charged in Count 1 if she acted under duress. The defendant Isabel Varela acted under duress if, because of a threat or menace, she believed that her life would be in immediate danger if she refused a demand or request to commit the crime.

"The demand or request may have been express or implied. The defendant Varela's belief that her life was in immediate danger must have been reasonable. When deciding whether her belief is reasonable, consider all the circumstances as they were known to and appeared to her, and consider whether [*sic*] a reasonable person in the same position as the defendant would have believed.

"A threat of future harm is not sufficient. The danger to life must have been immediate.

"The People must prove beyond a reasonable doubt that the defendant Varela did not act under duress. If the People have not met the burden, you must find her not guilty."[38]

B. *Legal Analysis*

Our Supreme Court has "suggested that 'in appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case . . . . [Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*People v. Bolden* (2002) 29 Cal.4th 515, 558 (*Bolden*).)

In the present case, the standard duress instruction informed the jury that Varela acted under duress if, "*because of a threat or menace*, she believed her life would be in

[38] As the instruction makes clear, the duress defense went to Varela's guilt in aiding and abetting an attempted robbery for purposes of the felony murder charge, and not the murder itself, for which a duress defense is not available. (See *People v. Anderson* (2002) 28 Cal.4th 767, 780.)

immediate danger if she refused a demand or request to commit the crime," and further stated that, when deciding whether her belief was reasonable, the jury must, inter alia, "*consider all the circumstances as they were known to and appeared to her* . . . ." (CALCRIM No. 3402, italics added.)

Contrary to Varela's assertion, this instruction neither forced the jury to consider only present threats nor precluded it from considering past threats or assaults, to the extent they affected her current belief that she was in immediate danger. Instead, the instruction told the jury to consider "all circumstances" known to Varela in deciding the reasonableness of her belief. In light of this language, past threats and assaults by Trujillo and other gang members associated with Trujillo plainly were evidence the jury could consider in reaching its conclusion. (See *Bolden*, *supra*, 29 Cal.4th at p. 559 [trial court is required to give a requested instruction relating reasonable doubt standard of proof to a particular element of crime charged "only when the point of the instruction would not be readily apparent to the jury from the remaining instructions"]; *People v. Hayes* (1990) 52 Cal.3d 577, 626 ["Because defendant's proposed instructions would merely have elaborated on . . . general instructions, the trial court's refusal to give them was not error"].)

Varela nonetheless points out that, in the self-defense context, upon defense request and when supported by sufficient evidence, the trial court must instruct the jury that it may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488; see CALCRIM No. 505.) However, even assuming that the failure to adapt the requested portion of CALCRIM No. 505 to the distinct defense of duress was error, it is not reasonably probable that, had the court given the requested pinpoint instruction, the result would have been different. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

First, Varela's counsel "thoroughly aired" the subject of the prior threats and assault in closing argument. (*People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1664 [failure to give pinpoint instruction in self-defense context] (*Gonzales*).) While discussing Varela's belief that she was in immediate danger, counsel described the

evidence regarding prior threats and assaults, as well as the evidence of contemporaneous threats. Second, the reasoning of *Gonzales* with respect to harmlessness applies here as well: "The concept at issue here [of prior assault and threats and the reasonableness of Varela's belief in her immediate danger] is closer to rough and ready common sense than abstract legal principle. It is also fully consistent with the otherwise complete [duress] instructions given by the court. It is unlikely the jury hearing the evidence, the instructions given and the argument of counsel would have failed to give [Varela's] position full consideration." (*Id*. at p. 1665, fn. omitted.)

VI. *Trial Court's Failure to Instruct the Jury to View the Oral Admissions of a Defendant with Caution*

Cardenas contends the trial court erred when it failed to instruct the jury sua sponte that a defendant's oral admissions should be viewed with caution.

