Filed 11/13/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CRISTIAN ARGETA et al., Defendants and Appellants.	B229135 (Los Angeles County Super. Ct. No. TA103939)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed in part, reversed in part, and remanded.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant Cristian Argeta.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Camilo Hernandez.

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

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, only the first paragraph of the opinion, part VII of the discussion, and the disposition are certified for publication.

Defendants Cristian Argeta and Camilo Hernandez appeal from a jury verdict convicting them of one count of murder (Pen. Code, § 187 subd. (a)) and five counts of attempted murder (Pen. Code, §§ 187 subd. (a), 664).[1] We vacated submission and received further briefing in light of the California Supreme Court's recent decision in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) and the United States Supreme Court's decision in *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455] (*Miller*). In the published portion of this opinion we discuss the application of these decisions to the punishment imposed on the appellants. Based on that analysis, we affirm as to Argeta but conclude the trial court's sentencing determinations regarding Hernandez must be reversed.

Besides arguing application of these cases, Hernandez contends: (1) the court committed reversible error in denying his motions under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 166-168, as recognized in *People v. Hartsch* (2010) 49 Cal.4th 472, 486, and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); and (2) the court abused its discretion when it imposed consecutive rather than concurrent sentences. We conclude the court did not err in denying Hernandez's *Wheeler/Batson* motions because the record reflects race-neutral grounds for striking the prospective jurors at issue; the court did not abuse its discretion in sentencing since there were factors supporting imposition of consecutive sentences.

Argeta presents the following claims, in addition to his argument about the application of *Miller* and *Caballero*: (1) the court prejudicially erred in admitting his statement that he wanted to "kill as many Black enemy gangsters as possible," statements he made in a recorded jailhouse telephone conversation, and evidence that members of Argeta's gang are out to kill African-Americans; and (2) prosecutorial misconduct during oral argument. We conclude the court did not prejudicially err in admitting Argeta's statements or Brown's testimony, and the prosecutor's statements during closing argument did not amount to prosecutorial misconduct.

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[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

Both defendants also identify clerical errors in their abstracts of judgment and Argeta points to an error in the minute order of the sentencing hearing. We shall direct the trial court to amend those abstracts and minute orders to the extent we find them to be erroneous.

FACTUAL AND PROCEDURAL SUMMARY

On November 25, 2008, Marvin Ceasar, Kevin Somerville, and Osborne Brown were walking to the foster home of Trashell Rader, Patricia Rader, and Tia Brooms. All six were teenagers and African-American. As Ceasar, Somerville, and Brown were walking, two young Hispanic men passed them. As they did, one of the Hispanic men said, "Compton Varrio Tortilla Flats" (CVTF) or "T Flats," which is the name of an Hispanic gang in Compton with a reputation for violence against African-Americans. Ceasar, Somerville, and Brown continued to walk. When they arrived at the foster home of Brooms and the Raders, the girls' foster mother refused them entry into the house because they were smoking. The six friends left the house and walked to a corner. Up the street, Somerville and Brown saw two Hispanic men. Ceasar could not see their faces or discern if they were the same two that had passed them before. The shorter of the two was kneeling and had his arms extended as if pointing a gun and the taller man was squatting next to him. Brown yelled that they were going to shoot. As the six friends began to run, gunshots rang out. Ceasar was shot in the leg and Trashell was shot in the chest. Brown tried to resuscitate Trashell but she died at the scene. Ceasar survived and was taken to the hospital. Physicians were unable to remove the bullet from his leg.

Guillermo Reyes was walking in the area when he heard what he thought were firecrackers. He saw two young Hispanic men, one short and the other tall. Both were running from the shooting. He heard one of the men tell the other to run faster. Reyes was unable to identify the men from photographic lineups.

Mercedes Martines was in the neighborhood selling corn from her van. As she was driving toward the corner where the shooting occurred, she heard what sounded like firecrackers. She saw two young men running on the street away from the shooting. She

recognized one of them as Hernandez, whom she knew from the neighborhood. She did not recognize the other man, but she thought that he was shorter than Hernandez.

Martines told Detective Hugo Reynaga, the investigating officer, that she recognized Hernandez and she showed Reynaga where Hernandez lived, the nearby house of one of his family members, and a third house (the Solorzano residence) where she frequently saw Hernandez with gang members. Martines picked out Hernandez's photograph from a photographic lineup.

Reynaga went to Hernandez's home. Hernandez was not there, but his parents consented to a search of his bedroom. Reynaga saw boxes and paper with CVTF gang graffiti, including writings that said "nigger killer." He booked these items into evidence.

