

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

IGNACIO RUIZ et al.,

Defendants and Appellants.

A139127

(Contra Costa County
Super. Ct. No. 5-101049-5)

Two men associated with the Norteños street gang were shot to death in a bar by Eliseo Flores, a member of the Sureños street gang. Appellants Ignacio Ruiz and Steven Valencia Miranda, who were also Sureños, were jointly tried for crimes arising from their participation in the shooting and were convicted of two counts of murder with special circumstances and related counts and allegations. They contend (1) the judgment must be reversed because the prosecutor used peremptory challenges to excuse three Latino/Hispanic jurors and other “minorities” in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); (2) they were deprived of due process because the trial court ordered two lengthy breaks in the proceedings during the prosecution’s case; and (3) the court allowed the prosecution to present gang evidence that was cumulative, unduly prejudicial, and obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Ruiz additionally argues that he was prejudiced by the introduction of evidence seized during an unlawful search of his home, and that the evidence at trial was insufficient to support his convictions. Miranda

additionally argues that the trial court should have permitted him to introduce evidence of an out-of-court statement he made prior to the shooting. We affirm.

I. FACTS AND PROCEDURAL HISTORY

An information was filed charging appellants with conspiracy to commit murder, two counts of first degree murder with multiple murder and gang special circumstance allegations, and active participation in a criminal street gang. (Pen. Code, §§ 182, subd. (a)(1), 187, subd. (a), 186.22, subd. (a), 190.2, subds. (a)(3),(22).)¹ It included firearm enhancement allegations under sections 12022.53, subdivisions (b), (c), (d) and (e)(1) and 186.22, subdivision (b)(1) as to all counts, and further alleged the conspiracy and murder counts were committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1).² Appellants were convicted of all charges and the special circumstance and enhancement allegations were found true after a jury trial at which the following evidence was adduced:

In the early 1960's, a split occurred between Hispanic prison inmates in California, with one group forming the Mexican Mafia gang, predominantly from Southern California, and one group forming the Nuestra Familia gang, predominantly from Northern California. The Mexican Mafia controls the Sureños gang and Nuestra Familia controls the Norteños gang, both of which operate outside of prison. The Mexican Mafia and Sureños have adopted the color blue, the number 13, and the letter M as their symbols. Nuestra Familia and the Norteños have adopted the color red, the number 14 and the letter N as their symbols. The two gangs have a longstanding rivalry and hatred for one another that manifest through acts of violence like shooting rival gang members.

The Richmond Sur Trece (RST) is a set of the Sureños street gang operating in Richmond. Other Sureño sets in western Contra Costa County include the Mexican Locos (ML), Varrio Frontera Locos (VFL), the South Side Locos (SSL) and the Easter

¹ Further statutory references are to the Penal Code unless otherwise indicated.

² Eliseo Flores and Victor Torres were also named as defendants, but Flores entered a plea agreement and the parties agreed to sever Torres's trial from appellants'.

Hill Locos (EHL). Because the Sureños are not as prevalent in Northern California, the gang members in these Sureño sets know each other, attend parties and functions such as funerals together, and keep in close contact with one another.

The Alvarado Gardens Bar (sometimes referred to as the bar or Alvarado Gardens) was located at the corner of McBryde Avenue and San Pablo Avenue in Richmond. About 5:00 p.m. on August 30, 2009, Corrina Whitney and her husband Intiaz Ahmed went to the Alvarado Gardens with a friend, Alvaro Garcia. Whitney and Ahmed belonged to a Norteño gang and Ahmed and Garcia were wearing red articles of clothing consistent with Norteño gang membership. Elena Martinez, a friend of Whitney's who was working that day as a bartender at the Alvarado Gardens, had belonged to the Norteños growing up and still associated with the gang.

About 6:45 p.m., Ahmed and Garcia went outside to smoke cigarettes and Martinez went with them. While outside, one of the men said something along the lines of, "fucking around out here, we're gonna get killed," and Martinez assured them they were in a good part of Richmond. Martinez went back inside to clean up the bar and the men followed her a few minutes later.

About 7:30 p.m., two men wearing blue bandanas over their faces walked into the bar, one after the other. The first man was wearing a white T-shirt and holding a shotgun with a pistol grip and the second man had a handgun. The man with the shotgun shot Ahmed in the neck and Garcia in the head from a distance of about five feet away. The man with a handgun fired his weapon into the floor two times. Ahmed and Garcia died of their wounds.

Martinez called 911 to report the shooting and told police that two "scraps"—a derogatory word for Sureño gang members—had left the bar with blue rags on their faces. Richmond Police Department officers responded to the scene and found a spent 12-gauge shotgun shell on the sidewalk in front of the entrance to the bar and another one inside the front door area. The floor and the door had strike marks from smaller caliber projectiles and the ceiling and other locations throughout the bar had strike marks consistent with a shotgun blast. A shotgun wad was underneath a table. Based on this

evidence, Sergeant Steve Harris concluded the shotgun rounds and two rounds from a small caliber weapon were fired at the bar from the area just inside the doorway.

Just before the shooting, a clerk who worked at a market next to the Alvarado Gardens Bar had seen two Latino men walking side-by-side in front of the market toward the bar. One wore a white T-shirt and the other wore a black sweater; and as they passed by, each put a blue bandana over his face. The clerk heard four or five gunshots and the men ran back toward the market still wearing the bandanas, one of them carrying a shotgun.

Based on the report that the shooters had been wearing blue bandanas and the victims had been wearing red, officers were dispatched to appellant Ruiz's home at 2501 Gaynor Avenue, located about half a mile away from the Alvarado Gardens, which was known from prior police contacts as a place where Sureño gang members regularly congregated. Sureño gang slogans were written on the sidewalk in front of the home and there was gang graffiti inside and outside the detached garage, which opened onto an alley and was the setting for gatherings of gang members on most weekends.