The trial court instructed the jury with CALCRIM No. 358 as follows: "You have heard evidence that defendant Jesus Trujillo and Isabel Varela [*sic*] made an oral or written statement before the trial. You must decide whether or not these defendants made any such statement in whole or in part.

"If you decide that the defendants made such a statement, consider the statements along with all the other evidence in reaching your verdict. It is up to you to decide how much importance to give such a statement."[39]

When it gave CALCRIM No. 358, the court left out the following bracketed language: "Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded." (CALCRIM No. 358, Dec. 2008 rev.) This portion of the instruction must be given sua

[39] The court also gave CALCRIM No. 359 as follows: "A defendant may not be convicted of any crime based on his or her out-of-court statement alone. You may only rely on the defendant's out-of-court statement to convict him or her if you conclude that other evidence shows the charged crime was committed.

"That other evidence may be slight, and only need to be [*sic*] enough to support a reasonable inference that a crime was committed. The identify [*sic*] of the person who committed the crime may be proved by the defendant's statements alone."

sponte "when there is evidence of an incriminating out-of-court oral statement made by the defendant." (Bench Note to CALCRIM No. 358, "Instructional Duty," citing *People v. Beagle* (1972) 6 Cal.3d 441, 455-456, overruled on other grounds in *People v. Castro* (1985) 38 Cal.3d 301; accord, *People v. Wilson* (2008) 43 Cal.4th 1, 19.)[40]

According to Cardenas, the trial court erred in failing to instruct on the need to view an incriminating admission with caution "because the record is replete with statements from [Cardenas] used to prove his guilt of robbery murder. These include key statements reported by Young that [Cardenas] mentioned: waiting for Varela, Varela bringing some guys, and [Cardenas] wanting to get money (not just drugs)." Cardenas asserts that these statements were vague, yet critical to the case against him since neither Varela nor the victims ever said anything explicit about a robbery, and the statements were used to "shore up equivocal proof [Cardenas] was in on a robbery."

Although the out-of-court statements identified by Cardenas were not necessarily incriminatory, they did have the potential to be seen as incriminatory by a jury, especially given Young's interpretation that a robbery or assault was going to take place. The court, therefore, should have instructed the jury to view defendants' admission with caution. (See *People v. Wilson, supra,* 43 Cal.4th at p. 19.)

When the evidence warrants it, a trial court's failure to instruct the jury to view a defendant's oral admissions with caution is reviewed under " 'the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' [Citation.] Because the cautionary instruction's purpose is ' "to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were

[40] Although Cardenas does not address the fact that the court's instruction only mentions Trujillo and Varela by name, we will presume that, for purposes of this argument, Cardenas is also claiming that the trial court should have included his name in the instruction.

repeated accurately. [Citations.]" [Citation.]' [Citation.]" (*People v. Wilson*, *supra*, 43 Cal.4th at p. 19.)[41]

In the present case, the court's instructional error was plainly harmless. First, in closing argument, the prosecutor repeatedly told the jury that Young's statements should not be trusted. For example, when discussing Young's testimony that he saw Trujillo shoot Castillo Ramirez, the prosecutor said: "If it was just Steve Young, this Norteno, multi-convicted felon out there saying that, nobody would believe that unless you corroborated it. You have to have some evidence that tells you that what he's telling you is the truth." Hence, even the prosecutor warned the jury to view Young's testimony with caution.

Second, Cardenas's statements to Young—absent Young's interpretation of them—were as consistent with Cardenas's defense theory as with that of the prosecution. Young's testimony that, during their phone conversation, Cardenas mentioned dope, money, and waiting for Varela, who might be pulling some "bullshit," actually could be used to support Cardenas's claim that the plan was to meet Varela and someone who had methamphetamine for sale at Dana Drive. Indeed, Cardenas himself testified quite similarly regarding what he had said to Young. For example, he testified that he told Young that he was on Dana Drive "waiting on" Varela, who "was supposed to be coming to hook something up." Cardenas also said he told Young "something about money," and also said something about Varela's "bullshit" because she was taking a long time to arrive.