Reynaga went to the Solorzano home looking for Hernandez. He interviewed Jose Solorzano, Jr., a 12-year-old boy. The boy told Reynaga that he knew Hernandez and had seen him earlier in the evening with "K9," Argeta's gang moniker. Solorzano told detectives he heard defendants yelling for his uncle, Eusebio Navarrete, an older member of the CVTF gang who was under house arrest at the Solorzano residence. Solorzano heard defendants tell Navarrete that they had just shot someone, had stashed the gun, and needed a place to hide. Navarrete refused to let them into the house. The Solorzano boy identified Hernandez from a six-pack photographic lineup. A few days later he again identified Argeta from a six pack photographic lineup.

The day after the shooting, Ceasar identified both defendants from photographic lineups as the two men they had passed in the street. Ceasar was unable to see the faces of the shooters and could not say whether they were the same men he saw earlier.

Somerville identified Hernandez from a photographic lineup. Somerville was unable to identify Argeta from a photographic lineup. Somerville identified both defendants in court as the two he had seen up the street at the time of the shooting, and he identified Argeta as the shooter.

About a week after the shooting, Brown identified Hernandez from a photographic lineup, but he was unable to identify Argeta. In court, Brown identified Argeta as the person he had seen kneeling and holding a gun.

Argeta was arrested at his house wearing a hat that bore the letters "CVTF." Police officers found papers with gang writing in Argeta's room. One of the writings said, "every day NK all day." "NK" in CVTF nomenclature stands for "nigger killer." Another writing referred to "dropping all kinds of birds from trees," which means assaulting or shooting at members of a local African-American gang.

Defendants were charged with one count of murder (§ 187, subd. (a)) and five counts of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a).) It was alleged as to all counts that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that a principal personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (d) & (e)(1)). As to Argeta it also was alleged that he personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d).) Defendants pleaded not guilty and denied the special allegations.

Jurors in the first trial were unable to reach a verdict and a mistrial was declared. The jury in the second trial found defendants guilty on all counts. It found the murder to be in the first degree and the gang allegations to be true. It also found firearm allegations to be true as to Argeta.

The court sentenced Argeta to 25 years to life for first degree murder plus 25 years to life for the firearm enhancement (§ 12022.52, subds. (d) & (e)(1)), and a life term for each of the five counts of attempted murder plus 25 years to life for the firearm enhancements. The sentences were to run consecutively. The court stayed the gang and remaining firearm enhancements.

The court sentenced Hernandez to 25 years to life for first degree murder plus life in prison for each of the attempted murder counts, with 15-year minimum parole eligibility periods pursuant to section 186.22, subdivision (b)(5).[2]

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[2] As we shall explain, the abstract of judgment erroneously reflects that the court imposed 15-year sentences for the gang enhancements on the attempted murder convictions pursuant to section 186.22, subdivision (b)(1). Instead, the court sentenced

These timely appeals followed.

DISCUSSION

I

Hernandez contends the court committed reversible error in denying two defense motions under *Wheeler*, *supra*, 22 Cal.3d 258 and *Batson, supra*, 476 U.S. 79. He argues the court impermissibly supplied the prosecutor with a race-neutral reason for challenging three Hispanic jurors and the prosecutor's reasons for challenging three other Hispanic jurors were pretextual, speculative, and not supported by the record.

The use of peremptory challenges to excuse prospective jurors solely on the basis of group bias violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) It also violates a defendant's right to equal protection under the Fourteenth Amendment. (*Id*. at pp. 283-284; *Miller-El v. Dretke* (2005) 545 U.S. 231, 238.)

If one party believes the other is using peremptory challenges to remove prospective jurors because of their race, that party must raise a timely objection and make a prima facie showing of discrimination. This is done "'by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*People v. Clark* (2011) 52 Cal.4th 856, 904 (*Clark*).)

Upon a prima facie showing, the burden shifts to the other party to provide a race-neutral explanation for the juror challenge. (*Clark*, *supra*, 52 Cal.4th at p. 904.) The explanation "'need not rise to the level justifying exercise of a challenge for cause.' [Citation.] Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as 'a mask for race prejudice' [citation]." (*People v. Williams* (1997) 16 Cal.4th 635, 664.)

Hernandez to life in prison for those convictions with a 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5).

If the challenging party offers a race-neutral explanation, the trial court must decide whether the opponent of the challenge has proved purposeful racial discrimination. (*Clark, supra*, 52 Cal.4th at p. 904.) Since the trial judge's findings turn on an evaluation of credibility, those findings are entitled to deference and will be upheld if the court's ruling is supported by substantial evidence. (*People v. Jackson* (1992) 10 Cal.App.4th 13, 23.)