Officers Gunnar Googins and Cliff Calderan went to the alley behind the property where they smelled something burning and noticed smoke creeping through the cracks of the closed garage door. They heard talking and laughter coming from inside the garage. Eliseo Flores looked over the fence of the property and asked what was up. Googins asked Flores if he was with anyone else, and Flores said no and walked toward the house. Ruiz opened the garage door from the inside and officers saw various items of clothing—a long-sleeved white T-shirt, a gray hooded sweatshirt, and a black glove—burning on the floor. While Googins spoke to Ruiz, Calderan stomped out the fire. Flores walked back into the garage and was detained. Officers searched the yard and looked into a shed next to the garage, where they found a blue bandana on top of a propane tank.

Meanwhile, other officers went to the front of the house, where they contacted Ruiz's wife, Magda Contreras. Victor Torres walked out through the front door and was handcuffed. Contreras said no one else was in the house, but gave the officers permission to go inside and search for others. Officers entered and found appellant Miranda lying on

the couch, apparently pretending to be asleep. He was handcuffed and taken into custody. Officers went through the house to look for other individuals and to secure the house. They tipped the bed in the master bedroom and saw an assault rifle and Mossberg shotgun with a pistol grip. Also under the bed was a live 12-gauge shotgun cartridge, an expended 12-gauge shotgun shell, a 30-round magazine for a rifle, and over 120 rounds of .45-caliber ammunition. During a subsequent search after a warrant issued, officers opened the top drawer of a nightstand next to the bed and discovered a .22-caliber single-action revolver with four live rounds and two spent casings, a chrome .45-caliber semiautomatic pistol with two live rounds, two nine-millimeter pistol magazines, a half box of .45-caliber ammunition, and documents in Ruiz's name. The serial numbers on the Mossberg shotgun and the .45-caliber pistol had been obliterated.

Martinez was taken to 2501 Gaynor Avenue to see whether she could identify any of the four men the police had detained there. She identified Torres as the person who looked most like the man who entered the bar with the shotgun, indicating she was 70 percent sure of her identification. She also said she was "pretty sure" Miranda was the second person, but acknowledged she did not see him as well as the first person. In subsequent court proceedings, Martinez said she had "no idea" what the second person looked like.

Criminalist Terence Wong determined that the Mossberg shotgun found under Ruiz's bed was the gun used to fire the shotgun shells recovered from the Alvarado Gardens Bar, as well as the additional shotgun shell found under Ruiz's bed. He concluded the two .22-caliber projectiles found inside the bar had been fired by the same weapon, and while he could not determine whether the revolver found in Ruiz's nightstand was that weapon, the projectiles found in the bar were of the same design as the unfired cartridges in the revolver.

Particles consistent with gunshot residue were found on a sample lifted from Miranda's left hand, and a few particles consistent with gunshot residue were found on the white T-shirt recovered from the fire in Ruiz's garage. Gunshot residue suggests a

person may have discharged a firearm, been in an environment where a firearm was discharged, or received the residue from environmental sources.

DNA from four contributors, including Flores, was found on the grip of the Mossberg shotgun. Blood stains from the white T-shirt retrieved from the fire had DNA from victim Ahmed, and another sample retrieved from the shirt showed a mixture of DNA with Flores as a major contributor. A sample from the gray hoodie recovered from the fire had DNA from three contributors, including Torres. Torres was also a contributor of DNA in samples retrieved from the blue bandana found in the shed on Ruiz's property.

Ruiz's wife owned a white Dodge Magnum. Surveillance cameras from a gas station across the street from the Alvarado Gardens showed that at 7:24 p.m. on August 30 (about seven minutes before Martinez called 911 to report the shooting), a white car was traveling on San Pablo Avenue and turned left onto McBryde Avenue traveling west, past the Alvarado Gardens Bar. A neighbor of Ruiz's had been allowing Ruiz to park his car in his driveway while he was remodeling his home, and security cameras showed that at 7:34 p.m., Ruiz's car pulled into the driveway and Ruiz, Miranda, Flores and Torres got out and walked toward Ruiz's house.

Miranda's cell phone was found on the left rear floorboard of the Dodge Magnum when it was searched by police. Cell phone records showed that at 6:45 p.m. on the day of the shooting, Miranda's cell phone received a 34-second call from Flores's cell phone, and at 7:05 p.m., it received a 22-second call from Flores's cell phone.

Ruiz was interviewed twice by police. In the first interview, he acknowledged owning the assault weapon and .45-caliber pistol found in his bedroom (neither of which was linked to the shooting), but claimed the other guns had been dropped off at his house by his "homies." He told police that on the day of the shooting, he had taken his children to visit his parents in Vallejo, and left to return to his home at 2501 Gaynor Drive in Richmond between 5:00 p.m. and 6:00 p.m. He took the McBryde Avenue exit off Interstate Highway 80, drove down McBryde, made a left turn on 29th Street and a right turn on Gaynor, a route that went past the Alvarado Gardens Bar where the murders were

committed. He told police that after returning home he went out cruising for a little while by himself, and that after he returned the other men found at his house (Miranda, Torres and Flores) came by. He denied at first that any of the others had been riding with him in the car.

Later in the interview, police handed Ruiz a note they (falsely) said was written by Flores, which stated that Flores had told the truth. After reading the note, Ruiz acknowledged picking up Miranda, Torres and Flores at their houses and driving around in his car. He said he stopped to see a friend who lived on 37th Street (near the Alvarado Gardens), while Miranda, Torres and Flores went to the store and came back. They drove to Ruiz's house, and Flores gave Ruiz guns to hide, which he had not seen before.

During the second interview, Ruiz told police he got the shotgun from Flores and the revolver from Miranda when they returned to his car. He said Flores told him he had walked in, seen some Norteños, and shot them, and Miranda said he had also fired some shots. Ruiz did not know what Torres was doing while Miranda and Flores were gone; he might have been sitting in the backseat of the car.