Given that Cardenas's testimony about what was said in their conversation was strikingly similar to Young's testimony, and that Cardenas's statements were as consistent with Cardenas's defense as with the prosecution's theory, there is no basis for

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[41] We reject Cardenas's claim that the error denied him due process of law and resulted in a fundamentally unfair trial since our Supreme Court has held that "[f]ailure to give the cautionary instruction is not one of the ' " 'very narrow[ ]' " ' categories of error that make the trial fundamentally unfair. [Citation.]' [Citation.]" (*People v. Dickey* (2005) 35 Cal.4th 884, 905.)

concern that the jury could have wrongly believed Young's testimony regarding Cardenas's out-of-court statement. (See *People v. Wilson*, *supra*, 43 Cal.4th at p. 19.)

VII. *Prosecutorial Misconduct in Closing Argument*

Varela and Trujillo each contend that certain comments made by the prosecutor during closing argument constituted misconduct.

The California Supreme Court has explained that " ' " '[a] prosecutor' . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The defendant need not show that the prosecutor acted in bad faith. (*Id*. at p. 822.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) " 'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

A. *Varela's Contention*

Varela contends the prosecutor committed misconduct by misstating the law of duress during closing argument.

1. *Trial Court Background*

In his rebuttal argument, the prosecutor argued that Varela's duress defense was "not supported" and "not really sufficient," explaining, "When you analyze out the so-called threats, what they mean, whether or not there was any immediacy of risk of harm

with her options, what a reasonable person would have done, she doesn't get the benefit of that."

The following exchange then took place:

"MR. OGUL [Varela's counsel]: That misstates the law. Duress doesn't require what a reasonable person would have done.

"THE COURT: Overruled.

"MR. OGUL: It requires what a reasonable person would have believed was an immediate danger.

"THE COURT: Overruled.

"MR. WILLIAMSON [the prosecutor]: And he was right about that, so he made a point; it is correct." The prosecutor then moved on to another topic.

2. *Legal Analysis*

According to Varela, the prosecutor misstated the law of duress by arguing that the question was what a reasonable person would have done, when the question for purposes of determining duress is whether Varela reasonably believed that her life was in immediate danger. (See CALCRIM No. 3402; cf. *People v. Najera* (2006) 138 Cal.App.4th 212, 223-224 [prosecutor incorrectly stated during closing argument that heat of passion was based on what a reasonable person would do, rather than on whether provocation was sufficient to cause a reasonable person to act rashly].)

Assuming for purposes of argument that the prosecutor's misstatement constituted misconduct, that misconduct was immediately cured by the prosecutor's acknowledgement that Varela's counsel's statement regarding what the law requires was accurate, i.e., that counsel was "right about that, so he made a point; it is correct." It is therefore not reasonably probable that Varela would have received a more favorable outcome had the prosecutor not made such a comment. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

B. *Trujillo's Contention*

Trujillo contends the prosecutor committed misconduct during the rebuttal portion of his closing argument by making improper comments about Trujillo's counsel's feelings about the case.

1. *Trial Court Background*

During his rebuttal argument, the prosecutor, in discussing the evidence against defendants, told the jury it was not his "job as prosecutor to disparage or denigrate defense counsel." He then discussed Trujillo's counsel, John Coffer, saying, "he really never told you he had a defense. All he did was attack everybody . . . ." The prosecutor then said, "And I'm not denigrating him. You know, he only has what he has to work with here in this case. I'm sure if you ask Mr. Coffer, he'd say, 'I'd rather be trying Mr. Williamson's [the prosecutor's] case, if you want to know the truth,' in terms of what you have to work with."

Trujillo's counsel then stated, "I would ask that counsel not comment on what I would wish to do." The court responded, "Overruled."