A. *Prospective Jurors Martinez, Monico, and Perea*

Hernandez argues the court impermissibly offered the prosecutor a race-neutral justification for challenging prospective jurors Martinez, Monico, and Perea. After the prosecutor exercised five of his first eight peremptory challenges to excuse Hispanic jurors, defendants' attorneys brought a motion under *Wheeler* and *Batson*. The court said "for the record as I see it right now, [Martinez] had a cousin [who] was in prison. [Perea] also had a brother-in-law who went to jail," and the father of Monico's children is in state prison. As to the remaining two jurors, the court asked the prosecutor "[w]ithout me specifically indicating that I do find there is a prima facie case made, I've already indicated what I felt about the other jurors[,] [c]ould you explain your reason for having kicked them[?]"

We do not find Hernandez's interpretation that the court was offering the prosecutor a race-neutral basis for challenging these jurors to be reasonable. We interpret the court's statement as ruling that it did not find that defendants had made a prima facie showing of race discrimination since those prospective jurors had family ties to persons who had been or were incarcerated. The court did not supply a race-neutral reason to the prosecutor for challenging those jurors, but explained the basis of its finding that the defendants had not made a prima facie showing.

Hernandez further contends the court impliedly found a prima facie case because it allowed the prosecutor to provide reasons for challenging Martinez, Monico, and Perea.

"When a trial court, after a *Wheeler*/*Batson* motion has been made, requests the prosecution to justify its peremptory challenges, then the question whether defendant has made a prima facie showing is either considered moot (see *Hernandez v. New York*

(1991) 500 U.S. 352, 359) or a finding of a prima facie showing is considered implicit in the request (*People v. Fuentes* (1991) 54 Cal.3d 707, 715-716). But when, as here, the trial court states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for purposes of completing the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied. ([*People v.*] *Turner* [1994] 8 Cal.4th [137,] 167[, overruled on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555].)" (*People v. Welch* (1999) 20 Cal.4th 701, 745-746.)

After finding there was no prima facie showing of discrimination, the court told the prosecutor, "If you want to, make a complete record as to all of the ones that they challenged." The prosecutor said, "I do, Your Honor, because I want to make sure the record is clear." We interpret this exchange as the court inviting the prosecutor to justify its challenges for the purpose of creating a complete record for appeal and the prosecutor accepting this invitation. This interpretation is supported by the court's subsequent statements: "I started off my analysis by indicating that [those three jurors] had family members who had been prosecuted and were in prison, and that was . . . sufficient" and "As I explained, with [the three jurors] I don't think the first two steps [of *Wheeler/Batson*] have been demonstrated." We conclude that the court ruled that the defendants had not made a prima facie showing of race discrimination.

Hernandez does not challenge the court's ruling that defendants had not made a prima facie showing of race discrimination as to these three jurors. Instead, he challenges only the prosecutor's reasons for challenging them, which were offered only to make a complete record for appeal. Even if he had made a broader challenge, the record reflects race-neutral grounds for the peremptory challenges. (*Clark*, *supra*, 52 Cal.4th at p. 908.) All three prospective jurors had ties with persons who had been incarcerated. (See *People v. Gray* (2005) 37 Cal.4th 168, 192 [no prima facie showing of discrimination where prospective juror indicated that someone close to her had been arrested and sent to jail]; *People v. Lomax* (2010) 49 Cal.4th 530, 575 [arrest of close relative is accepted race-neutral justification for use of peremptory strike].) Viewing the record as a whole,

we conclude it does not support an inference that the prosecutor excused these jurors because of their race.

B. *Prospective Juror Diaz (1301)*[3]

Hernandez contends the prosecutor's reasons for challenging Diaz—her lack of life experience and young age—are not supported by the record and were pretextual.

Diaz was a young, Hispanic woman who had one child and worked at Wal-Mart as a sales associate. The prosecutor explained that he challenged her because she was young, had no jury experience, had never been a victim or witness to a crime, looked like one of the audience members supporting the defendants, and had made eye contact with the defense table. The prosecutor stated, "[i]t was mostly the lack of life experience."

Defense attorneys for Hernandez and Argeta responded that age was not an appropriate basis for striking a juror, Diaz looked at the defendants because the court asked the jurors to do so, and several other members of the panel lacked jury experience. The court concluded Diaz's youth and lack of life experience were genuine, race-neutral reasons for striking her.

As Hernandez acknowledges, lack of life experience and young age are facially race-neutral explanations. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 575; *People v. Sims* (1993) 5 Cal.4th 405, 430; see also *Rice v. Collins* (2006) 546 U.S. 333, 341.) He contends, however, that these reasons are not supported by the record because the prosecutor did not ask the prospective juror about her life experience. He notes that Diaz had a job and a child, which indicates substantial life experience despite her young age.