At trial, Ruiz testified that about half an hour after he returned home from visiting his parents in Vallejo, he went out again and picked up Flores, Torres and finally Miranda. Although he picked up Torres "at a liquor store," they decided to go somewhere to buy some alcohol and go to a party Miranda was planning to attend. Flores asked Ruiz to pull over on McBryde Avenue near the Alvarado Gardens Bar and got out with Miranda and Torres. Ruiz then drove to the home of a friend, Juan Zepeda, who lived about a block away.³ But before he could knock on Zepeda's door, Ruiz saw the others walking toward him, and they all got back into the car. Flores said he had shot some Norteños and Ruiz drove them back to his house at Flores's direction. When they arrived, Ruiz saw for the first time that Flores had a shotgun at his side. He took the

³ Zepeda testified that he lived about a block and a half from the bar and that Ruiz, whom he had known for about ten years, would sometimes come to his home unannounced. On the day of the shooting, Zepeda saw Ruiz driving the Dodge Magnum alone at about 6:00 p.m. but Ruiz did not see Zepeda.

shotgun from Flores and either Miranda or Torres handed him a gun from the back seat; Ruiz went straight to his bedroom and threw the shotgun under his bed and the handgun into a drawer. Ruiz owned the other guns found in the bedroom, having purchased them a couple of weeks earlier to sell for a profit.

Ruiz admitted he had made false statements to police during his interviews, but claimed he did so to protect Miranda, Flores and Torres. He denied knowing in advance that any of them had weapons or intended to commit a shooting. Although he understood the Sureños were violent, he was not involved in their criminal activities and was only a social member of the gang. He had been shot by Norteños in 2001, after which he got his Sureño tattoos.

Ruiz's wife, Magda Contreras, testified that on the day of the shooting she and Ruiz both returned home from different locations about 6:15 p.m. Ruiz stayed for 15 to 20 minutes and then left at 6:35 p.m. or 6:40 p.m., taking the Dodge Magnum. He returned about 7:30 p.m., shortly before the police arrived, and though he came through the front door of the house alone, the backyard was accessible through a side gate. Contreras recognized Torres, Flores and Miranda, who were detained by police that night, as friends of Ruiz's.

In the opinion of Detective Daniel Reina, the RST set of the Sureños was a criminal street gang in that it was composed of three or more individuals; was an ongoing group or association; and had common signs or symbols. Members of the RST Sureños had committed a number of statutorily specified offenses between 2007 and 2009, and the gang's primary activities included the commission of statutorily specified crimes such as homicides, robberies, auto theft and narcotics sales. Ruiz, Miranda, Flores and Torres all belonged to the Sureños and RST. Ruiz had gang-related tattoos and admitted having been jumped into the gang when he was 15 years old. Also significant was the Sureño graffiti at Ruiz's home at 2501 Gaynor Avenue, where other Sureño gang members congregated. Miranda had gang-related tattoos on his body and gang-related images on his cell phone.

Diego Garcia, a former gang member who was now involved in trying to discourage youths from joining gangs, testified as a defense expert about the dynamics of Sureño gangs in the Richmond area. Among other things, he explained that some people who were involved in gangs when they were younger drifted away from them after high school, even if they continued to socialize with gang members. He acknowledged that if a member intended to leave the gang and was interested only in socializing, it would not make sense to get a large gang tattoo. Steven Farjardo testified as a defense expert in the dynamics of juveniles and gangs, describing some circumstances (poverty, dysfunctional families, lack of education, lack of opportunities) that might cause a youth to join a gang. He acknowledged that when a gang member commits crimes with other gang members, it indicates the person is “more than just in it for the parties; they’re in it for the commission of crime as well.”

Miranda presented evidence he suffered from attention deficit hyperactivity disorder, meaning he had a limited ability to comprehend information and follow directions. Ruiz presented evidence that he was a homeowner and family man.

During closing argument, counsel for Ruiz argued Ruiz was not guilty of the charged offenses because he did not know about the shooting in advance and was simply trying to protect his fellow gang members. Miranda’s counsel argued that the evidence showed Torres was the backup shooter and Miranda’s presence in the car was not enough to show he conspired with the others or aided and abetted the murder.

II. DISCUSSION

A. *Motion to Suppress Evidence Under § 1538.5 (Ruiz)*

Ruiz contends the trial court should have granted his motion to suppress incriminating evidence discovered during warrantless searches of his home at 2501 Gaynor Avenue, which included guns hidden under a mattress inside the house (one of

which was the murder weapon), clothing found burning inside the garage, and a blue bandana discovered inside a shed.⁴ We disagree.

1. Proceedings Below

Ruiz filed a motion to suppress evidence, arguing (1) police discovered the weapons used in the shooting during a warrantless entry into his home that exceeded the scope of consent given by his wife to search for persons inside; (2) police discovered clothing linked to the shooting during a warrantless search of his garage that was not supported by exigent circumstances or any other exception to the warrant requirement; and (3) police discovered a blue bandana during a warrantless entry into a shed in the yard that was not supported by exigent circumstances or some other exception to the warrant requirement. The prosecution opposed the motion on the ground that (1) the search of the garage and the house were justified by consent; (2) the clothing in the garage was within plain view of officers outside the garage; (3) exigent circumstances supported the entry into the garage because it was necessary to prevent the destruction of evidence; (4) the shed was searched as part of a lawful protective sweep; and (5) assuming the initial searches of the house, garage and shed were unlawful, the doctrine of inevitable discovery removed any taint. The court held a hearing at which the following evidence was adduced:

Officer Mitchell Peixoto of the Richmond Police Department was working as the team supervisor of the weekend graveyard shift on August 30, 2009. At 7:32 p.m., he heard the broadcast of the shooting at the Alvarado Gardens Bar. The dispatcher indicated the victims were possibly Norteño gang members and the suspects were possibly Sureños, based on the blue bandanas worn by the suspects and the red clothing worn by the victims.

Officer Peixoto dispatched his team to the alleyway behind Ruiz's house at 2501 Gaynor Avenue, which was located less than a mile from the scene of the shooting and

⁴ The trial court denied Miranda's motion to suppress the same evidence because he did not demonstrate he had a reasonable expectation of privacy in the premises, a ruling he does not challenge on appeal.

which he and other officers knew from previous contacts to be a place where Sureño gang members congregated. When Peixoto had visited the home on previous occasions, he had seen Sureño gang graffiti, including a reference to RST.