2. *Legal Analysis*

"Prosecutors are permitted to make vigorous, colorful arguments with obvious hyperbole . . . ." (*People v. Lewis* (2004) 117 Cal.App.4th 246, 259-260.) However, " '[c]asting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.' [Citation.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 183-184 (*Sandoval*).)

In *Sandoval*, the defendant claimed the prosecutor had committed misconduct in a number of ways, including by improperly attacking defense counsel during closing argument. (*Sandoval*, *supra*, 4Cal.4th at p. 183.) For example, "the prosecutor referred to attempts by defense counsel to mislead the jury and, at one point, accused defense counsel of perpetrating a fraud on the court. The prosecutor also referred to defense theories and evidence as 'ridiculous' and 'nonsense,' " which the defendant interpreted to be an accusation of defense fabrication of evidence. (*Ibid.*)

The California Supreme Court found that many of these comments constituted misconduct, but rejected the defendant's claim that the misconduct was prejudicial. As the court explained: "All of these remarks were a small part of the prosecutor's very lengthy review of the evidence presented. They were clearly recognizable as an advocate's hyperbole. [Citation.] Accordingly, we find no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments. [Citation.]" (*Sandoval*, *supra*, 4 Cal.4th at p. 184.)

While we believe the court too easily overruled defense counsel's objection, the prosecutor's statement was also "clearly recognizable as an advocate's hyperbole." Such misconduct was plainly harmless.[42] As in *Sandoval*, these comments were a very small part of the prosecutor's argument, and were far less inflammatory than the prosecutor's remarks in *Sandoval*. (See *Sandoval*, *supra*, 4 Cal.4th at p. 184.) Here too, the comments were obviously "recognizable as an advocate's hyperbole." (*Ibid*.) Contrary to Trujillo's assertion that the comments referred to information not in evidence or insinuated that Trujillo's counsel did not want to be representing him, in context, it is clear that the prosecutor was, perhaps overzealously, commenting on the evidence and the perceived weakness of Trujillo's defense.[43]

Because we conclude that it is not reasonably probable "that the jury would have reached a more favorable result absent the objectionable comments," Trujillo's claim of prosecutorial misconduct cannot succeed. (*Sandoval*, *supra*, 4 Cal.4th at p. 184; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

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[42] For purposes of this argument, we will also assume that counsel's objection was sufficient to preserve the issue on appeal, given his failure to specifically state that he was objecting on the ground of prosecutorial misconduct or to request that the court admonish the jury. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1201 ["To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety"].)

[43] We again observe the trial court gave CALCRIM No. 222, which instructed the jury that it must decide the case based on the evidence and that nothing the lawyers said was evidence.

VIII. *Cumulative Error*

All three defendants contend that, even if none of the errors in themselves require reversal, the cumulative effect of those errors resulted in prejudicial error. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) We disagree.

We have concluded that none of the alleged errors committed during this lengthy trial were prejudicial. Nor do we find that the cumulative effect of any errors calls into doubt the jury's verdicts or undermines the fairness of the trial in this case, particularly in light of the strong evidence of guilt. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

IX. *Cruel and Unusual Punishment*

Both Varela and Cardenas contend their sentences constitute cruel and unusual punishment under both the California and United States Constitutions.

A. *Varela's Claim*

Varela was sentenced in this matter to 50 years to life in prison.

1. *Trial Court Background*

At Varela's sentencing hearing, her attorney moved to "strike the enhancement" and "reduce the offense" on the ground of cruel and unusual punishment under the state and federal constitutions.