As we have discussed, a prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. Indeed, "adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as 'a mask for race prejudice' [citation]." (*People v. Williams*, *supra*, 16 Cal.4th at p. 664.) Thus, "[t]he proper focus of a

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[3] Two of the stricken jurors share the same surname: Diaz. We use their juror number to distinguish between the two.

Batson/Wheeler inquiry . . . is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons. (*Purkett* [*v. Elem* (1995)] 514 U.S. [765,] 769.)" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.) Thus, if a prosecutor believes a prospective juror who is young, has never been a victim of crime, and has never witnessed a crime, would not make a good juror in the case, a peremptory challenge to the prospective juror, sincerely exercised on that basis, would constitute a valid and nondiscriminatory reason for the challenge. (See *ibid*.)

Diaz said that she had no jury experience and had not been the victim of or witness to a crime. The prosecutor pointed out that these factors, combined with her young age, suggested that Diaz lacked life experience and would be an unsuitable juror for the case. Even though Diaz had a job and a child, the prosecutor could still conclude that she lacked sufficient life experience to serve. The issue is not whether this is a conclusion most people would reach, but whether the prosecutor genuinely relied on it in making the challenge. (*Batson*, *supra*, 476 U.S. at p. 98, fn. 21.) There is nothing in the record that contradicts the court's conclusion in favor of the prosecutor.

Hernandez compares Diaz (1301) with Perea, an Hispanic juror who was retired and had four children, and the other Diaz (7059), an Hispanic juror who had served on two juries that had reached verdicts. Hernandez's argument is that even Hispanic jurors with life experience were challenged. But Perea had a brother-in-law who had suffered six felony convictions and Diaz (7059) had a son about the same age as defendants. Thus, the record provides legitimate bases apart from their level of life experience or jury service for challenging each of these prospective, Hispanic jurors.

C. *Prospective Juror Diaz* (*7059*)

Hernandez argues that, contrary to the prosecutor's representation, prospective juror Diaz's comments about his son, who was about the same age as defendants, did not show that he would be sympathetic to defendants. Since the prosecutor justified the challenge of Diaz on this ground, Hernandez contends that the reason was pretextual.

During voir dire, the prosecutor asked Diaz: "The judge read the charges. You looked to the defense side of the table, and what were your thoughts?" Diaz said, "it's hard because if you have a son or daughter [who is around the same age], you start thinking real hard, you know. You start kind of truthfully wishing it's not your son or your daughter in that fashion. And, you know, I'm going to be honest and everything. But I have to still be fair and impartial, you know, because that's life. He's a human being."

The prosecutor stated that he challenged Diaz because his statements about his son suggested he might favor defendants and because he said he would change his scheduled vacation to accommodate the trial. Attorneys for the defendants argued that an individual's eagerness to serve on a jury should be a positive factor rather than a reason justifying a peremptory challenge. The court concluded that the prosecutor's concern about Diaz's son being the same age as the defendants was a race-neutral justification for exercising a peremptory challenge. Dismissing a prospective juror who has a child the same age as the defendant is a race-neutral reason for the challenge. (See *People v. Jordan* (2006) 146 Cal.App.4th 232, 258.)

Hernandez claims that Diaz's statements about his son did not indicate any sympathy with the defendants but "a prayer that his son would not find himself in their shoes." But as we have already stated, a prosecutor's explanations need not rise to the level of justifying a challenge for cause, and may be no more than a "hunch" about a prospective juror. (*Batson*, *supra*, 476 U.S. at pp. 97-98; *Wheeler*, *supra*, 22 Cal.3d at pp. 274-276.) Based on Diaz's statements about his son and the fact that the son was about the same age as defendants, the trial court could reasonably credit the prosecutor's reason for his challenge was his concern over a pro-defense bias on the part of Diaz. (See *People v. Huggins* (2006) 38 Cal.4th 175, 233.)

D. *Prospective Juror Reyes*

Hernandez contends the prosecutor's use of a peremptory challenge to excuse Reyes on the ground that he lacked life experience and maturity is not supported by the record.

After the prosecutor exercised his 10th peremptory challenge to excuse this prospective juror, defendants renewed their motion under *Wheeler* and *Batson*. Reyes was a single, Hispanic man, who had no jury experience, and had never witnessed or been the victim of a crime. The prosecutor stated that he challenged Reyes because he was young, had never been a witness to or victim of a crime, had never served on a jury, and had spiked hair. All of this, the prosecutor said, indicated that Reyes did not have enough experience or maturity to serve as a juror in a murder case. The defense attorneys said that those reasons were speculative. The court found the prosecutor's explanations to be genuine and race-neutral.