Officers Googins and Calderon⁵ responded to the alley behind 2501 Gaynor Avenue, where the detached garage belonging to the premises could be accessed. During previous contacts at the same location, Googins had observed Ruiz and other Sureños congregating in or near the garage, which was heavily tagged with Sureño graffiti. On the night of the shooting, the garage door was closed and the officers could hear laughing inside. They also smelled something burning and saw smoke leaking out from inside the garage.

Eliseo Flores popped his head over the back fence.⁶ Officer Googins asked him in English who was with him and Flores responded in English that he was alone. Officer Calderon then asked Flores in English who was with him and Flores said, “I speak no English” before walking away toward the house. The door of the garage opened and the officers saw something burning on the floor inside. Ruiz walked out of the garage and asked Officer Googins what was going on. Googins responded by asking him what he was burning inside the garage and Ruiz said it was cardboard. Calderon said, “That’s not cardboard being burned” and Googins asked Ruiz again what he was burning. Ruiz responded, “You know how it is, man. We got to do what we got to do.”

Officer Googins asked Ruiz if they could enter the garage and Ruiz said “yeah.” Officer Calderon went inside and stomped out the fire, at which point Googins could see it was clothing being burned: a white T-shirt, a gray hooded sweatshirt and a black glove. Googins was suspicious because one of the suspects involved in the shooting had been described as wearing a white T-shirt, and Ruiz was detained and handcuffed. Flores

⁵ Calderon did not testify at the hearing on the section 1538.5 motion, but the parties stipulated that his preliminary hearing testimony could be considered by the court in its entirety.

⁶ Googins identified the man as Flores. Calderon initially identified the man as Miranda, but under cross-examination acknowledged that in his written report he had identified the man who popped his head over the fence as Flores.

entered the garage and was arrested. Calderon then searched the yard, including a shed where he found a blue bandana similar to the ones reportedly worn by the suspects at the time of the shooting.

Officer Peixoto was advised that officers who had gone to the alley behind the house had discovered people burning clothing or evidence. He went to the front of the residence and spoke with Ruiz's wife, Magna Contreras, who said she lived there with her husband and children and indicated that no one was inside the house. Peixoto asked her for consent to search inside for other persons and she agreed. Inside the house, Peixoto found Miranda lying on the couch in the living room, "either sleeping or acting like he was sleeping." Miranda was detained and escorted outside the house, at which point two other officers entered to assist Peixoto in the search for other persons.

During the search, the officers looked in every area where a person could be hiding, but did not "open drawers or things like that." When searching the master bedroom, Officer Peixoto lifted up the mattress of the bed to make sure no one was hiding underneath and the officer who was with him saw a shotgun, an assault rifle and a machete. The space between the bottom of the bed frame and the floor was not large enough to allow a person to hide under the bed, but Peixoto could not discern this before tipping the bed because a dust ruffle obscured his view of that space. Peixoto did not seize the weapons under the bed.

Officer Peixoto went outside and told Contreras he would be securing the house until they could get a search warrant but she could go inside to get some necessities. Contreras declined the offer and told Peixoto the police did not need the warrant, that "[they] could search." Peixoto thanked her but told her they were still going to seek a warrant. He asked Contreras why she wasn't honest about someone being inside the house and she explained that Miranda had not been inside when she left and must have come in from the backyard or somewhere else.

That same night, Sergeant Michael Rood submitted an affidavit to a judge seeking a warrant to search the premises at 2501 Gaynor Avenue. The affidavit included information about the incriminating evidence discovered during the warrantless search of

the premises (the guns, the burning clothing and the blue bandana), but it also relied on the following information that was not derived from the warrantless search: (1) that a double homicide had been committed at a bar that was less than a mile away from 2501 Gaynor Avenue; (2) the homicide victims were wearing red suggesting an association with the Norteño street gang; (3) that 2501 Gaynor was a place where known Sureño associates would congregate; (4) that Victor Torres was a person detained at 2501 Gaynor on the night of the shooting and was identified by the bartender who witnessed the shooting as one of the gunmen; and (5) witnesses to the shooting had said there were two shooters. The warrant issued and premises were searched pursuant to the warrant later that night.

The trial court issued a written order denying the motion to suppress, finding, among other things: (1) Ruiz's wife had consented to a search of the house to look for other persons and officers could have reasonably believed a person was hiding under the bed where the weapons were discovered; (2) Officer Calderon's entry into the garage was justified by Ruiz's consent; (3) the burning items of clothing were in plain view of Officer Googins from his lawful vantage point outside the garage, which gave the officers probable cause to enter and prevent evidence from being destroyed; (4) the inevitable discovery and independent source doctrines applied in any event.

2. Standard of Review

“ ‘The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.’ ” (*People v. Maury* (2003) 30 Cal.4th 342, 384.) We review the trial court's ruling, not its reasoning, and will affirm an order denying a motion to suppress if it is correct on any theory of law applicable to the case. (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529.)

3. Entry into and Search of the House (Weapons Under Mattress)

“An otherwise unreasonable search is legal if it is conducted pursuant to a free and voluntary consent.” (*People v. Smith* (2010) 190 Cal.App.4th 572, 577.) The authority to search is limited by the scope of the consent, which “usually is defined by the expressed object of the search” based on what reasonably would have been understood by the exchange between the officer and the person giving consent. (*People v. Jenkins* (2000) 22 Cal.4th 900, 974; see *People v. Timms* (1986) 179 Cal.App.3d 86, 92.)

Magda Contreras was married to Ruiz, lived at 2015 Gaynor Avenue with him and their children, and advised Officer Peixoto of those facts. She therefore “ ‘possessed common authority over or other sufficient relationship to the premises . . . sought to be inspected.’ ” (*People v. Oldham* (2000) 81 Cal.App.4th 1, 9.) When Contreras gave Peixoto permission to search the house for additional suspects, he was entitled to search the areas inside the house where a person might reasonably be found. (See *People v. Superior Court (Arketa)* (1970) 10 Cal.App.3d 122, 125–127 [consent to search for fleeing suspect authorized search to look for man who matched the description and did not extend to a closet where a crowbar was found].)