The trial court denied the motion, explaining: "The Court in its own opinion, again, does not believe Ms. Varela . . . had any intent to kill Mr. Gerardo Castillo, but it is clear to the Court that she did intend to lure the three victims to the location where they would be robbed, and/or assaulted, and that Mr. Castillo's death was the natural and probable consequence of that assault. [¶] . . . [¶]

" . . . What was striking to the Court [in watching the four hours of videotape of Varela's post-arrest interviews with police] was after having lured these men to this apartment building, having taken off from that location, having either witnessed or certainly been aware that the person had been killed, Ms. Varela sat with the police for . . . over an hour telling some false story before eventually being confronted with the facts. [¶] Having then admitted her culpability, it would seem to this Court, Ms. Varela's

concern throughout [was] all about Ms. Varela and not about anyone else, to include the victim in this case. [¶] . . . [¶]

"And again, but for Ms. Varela's active participation of taking these three gentlemen into a cab to the Dana Street address, taking them around, leading them through this dark alley, none of this would have occurred."

2. *Legal Analysis*

a. *The California Constitution*

Varela first argues that, pursuant to the California Constitution, her sentence is grossly disproportionate to her culpability.

"Article I, section 17 of the California Constitution prohibits infliction of '[c]ruel and unusual punishment.' A sentence may violate this prohibition if ' "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." ' [Citation.] [¶] . . . [The defendant] must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability. [Citation.] Therefore, '[f]indings of disproportionality have occurred with exquisite rarity in the case law.' [Citation.]" (*People v. Em* (2009) 171 Cal.App.4th 964, 972 (*Em*).) " 'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.' [Citation.]" (*Id.* at p. 971.)

In *In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*), superseded by statute on other grounds as stated in *People v. West* (1999) 70 Cal.App.4th 248, 256, our Supreme Court discussed three factors to be used in determining whether a particular punishment is disproportionate: (1) the nature of the offense and/or the offender; (2) compare the challenged punishment with those prescribed in California for other, more serious offenses; and (3) compare the challenged punishment with punishments for the same offense in other jurisdictions. A showing of disproportionality based on any one of these factors is sufficient to demonstrate that the punishment is disproportionate. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38.)

First, with respect to the nature of the offense and/or offender, Varela acknowledges that she "actively participated in the robbery, a serious crime," but nonetheless argues "she was in no position to refuse to follow the orders given to her by Trujillo." Varela fails to note, however, that the jury rejected her defense that she acted under duress and convicted her as charged.[44]

Varela also states in support of her claim that she was unarmed and did not join in the attack on the victims. In addition, she describes herself as "an immature, 26-year-old woman with [an] alcohol problem and no home."[45] She notes that her mother told the court at Varela's sentencing hearing that Varela was a follower who was incapable of thinking for herself. In addition, while she had been convicted of auto theft shortly before committing the present offense, the presentence report described her criminal record as "minimal." Finally, she states that she "was not a hardcore gang member."

None of these claimed facts alters the crucial facts that Varela lured the three men to Dana Drive, where she knew two fellow-gang members—Trujillo and Cardenas—would be waiting, and that the jury rejected her claim that she did so in fear for her life. Thus, as the trial court found, "but for her active participation, . . . none of this would have occurred."[46] In addition, Varela had been convicted of felony vehicle theft in January 2007 and was awaiting sentencing when the present crime occurred. She also

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[44] While Varela is correct that gang expert McCoy responded in the affirmative to a hypothetical asking whether a severe beating or killing would result from her refusing to do something the Nortenos ordered her to do to make up for losing a gun, this answer was based on Varela's defense of duress, which was disbelieved by the jury.

[45] Respondent notes that Varela was actually 25 years old at the time of the offense.

[46] We also observe that Varela's claim that she acted under duress was not only rejected by the jury but that, as respondent puts it, the record "shows a defendant who not only played an indispensable role in allowing the crime to occur but, evidently showing no remorse afterward, tried to help the killer escape . . . . If [Varela] was a reluctant participant, there was precious little evidence of that reluctance besides her self-serving testimony, and her actions suggested otherwise."

was aware that Trujillo possessed a gun, given that she had bought ammunition for him earlier that same day.