A "potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge." (*People v. Lomax, supra*, 49 Cal.4th at p. 575.) "[A] prosecutor may fear bias on the part of [a] juror . . . simply because his . . . hair length suggest[s] an unconventional lifestyle." (*People v. Wheeler, supra*, 22 Cal.3d at p. 275.)

II

Hernandez contends the trial court abused its discretion in sentencing him to consecutive terms for each of his convictions, resulting in a prison term of 100 years to life. We find no abuse of discretion.

The trial court has broad discretion with regard to imposing concurrent or consecutive terms, and its decision will be affirmed on appeal, so long as it is not arbitrary or irrational and is supported by any reasonable inference from the record. (*People v. Monge* (1997) 16 Cal.4th 826, 850-851; *People v. King* (2010) 183 Cal.App.4th 1281, 1323.) The party attacking the sentence must show the sentencing decision was irrational or arbitrary and if it fails to do so, "'the trial court is presumed to have acted to achieve legitimate sentencing objectives.'" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

California Rules of Court, rule 4.425 states "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences," including, the presence of any

circumstances in aggravation or mitigation.[4] "Only one criterion or factor in aggravation is necessary to support a consecutive sentence." (*People v. Davis* (1995) 10 Cal.4th 463, 552.) But a factor in aggravation used to impose an upper term, cannot also be used to enhance the defendant's sentence. (Cal. Rules of Court, rule 4.425(b).) Similarly, an element of the offense of which a defendant is convicted cannot be used as the basis for imposing a consecutive sentence. (*Ibid*.)

The trial court sentenced Hernandez to 25 years to life in prison for the murder conviction plus five life terms with 15-year minimum parole eligibility periods based on the other convictions. The court based the 15-year minimum eligibility parole date on the gang enhancement, section 186.22.

The court ruled that all of the terms would run consecutive to each other. The court based its decision to impose consecutive sentences on the following grounds: 1) the victims were young and vulnerable; 2) the defendants targeted the victims because they were African-American, and the victims did nothing to provoke the shooting; 3) Ceasar still had a bullet in his leg and it caused him pain; 4) the surviving victims faced the threat of great bodily harm and were scarred by watching their friend die; and 5) during the previous and present trial, Hernandez drew graffiti on his jail cell walls expressing that he is "dedicated to his gang lifestyle and dedicated toward animosity toward Black people."

Hernandez claims that where a single act results in crimes against multiple victims, the multiple victim circumstance cannot be a basis for imposing consecutive sentences. The record does not suggest that the court relied on the presence of multiple victims, but instead based its decision on the violence of the crime, the great bodily harm

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[4] California Rules of Court, rule 4.421(a) identifies aggravating factors relating to the crime, including that the crime involved "great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness," the "defendant was armed with or used a weapon," and "[t]he victim was particularly vulnerable." Rule 4.421(b) identifies aggravating factors relating to the defendant, including that he or she "has engaged in violent conduct that indicates a serious danger to society." (Cal. Rules of Court, rule 4.421(b).)

inflicted upon Ceasar, the threat of great bodily harm against the four victims who were not shot, the vulnerability of the victims, and the callousness of the crime as evidenced by defendants' racial animus. Any one of these factors alone is sufficient to sustain the court's decision. (See *People v. Davis*, *supra*, 10 Cal.4th at p. 552.)

Hernandez further contends that violence is an element of murder and attempted murder and may not be used to also impose consecutive sentences. Violence is not an element of murder. (*People v. Dixie* (1979) 98 Cal.App.3d 852, 856 [violence can be used to impose upper term for murder]; see also *People v. Cook* (2001) 91 Cal.App.4th 910, 919 [same].)

Hernandez also claims the presence of some mitigating factors, including that he was a minor, was convicted as an aider and abettor, had only one prior juvenile petition sustained for possession of burglary tools, and had no record on probation or parole, demonstrates that the court abused its discretion in imposing consecutive sentences. But courts have "'wide discretion in weighing the aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as well as quantitative terms" [citation].'" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) The court concluded that the nature of the crime and the vulnerability of the victims outweighed the presence of mitigating factors, and we see no abuse of the court's discretion.

III

Argeta argues the trial court committed prejudicial error by admitting his statement to a police officer several months before the shooting that he was going "to kill as many Black enemy gangsters as possible." He contends the statement was irrelevant to show intent or motive, or in the alternative that it was highly prejudicial and should have been excluded under Evidence Code section 352. A trial court's ruling on the admission of evidence is reviewed for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 578.)