Ruiz argues Officer Peixoto exceeded the scope of Contreras’s consent when he flipped the mattress over and discovered the weapons because the space between the mattress and the floor was too small for a person to hide underneath. We are not persuaded. Peixoto testified he could not discern the size of the space under the bed from his vantage point. The trial court credited this testimony, noting there was no evidence suggesting the officers looked into other locations such as cabinets and drawers where a person could not be hiding. We defer to the court’s credibility determination and conclude Peixoto did not exceed the scope of the consent granted to him by Ruiz’s wife. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 758 (*Monterroso*).)

4. Search of the Garage (Burning Clothing Linked to Shooting)

The evidence similarly supports the trial court’s determination that the officers had been given consent to enter the garage. Officer Googins testified that Ruiz gave them permission to enter after he opened the garage door. Though Ruiz attempted to discredit

Googins by pointing to Officer Calderon's testimony that he went into the garage when he saw the fire and did not hear what Ruiz said to Googins, this testimony was given at the preliminary hearing where the focus was not upon the lawfulness of the entry,^(see fn. 5) and it did not directly contradict Googins's more specific testimony concerning what was said by Ruiz and when. We defer to the trial court's determination that Googins was credible on this point. (*Monterroso, supra*, 34 Cal.4th at p. 758.)

Moreover, the presumption of unreasonableness that attaches to a warrantless entry into a home is overcome when officers have probable cause to believe the entry is necessary to prevent the destruction of evidence or prevent imminent danger to life or serious damage to property. (*People v. Thompson* (2006) 38 Cal.4th 811, 817–818.) Googins testified that from his vantage point in the alley, where he had a right to be, he saw that the items being burned were clothing matching the description of that worn by one of the suspects. The very fact that clothing was being burned in a location associated with Sureños, shortly after the nearby shooting of two Norteños, was highly suspicious. And, even if officers did not immediately realize that evidence relating to the crime was being burned, there was still an uncontained fire in the middle of the garage. “A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry ‘reasonable.’” (*Michigan v. Tyler* (1978) 436 U.S. 499, 509.) We have no difficulty concluding that entry was justified to prevent the destruction of evidence and/or extinguish the fire, apart from the consent given by Ruiz.

5. Search of the Shed (Blue Bandana)

The trial court did not explicitly rule on the legality of Officer Calderon's search of the shed after Flores was arrested, which led to the discovery of the blue bandana. The prosecution argued below (and the People on appeal) that the search was authorized as a protective sweep. (*Maryland v. Buie* (1990) 494 U.S. 325, 327.) We need not decide whether a protective sweep was authorized because, as the trial court concluded, the bandana was admissible under the independent source and inevitable discovery doctrines regardless of the legality of the initial entry.

Under the independent source doctrine, evidence discovered during an unlawful search is admissible if the same evidence is obtained through independent lawful activities untainted by the initial illegality. (*Murray v. United States* (1988) 487 U.S. 533, 538 (*Murray*)). The inevitable discovery doctrine is “an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it *inevitably* would have been discovered.” (*People v. Robles* (2000) 23 Cal.4th 789, 800; see *Murray*, at p. 539.) In contrast to the independent source doctrine, the issue with the inevitable discovery doctrine is not whether the police acquired evidence from an untainted source but whether the tainted evidence would have inevitably been discovered lawfully. (*Nix v. Williams* (1984) 467 U.S. 431, 448–450.)

We have already concluded that the burning clothing in the garage and the guns inside the house were discovered during lawful searches. Information about these items was included in the search warrant affidavit, as was additional information linking the premises to the shooting: the color of the apparel worn by the suspects and the victims; the history of the premises to be searched as a place where Sureño gang members congregated; the proximity of the premises to the bar where the shooting occurred; and the arrest of Torres, who was identified by an eyewitness as the shooter, outside the house on that same evening. This information, which came from a source independent from the search of the shed, supplied probable cause to search the entire premises. The shed would inevitably have been searched under a properly issued warrant and suppression of the blue bandana was not required.

B. Batson/Wheeler *Motions* (*Ruiz and Miranda*)

Appellants argue their convictions must be reversed because the prosecution improperly used peremptory challenges to exclude Hispanic jurors from the panel based on presumed group bias, in violation of *Batson*, *supra*, 476 U.S. 79 and *Wheeler*, *supra*, 22 Cal.3d 258. He also argues the trial court erred in failing to conduct a *Batson/Wheeler* analysis when appellants objected that the prosecution was using a disproportionate

amount of peremptory challenges to excuse “minorities” or “people of color.” We disagree.

1. General Legal Principles

Under *Batson*, *supra*, 476 U.S. 79 and *Wheeler*, *supra*, 22 Cal.3d 258, “ ‘[a] party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds.’ ” (*People v. Rushing* (2011) 197 Cal.App.4th 801, 808.) Both the state and the federal Constitutions bar peremptory challenges that are based on a juror’s race, ethnicity or membership in a similar cognizable class. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*.)

A defendant who suspects a juror has been challenged for a discriminatory reason must bring a motion under *Batson/Wheeler*, at which point the trial court will analyze the claim using a familiar three-prong test. First, the court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race, ethnicity or some other impermissible ground. Second, if the showing is made, the burden then shifts to the prosecutor to demonstrate the challenge was exercised for a race neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination, with the ultimate burden of persuasion never shifting from the defendant opposing the prosecution’s challenge. (*Lenix, supra*, 44 Cal.4th at p. 612.)

A discriminatory challenge of even a single member of a cognizable group is unconstitutional. (*Synder v. Louisiana* (2008) 552 U.S. 472, 478; *People v. Fuentes* (1991) 54 Cal.3d 707, 715.) While persons of specific races and ethnicities may be said to belong to a cognizable group, the more general category of “minorities” or “people of color” does not amount to a cognizable group. (*People v. Davis* (2009) 46 Cal.4th 539, 583 (*Davis*); *People v. Neuman* (2009) 176 Cal.App.4th 571, 578 (*Neuman*.) A prima facie case of discrimination may sometimes be based on physical appearance, without the need to establish the precise racial or ethnic identity of the juror. (*People v. Bell* (2007)

40 Cal.4th 582, 599; *People v. Motton* (1985) 39 Cal.3d 596, 604.) Jurors with Hispanic surnames have been held to be a cognizable group. (*People v. Trevino* (1985) 39 Cal.3d 667, 683–687, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219–1222.)