Varela's sentence included both a 25-years-to-life sentence for felony-murder and a 25-years-to-life enhancement for the firearm use, under section 12022.53. In enacting section 12022.53, the "Legislature found 'that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and deter violent crime.' (Stats. 1997, ch. 503, § 1.)" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 493.) The underlying purpose of section 12033.53—to protect innocent people and deter violent crime—is plainly applicable to the offense committed by Varela.[47]

Thus, we cannot say that Varela's sentence was disproportionate based on the first *Lynch* factor: the nature of the offense and/or the offender. (See *Lynch*, *supra*, 8Cal.3d at pp. 425-426.)

As to the second *Lynch* factor, Varela acknowledges that the punishment she received is not disproportionate "[i]n the abstract" to other sentences imposed for similar crimes in California. (See *Lynch*, *supra*, 8Cal.3d at pp. 426-427.)

With respect to the third *Lynch* factor, Varela states, "California's penalty exceeds the punishments in *all* other jurisdictions for an accomplice's use of a firearm" in that "[n]o other state provides for a mandatory 25-year or life-sentence enhancement for vicarious gun use during a felony, even where the defendant harbored malice" and "no

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[47] Varela attempts to distinguish her situation from that of defendants in other cases in which a sentence pursuant to section 12022.53 has been upheld against a claim of cruel and unusual punishment. (See, e.g., *Em*, *supra*, 171 Cal.App.4th 964 [affirming two consecutive 25-years-to-life sentences imposed on a 15-year-old gang member for actively aiding and abetting felony-murder]; *People v. Gonzales* (2001) 87 Cal.App.4th 1 [affirming 50-year-to-life sentences imposed on two 16-year-olds convicted of actively aiding and abetting first degree murder]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1215 [defendant personally committed an unprovoked murder].) Although *People v. Zepeda* is distinguishable in that it involved a defendant who personally committed the murder, we do not agree that the other two cases included much more heinous facts and further observe that the defendants there were some 10 years younger than Varela when they committed their crimes.

other state singles out gang cases as the only type of cases in which enhancements can be vicariously imposed." (See *Lynch*, *supra*, 8 Cal.3d at pp. 427-429.) Specifically, Varela observes that, "of the 46 other states that increase penalties where firearms are used, only 15 impose mandatory sentence increases over which the sentencing judge has no discretion" and, of those 15 states, the longest additional penalty is 10 years, with the average being 4.8 years. She concludes, "California stands alone in providing for the longest sentence with the least amount of judicial discretion."

However, simply because California may impose the harshest punishment when compared to penalties for similar crimes in other jurisdictions does not mean the penalty is unconstitutional. As the appellate court in *People v. Gonzales*, *supra*, 87 Cal.App.4th 1, 18, explained: "[The defendant] also argues that the punishment imposed under section 12022.53 is unconstitutional because it is greater than the sentencing schemes in other states. We agree with the reasoning of the court in *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516 . . . , a 'Three Strikes' case: "That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This [state's] constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." ' " Here, we do not believe that the mere fact that our Legislature saw fit to impose a greater mandatory punishment than other jurisdictions for vicarious firearm use demonstrates disproportionality in the present case.

For all of these reasons, we conclude that Varela has not overcome the " 'considerable burden' " required under California law to demonstrate that her sentence is so disproportionate to the offense of which she was convicted that it " ' "shocks the conscience and offends fundamental notions of human dignity." ' [Citation.]" (*Em*, *supra*, 171 Cal.App.4th at p. 972.)

b. *The United States Constitution*

Varela further contends her sentence violates the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution, which states: " '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' [Citation.] 'The Eighth Amendment, which forbids cruel and unusual punishments, contains a "narrow proportionality principle" that "applies to noncapital sentences." ' [Citation.] The appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality." (*Em*, *supra*, 171 Cal.App.4th at pp. 976-977, citing *Ewing v. California* (2003) 538 U.S. 11, 20; *Harmelin v. Michigan* (1991) 501 U.S. 951, 1001 (conc. opn. of Kennedy, J.).)