In May 2008, when Argeta was being transported to juvenile hall for another matter, he told Deputy Sheriff Raul Ibarra that when he was released he was going "to

kill as many Black enemy gangsters as possible." The prosecutor sought to introduce this statement. Defense counsel objected, arguing that it was irrelevant because none of the six victims in this case was a gang member.[5] The trial court ruled that the statement was relevant to show Argeta's motive and intent.

Evidence showing Argeta had a motive for shooting into a crowd of six African-Americans was relevant. (*People v. Sykes* (1955) 44 Cal.2d 166, 170 ["Motive is a material fact."]; *People v. Perez* (1974) 42 Cal.App.3d 760, 767 ["Motive is always relevant in a criminal prosecution."].) It does not matter that none of the victims was a gang member since the jury could have found that Argeta perceived them to be, as evidenced by the gang challenge initiated by defendants when they walked past Ceasar, Somerville, and Brown. Argeta's alleged motive to kill Black gang members was just as arguable on facts suggesting that the victims were Black and in territory claimed by CVTF, as it would have been on facts suggesting the victims actually were gang members. (See *People v. Williams* (1997) 16 Cal.4th 153, 194.)

Argeta's trial counsel did not object that the statement was unduly prejudicial under Evidence Code section 352, and that claim is forfeited on appeal. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1130.) Even if we were to reach it, we would conclude that the trial court could reasonably conclude that the relevancy of this evidence was not outweighed by its prejudicial effect. Although not an element to be proved by the prosecution, motive almost always is a relevant fact in a criminal prosecution. (See *Sykes, supra*, 44 Cal.2d at p. 170.) Any prejudicial effect was diminished by other evidence showing that Argeta wanted to kill African-Americans, including writings found in his possession saying "every day NK all day" and his association with a gang known for targeting African-Americans.

IV

Argeta contends the court abused its discretion in admitting Brown's testimony that, in his opinion, members of the CVTF gang were "out to kill Blacks." He argues that

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[5] Argeta's trial counsel also objected that Argeta had used a derogatory word for "Black," but the prosecutor represented that Argeta had said Black.

the testimony was irrelevant and unduly prejudicial under Evidence Code section 352, its admission violating his constitutional right to a fair trial.

Brown testified in the defendants' first trial but was unavailable for the second. The prosecutor sought to admit his testimony from the first trial. (See Evid. Code, § 1291.)

Argeta's counsel did not object on the ground that the testimony was irrelevant or violated his right to a fair trial, and those claims are forfeited on appeal. (See *People v. Price* (1991) 1 Cal.4th 324, 430, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165; *People v. Martinez* (2010) 47 Cal.4th 911, 961 [claim that evidence was irrelevant was forfeited where defense counsel only lodged objection based on Evid. Code, § 352].)

Even if we were to reach these claims, the prosecutor offered the evidence to bolster Brown's eyewitness identification of the defendants. Brown testified that when the three friends were walking, they saw two young Hispanic men pass them and heard one of those men say "Compton Varrio Tortilla Flats." Brown turned to look at those men. Later, when the six friends walked to the corner, Brown saw the two Hispanic men again. He saw one of the men kneeling down with his arms extended toward the group of friends as if he was pointing a gun. At this point, Brown yelled at his friends to run. Because Brown had heard of the gang and feared its members since he thought they were "out to kill Blacks," he was more likely to pay attention to the defendants when they said the name of their gang and more likely to notice them again when the friends were standing on the corner. Thus, the evidence was relevant.

There also was other evidence that members of CVTF were "out to kill Blacks," and the most prejudicial evidence was the expert witness testimony to that effect. Detective Jose Salgado testified that members of the gang hated African-Americans and committed crimes against them. He testified about other cases involving CVTF members committing racially motivated crimes against African-Americans, including the murder of an African-American man and an incident in which 30 or 40 gang members broke the windows of a house where an African-American family resided and said, "Niggers, you

don't belong here. This is our neighborhood." Attorneys for defendants did not object to this testimony.

Evidence admitted at trial showed that defendants admitted being members of CVTF, a gang known for its hatred of African-Americans and for committing criminal acts against African-Americans, and that defendants had made written and oral statements expressing animus toward African-Americans. We are satisfied that if there was any "prejudice" as that term is used in Evidence Code section 352, resulting from Brown's testimony, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

V

Argeta claims the court erred in admitting a recorded jailhouse telephone conversation with his mother and aunt in which he talked about getting rid of "the toy." He argues that the statements should have been excluded because the word "toy" is ambiguous and the statements were therefore irrelevant.

While under arrest and interrogation by a detective about the location of the murder weapon, Argeta called his mother and aunt from jail. In the recorded conversation he told his aunt to take away the "toy" and to "take the thing to you know who." The prosecutor stated that the gang expert would testify that the word "toy" means "gun" in gang parlance. Argeta's trial counsel objected, arguing that the testimony was irrelevant because toy might have referred to a toy for Argeta's dog, which he also spoke about in the phone conversation, rather than a gun.