2. Voir Dire Proceedings

The prosecutor used peremptory challenges to excuse three prospective jurors who appeared to be Latino/Hispanic: Jurors R.B., J.H. and E.T. The court denied appellants’ *Batson/Wheeler* motion as to each.

Juror R.B. was a 30-year-old married woman with no children who had worked as a sales and service specialist for Bank of America for nine years. She had lived in Richmond for about 20 years but had not heard of the Norteños or Sureños. She was fluent in Spanish and had previously served on a criminal jury that had reached a verdict, but the case did not leave her with a strong impression one way or the other.

The prosecutor used a peremptory challenge to excuse Juror R.B., at which point appellants’ trial counsel lodged an objection under *Batson/Wheeler*. The court noted the defense had been excusing young jurors without a lot of life experience. It ruled the defense had failed to make a prima facie case of discrimination, but allowed the prosecutor to offer his reasons for the peremptory challenge as “an insurance policy of sorts.” The prosecutor observed the prospective juror was young, lacked life experience and had no children. The juror’s spelling on her questionnaire “wasn’t perfect,” which was not itself “eliminating,” but was a circumstance the prosecutor had noted.⁷ The prosecutor also stated that he found it “alarming” she had lived in Richmond for 20 years but had never heard of the Norteños or Sureños, a circumstance indicating she was either “very sheltered or [was] not being completely forthright” regarding her knowledge of those gangs. The court reiterated there was no prima facie case of discrimination and

⁷ Although appellants describe the questionnaire as containing “no spelling errors,” it does contain some misplaced apostrophes and grammatical errors and the juror’s handwriting makes it difficult to tell whether certain words are spelled correctly.

additionally found the prosecutor had stated “race neutral reasons for exercising the challenges he has made.”

The second prospective juror at issue was J.H., who was 58 years old and had worked for Dow Credit Union for the last nine and a half years. Her deceased husband had been a police officer in San Francisco for 22 years and had special training relating to criminal street gangs, and his career had contributed to his death. Both her husband and father had served in the military. Juror J.H. and her husband had owned a variety of guns and she had used guns for target practice. Although she had five stepdaughters (her husband’s children), they had not communicated with her since her husband’s death. Juror J.H. had a stepson who had gone to prison over 10 years earlier on a drug charge, but she had little contact with him during that period. She indicated on her questionnaire that she had an opinion about the criminal justice system that would make it difficult for her to be fair.⁸

The prosecutor exercised a peremptory challenge against Juror J.H. and defense counsel again objected under *Batson/Wheeler*. The parties were uncertain as to whether Juror J.H. was ethnically Latina/Hispanic, though she had a “Spanish surname.” The court commented that Juror J.H. “has got somewhat of a—has been arrested, if I recall correctly”⁹ and additionally noted that someone in her family had been sent to prison. The court asked whether the prosecutor wanted to add anything and the prosecutor responded, “[A]side from that, what drew my attention [to her] is that she had five stepdaughters who she is now estranged from, and that seemed to me a red flag.” Defense counsel countered that Juror J.H.’s stepson had gone to prison a long time ago, and that she had significant connections to law enforcement, so “suggesting that somehow she’s got a defense skewed view of the criminal justice system is not reflected

⁸ Before the court began its questioning of Juror J.H., it indicated “I think [H.] is going to be a problem.”

⁹ This was a mistake on the trial court’s part, as there is no indication Juror J.H. had been arrested. We do not agree with appellants that the prosecutor adopted the purported arrest as a reason for his challenge, because, as noted below, his comments were clearly focused on the fact of her estrangement from her stepdaughters.

in the record.” The court found the defense had not established a prima facie case of discrimination against Juror J.H., but assuming it erred in this ruling “there’s still multiple reasons to excuse her assuming she’s Latina.”

The third and final juror at issue was Juror E.T., who was 47 years old, married and had one child. He had served in the military where he used a gun, and had most recently worked as a capital project manager for the University of California San Francisco’s Medical Center, supervising about 30 people. His cousin was a sheriff and neither Juror E.T., nor any of his family or close friends, had ever been accused of or convicted of a crime. Juror E.T. had grown up in San Francisco’s Mission District where “gang activity was a way of life.” None of his friends or family members were in gangs and he was aware of no gang activity in the community where he currently lived, but he had interacted with gang members in school because it was “part of the life” where he grew up. Juror E.T. belonged to a lowrider automobile club in Pittsburg that held an annual toy drive for special needs children, and during the car shows he attended, he met Norteños, Sureños and other gang members. Because he did not associate with these gang members, he did not have any positive or negative experiences with them.

The prosecutor used a peremptory challenge to excuse Juror E.T., and defense counsel objected under *Batson/Wheeler*. The court found that in this instance, the circumstances supported a prima facie case of discrimination, and asked the prosecutor to give his reasons for striking the juror. The prosecutor told the court he had struggled with the decision because the juror had “myriad benefits” for the prosecution, including his job as a capital manager, his service in the Army, and his having raised a family. However, Juror E.T. went to car shows where he saw Sureño gang members in a nonconfrontational, nonthreatening context, and he had grown up in an area where gang activity was a way of life. The prosecutor deduced from this that Juror E.T. “doesn’t think of the Sureños as either good or bad” and saw them as a “non-threat,” a perspective that would conflict with the prosecutor’s theory that Sureños were committed to killing rival gang members.

The trial court, though initially “surprised and unhappy” that the prosecutor had excused Juror E.T., reviewed its notes concerning the juror’s contacts with Norteños and Sureños, and found them to be consistent with the prosecutor’s representations. The court concluded the prosecutor had stated a genuine race neutral reason for excusing the juror and denied the *Batson/Wheeler* motion.