For many of the same reasons her state claim failed, Varela has failed to show gross disproportionality under the Eighth Amendment. (Cf. *Em*, *supra*, 171 Cal.App.4th at p. 977 [citing two three strikes cases in which United States Supreme Court upheld sentences of 25 years to life and 50 years to life for petty thefts, concluding that if such sentences were not grossly disproportionate, a 15-year-old's sentence of 50 years to life for murder was not grossly disproportionate.)

B. *Cardenas's Claim*

In his contention that his sentence constitutes cruel and unusual punishment, Cardenas incorporates Varela's disproportionality argument. Assuming Cardenas has not forfeited this claim for failure to raise it in the trial court, we find that it is without merit.

Cardenas states that he was 27 years old at the time of sentencing and that he "does not have a particularly lengthy or violent history and his assaultive behavior is related to alcohol; his only violent conviction is a juvenile fight almost ten years earlier." He further states that imposition of the firearm enhancement based on his gang status is particularly excessive, noting that he shot no one and asserting that the gang nature of the crime is dubious.

Based on these facts, Cardenas argues that his situation is comparable to that of the defendant in *People v. Dillon*, *supra*, 34 Cal.3d 441, in which a 17-year-old was

convicted of first degree murder and attempted robbery, and was sentenced to life in prison after he shot and killed a man during an attempt by the defendant and his friends to steal marijuana plants the victim was growing. The defendant had previously overheard the victim threaten to shoot anyone who came on his property. (*Id.* at p. 451.) When the defendant heard the victim approaching and saw him carrying a shotgun, the defendant "began rapidly firing his rifle at him." (*Id*. at p. 452) Our Supreme Court concluded that the specific facts of the crime and the defendant's culpability demonstrated that the imposition of a life sentence constituted cruel and unusual punishment. (*Id.* at pp. 450, 489.) Cardenas's situation—in which the evidence showed that a then-26-year-old gang member with a criminal record actively participated in an ambush of and assault on three drunken men associated with a rival gang—is not comparable to that of the defendant in *Dillon*.

Like Varela, Cardenas has not shown that his sentence constituted cruel and unusual punishment under either the California or United States Constitution. (See *Em*, *supra*, 171 Cal.App.4th at pp. 972, 976-977.)[48]

X. *Cardenas's Presentence Custody Credits*

Cardenas contends the trial court incorrectly awarded him 549 days of presentence custody credits, rather than the 550 days to which he was entitled. Respondent agrees.

"As a general rule, a defendant is supposed to have the trial court correct a miscalculation of presentence custody credits. [Citation.] However, if—as here—there are other appellate issues to be decided, the appellate court may simply resolve the

[48] Cardenas describes his term of 51 years to life as an "effective LWOP," given that, at his age, a 51-year term exceeds typical male life expectancy. He then states, "[a]t some point the courts must distinguish between offenders who merit parole consideration within their lifetime and those who do not. Whether as a matter of state or federal law, [Cardenas] urges the Court to make this distinction here." Our conclusion, however, necessarily is based on our application of the law regarding cruel and unusual punishment to the facts of this case, in light of the sentence deemed appropriate by our Legislature.

custody credits issue in the interests of economy. [Citation.]" (*People v. Jones* (2000) 82 Cal.App.4th 485, 493.)

Cardenas was in presentence custody for 550 days: from March 10, 2007 to September 9, 2008, the date of sentencing.[49] He is entitled to one additional day of presentence custody credit, and we shall modify the judgment to reflect an award of 550 days of presentence credits.

DISPOSITION

Cardenas's judgment is modified to reflect the award of 550 days of presentence custody credits. The superior court is directed to prepare an amended abstract of judgment for Cardenas, which reflects the correct award of presentence custody credit. In all other respects, the judgments are affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.

[49] Cardenas theorizes that the error might have been due to the court's failure to account for a leap year or the day of arrest or sentencing.