We conclude the statement was relevant to suggest why the murder weapon was not found. At trial, Detective Salgado testified that members of the CVTF gang use the word "toy" to refer to a gun. It was for the jury to decide whether the word meant "gun" or something else in the context of Argeta's conversation. Moreover, the court allowed the remainder of the conversation to be presented to the jury, which included Argeta's statements denying that he committed the crime. We find no error.

VI

Argeta contends the prosecutor committed misconduct during his closing argument when he stated that defendant's trial counsel "took an oath to defend [his] client to the end at all costs."

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."'" (*People v. Rundle* (2008) 43 Cal.4th 76, 157, disapproved on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

During the trial, the prosecutor presented testimony that the casings and bullet retrieved from the crime scene were not tested for DNA because the rain on the night of the shooting likely washed away any DNA and the heat generated when the gun was shot likely burned off any DNA. During his closing argument, Argeta's attorney criticized the police officers for not testing these items for DNA. In the rebuttal argument, the prosecutor said, "if you believe a defense attorney and you took an oath to defend your client to the end at all costs, you took that oath . . . if you believe there's DNA on fired casings . . . that exculpates your client, test it. . . . Talk is cheap. If you believe there's DNA evidence on there, go ahead and do it."

After the prosecutor's argument, Argeta's trial counsel objected to the prosecutor's statement that counsel would defend his client at all costs because it implied that the attorney was "operating outside ethical boundaries." Argeta's attorney requested that the jury be admonished or that he be permitted to address the jury on that issue. The

court denied the request, finding that it was not reasonable to believe that the jury would infer counsel was unethical based on the prosecutor's statement.

Argeta contends this comment was an attack on his trial attorney's integrity in that the prosecutor suggested that Argeta's attorney would do anything he could, including distort the truth, to ensure a not guilty verdict. Within context, the prosecutor seemed to be making the point that because Argeta's attorney took an oath to defend his client, if he truly believed there was exculpatory evidence on the casings, he would have tested it. We interpret the statement as a comment on Argeta's failure to introduce material exculpatory evidence and not as an attack on Argeta's trial counsel. (See *People v. Walsh* (1993) 6 Cal.4th 215, 262-263 [prosecutor's comment on defendant's failure to introduce evidence is not improper].) While the statement is problematic, we see no basis for finding that it "'"so infected the trial with unfairness as to make the resulting conviction a denial of due process."'" (*People v. Rundle, supra*, 43 Cal.4th at p. 157.)

VII

Defendants argue that their sentences constitute cruel and/or unusual punishment under the state and federal constitutions. As stated, we vacated earlier submission to consider the recent decisions.

Hernandez claims that since he was 15 years old when the crimes were committed, he was convicted of homicide only as an aider and abettor, and his sentence is functionally equivalent to a sentence of life without parole, the sentence is cruel and unusual under the federal Constitution as well as cruel or unusual under the California Constitution. (See *Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011] (*Graham*); *People v. Mendez* (2010) 188 Cal.App.4th 47 (*Mendez*); *Miller, supra,* 132 S.Ct. 2455; *Caballero, supra,* 55 Cal.4th 262.)

In *Graham*, the Unites States Supreme Court held that sentencing a juvenile to life without the possibility of parole for a *nonhomicide* offense violates the Eighth Amendment's prohibition of cruel and unusual punishment. (*Graham, supra,* 130 S.Ct at p. 2034.) The court noted the "fundamental differences between juvenile and adult minds" and that juveniles are "more capable of change than are adults." (*Id*. at p. 2026.)

The Supreme Court next took up the issue in *Miller*, two companion cases in which minors were convicted of murder and sentenced to life imprisonment without the possibility of parole. (*Miller*, *supra*, 132 S.Ct at p. 2460.) Based on the reasoning in *Graham*, the court held that it also is a violation of the Eighth Amendment to impose a *mandatory* life-without-parole sentence upon a juvenile in a *homicide* case. (*Miller*, at pp. 2467-2468.) The court concluded that such penalties "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," namely their "immaturity, impetuosity, and failure to appreciate risks and consequences." (*Ibid*.) Although *Miller* was a homicide case, the court pointed out that *Graham's* consideration of the unique characteristics and vulnerabilities of juveniles is not "crime-specific" and its "reasoning implicates any life-without-parole sentence for a juvenile" even if *Graham's* categorical ban regarding nonhomicide offenses did not. (*Miller*, at p. 2458.)