3. Analysis

The trial court found no prima facie case of discrimination had been made with respect to jurors R.B. and J.H. Although we would ordinarily begin our analysis with a review of these first-stage rulings notwithstanding the reasons proffered by the prosecution (*People v. Scott* (2015) 61 Cal.4th 363, 391), the court’s determination that a prima facie case had been made as to Juror E.T. makes it appropriate to proceed to the second and third steps of the *Batson/Wheeler* analysis as to all three jurors and to consider the prosecutor’s reasons for the challenges: “Where the appellate court is already evaluating the sincerity of the proffered reason for excusing one juror as part of its review of all the evidence as it bears on the question whether the excusal of *another* juror constituted unlawful discrimination [citations], the appellate court may likewise begin its review of the denial of the *Batson/Wheeler* motion as to the first juror by evaluating the sincerity of the proffered reason.” (*Scott*, at p. 392.)

In reviewing the ultimate question of whether the prosecutor excused the jurors for discriminatory reasons, we apply the substantial evidence standard, presuming the prosecutor used his peremptory challenges in a constitutional manner and “giv[ing] great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses.” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) The reason for a challenge does not need to be well-founded so long as it is not discriminatory. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) “The question for the trial court was this: was the reason given for the peremptory challenge a ‘legitimate reason,’ legitimate in the sense that it would not deny defendants equal protection of law [citation], or was it a disingenuous reason for a peremptory challenge that was in actuality exercised solely on grounds of group bias?” (*People v. Reynoso* (2003) 31 Cal.4th 903, 925 (*Reynoso*)).

The prosecutor stated race neutral reasons in support of each peremptory challenge at issue. Juror R.B. was relatively young and inexperienced, and did not know about the Norteños and Sureños despite living in a city with significant gang activity for 20 years and attending a high school in which gangs were prevalent. “A potential juror’s youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge” (*People v. Lomax* (2010) 49 Cal.4th 530, 575), and “[l]imited life experience is a race-neutral explanation” (*People v. Perez* (1994) 29 Cal.App.4th 1313, 1328). Juror J.H. was estranged from her five stepdaughters, suggesting she might have difficulties getting along with others and would consequently have trouble deliberating. Juror E.T. did not have any personal involvement with gangs, but he had grown up in an area where gangs were prevalent and belonged to a car club that brought him into contact with gang members in a social setting, and the prosecutor could reasonably conclude this might make him sympathetic to gang members and more receptive to defense arguments that appellants’ affiliation with the Sureños was not necessarily criminal in nature. (See *People v. Williams* (1997) 16 Cal.4th 153, 191 [juror who attended high school in area controlled by the defendant’s gang properly excused by prosecutor due to his possible sympathies toward defendant].)

The trial court was in the best position to evaluate the prosecutor’s credibility, and substantial evidence supports its determination that the challenges were based on the reasons proffered rather than group bias against Latinos/Hispanics. Significantly, the murder victims in this case were Latino/Hispanic, a circumstance that might be viewed as “neutralizing” any prosecutorial belief that Latino/Hispanic jurors would be biased in favor of appellants based on their shared ethnicity. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 116 (*DeHoyos*); *Reynoso, supra*, 31 Cal.4th at p. 926, fn. 7.)

Appellants suggest the prosecutor’s reasons for striking the three Latino/Hispanic jurors was pretextual because he did not exercise challenges against non-Latino jurors with similar characteristics. They note that some of the seated jurors were youthful or had made spelling mistakes on their questionnaires (like Juror R.B.), that one seated juror had lived in Richmond for 25 years and had not heard of the Norteños and Sureños (like

Juror R.B.), that some seated jurors had a relative convicted of a crime or were estranged from family members (like Juror J.H.), and that one seated juror had friends with gang contacts while in high school (similar to Juror E.T.).

Although it is one tool among many in evaluating the sincerity of a prosecutor's stated reasons for a peremptory challenge, comparative juror analysis on a cold record has inherent limitations, because tone and expression cannot be conveyed. Thus, "[a] party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them." (*People v. Jones* (2011) 51 Cal.4th 346, 365.) A court must consider the "totality of the record" in assessing whether a party's peremptory challenge rested upon an unlawful group bias. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1322, overruled in part on other grounds in *People v. Scott*, *supra*, 61 Cal.4th at p. 391, fn. 3.)

The non-Hispanic jurors specifically brought to our attention by appellants do not share the same combination of responses or characteristics found relevant by the prosecutor. (See *DeHoyos*, *supra*, 57 Cal.4th pp. 106–107.) For example, seated Juror No. 283 had not heard of the Norteños and Sureños despite having lived in Richmond for 25 years, but she was 51 years old at the time of trial and had not attended high school there as had Juror R.B. Several jurors had relatives who had been incarcerated or arrested similar to Juror J.H.'s stepson, but it was the court, not the prosecutor, that noted the stepson's arrest as a race-neutral reason for a peremptory challenge—the prosecutor actually focused on Juror J.H.'s estrangement from her stepdaughters as the reason he excused her from the jury. Seated Jurors Nos. 178 and 225 had been estranged from their brothers, but having difficulties with one sibling is considerably different than not speaking to an entire side of a family.

The trial court here demonstrated "a sincere and reasoned effort" to evaluate the prosecutor's explanation in light of the circumstances of the case before it, and its decision is therefore entitled to deference. (*Lenix*, *supra*, 44 Cal.4th at p. 614; *People v. Arias* (1996) 13 Cal.4th 92, 136.) The prosecutor's explanations were " " "clear and reasonably specific." ' ' ' (*Lenix*, at p. 613.) " "The justification need not support a

challenge for *cause*, and even a “trivial” reason, if genuine and neutral, will suffice.’ ” (*Ibid.*) In this case, the prosecutor’s reasons were not trivial in light of the circumstances of the case, and the totality of the record supports the trial court’s ruling.