The California Supreme Court addressed another aspect of the issue in *Caballero*, *supra*, 55 Cal.4th 262. That case involved a juvenile who was sentenced to 110 years to life for multiple, *nonhomicide* offenses. (*Id*. at pp. 268-269.) The court rejected the argument that a cumulative sentence for distinct crimes does not present an Eighth Amendment issue. (*Ibid*.) It found that when a juvenile is sentenced to minimum terms that exceed his or her life expectancy, the punishment is the functional equivalent of a life sentence without the possibility of parole. (*Ibid*.) The court concluded the sentence offends the dictates of *Graham* and constitutes cruel and unusual punishment. (*Caballero*, at pp. 268-269.) It also concluded "the state may not deprive [juveniles] at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Id*. at p. 268.) In addition, it laid out specific mitigating circumstances that must be considered by a sentencing court before determining at what point juveniles can seek parole, including their age, whether they were a direct perpetrator or an aider and abettor, and their physical and mental development. (*Ibid*.)

Here, the trial court imposed a minimum aggregate sentence of 100 years on Hernandez, who was 15 years old at the time of the crime. He was convicted for aiding

and abetting Argeta, an adult, in one count of murder and five counts of attempted murder. The People concede that this is the functional equivalent of a life sentence without possibility of parole. For the five counts of attempted homicide alone, Hernandez will face at least 75 years in prison before becoming eligible for parole, a term that in and of itself likely requires that he be in prison for the rest of his life. Based on these circumstances and in light of recent decisions of the United States and California Supreme Courts, we conclude the trial court's sentencing determinations regarding Hernandez must be reversed and the case remanded for resentencing on all counts in a manner consistent with the decision of the United States Supreme Court in *Miller* and our Supreme Court in *Caballero*.[6]

Relying on *Graham*, *Mendez*, *Miller*, and *Caballero*, Argeta contends his sentence is categorically cruel and/or unusual. Argeta was 18 and was convicted of first-degree murder as a principal. His counsel argues that since the crime was committed only five months after Argeta's 18th birthday the rationale applicable to the sentencing of juveniles should apply to him. We do not agree. These arguments regarding sentencing have been made in the past, and "while drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood." (*Roper v. Simmons* (2005) 543 U.S. 551, 554; see also *Graham*, *supra*, 130 S.Ct. at p. 2016.) Making an exception for a defendant who committed a crime just 5 months past his 18th birthday opens the door for the next defendant who is only 6 months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude Argeta's sentence is not cruel and/or unusual under *Graham*, *Miller*, or *Caballero*.

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[6] A new statute (Stats. 2012, ch. 43, § 27) amended section 1170 in terms that do not apply to issues before us on this appeal. This statute adds a new subdivision, (d)(2), to section 1170. The amendment provides that juveniles sentenced to life without the possibility of parole who have served at least 15 years of prison time on the sentence, may seek a reduced sentence based on rehabilitation.

VIII

Argeta contends his claims of error had the cumulative effect of rendering his trial unfair. "'We have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.)

IX

Both defendants identify clerical errors in the abstracts of judgment.

Hernandez contends and respondent agrees that the abstract of judgment erroneously reflects that the court imposed 15-year sentences for the gang enhancements in counts 2 through 6. Instead, the court sentenced him to life in prison for each of those four counts, with a 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5). As discussed above, we are remanding Hernandez's case for resentencing; thus, the issue is moot.

Argeta contends the abstract of judgment incorrectly indicates that he was sentenced to 40 years to life for firearm and gang enhancements for each of the five counts of attempted murder. The record of the sentencing proceeding reflects that the court stayed the gang enhancements. The abstract of judgment should be amended to reflect that Argeta was sentenced to a life term plus 25 years to life for the firearm enhancement, section 12022.53, subdivisions (d) and (e)(1). (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Argeta also argues the minute order of the sentencing proceeding incorrectly indicates that he was sentenced to a total prison term of 200 years plus 12 life terms. The total term is 175 years to life plus 12 life terms, and we conclude the sentencing minute order should be corrected as well.

Argeta further contends he was entitled to two additional days of custody credit. He was arrested on November 29, 2008, and sentenced on October 19, 2010, thus spending a total of 690 days in presentence custody. Argeta was awarded 688 days and is

entitled to two more. The abstract of judgment should be amended to include these two days.

DISPOSITION

As to Argeta, the judgment is modified to reflect a total of 690 days of presentence credit. In all other respects the judgment is affirmed. The trial court is directed to amend the abstract of judgment and October 19, 2010 minute order to reflect the correct sentence as stated above.

We remand Hernandez's case for reconsideration of his sentence, in a manner consistent with this opinion. In all other respects the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.