4. Prosecutor’s Peremptory Challenges Against “Minorities”

At the time of the first *Batson/Wheeler* motion concerning Latino/Hispanic jurors, appellants’ counsel also objected that the prosecutor had improperly challenged members of minority groups or people of color, including an African-American woman, an east Asian woman, and a Filipina. Counsel raised similar complaints at other points during the voir dire. The trial court agreed with the prosecution that minorities do not constitute a cognizable group.

Appellants argue the prosecutor’s use of peremptory challenges against minorities violated *Batson/Wheeler*. The California Supreme Court has held that minorities or people of color are not a cognizable group for *Batson/Wheeler* purposes. (*Davis, supra*, 46 Cal.4th 583.)¹⁰ We are bound by *Davis* and therefore reject appellants’ argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*)).

Although they acknowledge we are bound by *Davis*, appellants suggest that we should instead follow *Green v. Travis* (2d Cir. 2005) 414 F.3d 288, 297 (*Green*), in which the Second Circuit Court of Appeals rejected the contention that a defendant raising a *Batson* challenge must show that all venirepersons who were peremptorily excused belonged to the same “cognizable racial group.” The court in *Green* interpreted *Powers v. Ohio* (1991) 499 U.S. 400 (*Powers*) as “dramatically lessen[ing] the import of *Batson*’s ‘cognizable racial group’ language,” by holding that (1) a criminal defendant has third-

¹⁰ Though the court in *Davis* stated, “[W]e reject defendant’s contention that the trial court erred by ruling that ‘people of color’ is not a cognizable group for *Wheeler* analysis” without directly referring to *Batson*, it also indicated it would “only review defendant’s claim of *Wheeler/Batson* error based upon the prosecution’s peremptory challenges” to a cognizable group. (*Davis, supra*, 46 Cal.4th at p. 583.) The analysis in *Davis* appears equally applicable to a challenge under *Batson*, and appellants have cited no United States Supreme Court case holding minorities or people of color to be a cognizable group. (See *Neuman, supra*, 176 Cal.App.4th at p. 578 [rejecting defendant’s argument that *Davis* did not bar *Batson* claim addressed to exclusion of people of color].)

party standing to raise the equal protection claims of prospective jurors who have been peremptorily excluded on account of purposeful racial discrimination, even if the defendant and the prospective juror are not of the same cognizable group; and (2) the improper discriminatory exclusion of even a single juror violates equal protection principles. (*Green, supra*, 414 F.3d at p. 297.) “*Powers* makes clear that the only continuing relevance of *Batson*’s ‘cognizable racial group’ language is the requirement that a defendant alleging purposeful racial discrimination . . . must demonstrate that a peremptorily excused venireperson was challenged by reason of being a member of some ‘cognizable racial group.’ [Citation] . . . [O]ne venireperson cannot be excluded from a jury on account of race. *A fortiori*, several venirepersons of different races cannot be excluded from a jury on account of race.” (*Id.* at pp. 297–298, fn. omitted.)

Even if we were not bound by *Davis*, the application of *Green* would not require a different result. Unlike the case before us, the *Batson* motion in *Green* was not directed at a prosecutor’s challenges to “minorities” in general. (*Green, supra*, 414 F.3d at p. 298.) at p. 298.) Rather, the defense had objected to the prosecutor’s use of all of her peremptory challenges to strike Black and Hispanic jurors. (*Id.* at p. 299.) The *Green* court simply recognized that it was possible for the prosecution to make discriminatory challenges to jurors of more than one cognizable racial or ethnic group, and that it was appropriate to consider the sum of those challenges when determining whether a prima facie case of discrimination had been made to each of them. (*Id.* at pp. 296–299.) The court concluded the defense had established a prima facie case of discrimination as to the Black and Hispanic jurors in that case, but then upheld the judgment based on nondiscriminatory reasons the prosecutor offered for the challenges in a “reconstruction hearing” held to take evidence on the issue. (*Id.* at pp. 299–301; see *Neuman, supra*, 176 Cal.App.4th at pp. 575–590.) Appellants do not offer any specific argument on appeal that any of the individual minority jurors, other than the three Hispanic jurors discussed above, were excused for a discriminatory reason. We accordingly reject the claim that the judgment should be reversed based on the prosecutor’s use of peremptory challenges to excuse these jurors.

C. Breaks During Trial Proceedings (Ruiz and Miranda)

Both appellants argue the trial court violated their state and federal rights to due process and a fair trial by ordering breaks in the trial from November 30, 2012 to December 13, 2012 and from December 20, 2012 to January 7, 2013. These breaks occurred during the presentation of the prosecution's case-in-chief and were made to accommodate the schedules of the court, the prosecutor, defense counsel and various jurors, in addition to encompassing the year-end holidays. Neither Ruiz's nor Miranda's defense counsel objected to the schedule when it was memorialized by the court during voir dire or at any other time during the proceedings.

We agree with the People that appellants have forfeited their claim by their failure to object below. (See *People v. Gray* (2005) 37 Cal.4th 168, 226–229 [failure to object forfeited appellate challenge to 338-day hiatus between guilt and penalty phase in a capital case]; *People v. Bolden* (2002) 29 Cal.4th 515, 561–562 [no due process violation where jury deliberations adjourned for 13 calendar days and four court days during Christmas holidays]; *People v. Ochoa* (2001) 26 Cal.4th 398, 440 (*Ochoa*), abrogated on another ground as stated in *People v. Preito* (2003) 30 Cal.4th 226, 263, fn. 14 [challenge to continuance of trial for nine calendar days and five court days at the start of trial was forfeited by defense counsel's failure to object]; *People v. Johnson* (1993) 19 Cal.App.4th 778 (*Johnson*) [defendant forfeited challenge by failing to object to adjournment of proceedings for 17 calendar days over the holidays during jury deliberations].) We disagree with appellants' assertion that an objection would have been futile because the court "unilaterally" set the schedule. Nothing in the record suggests the court would not have considered an objection to the schedule if it had been raised.

Nor are we persuaded by appellants' reliance on *People v. Santamaria* (1991) 229 Cal.App.3d 269, 277 (*Santamaria*), in which the court held an adjournment of 10 days during jury deliberations was an abuse of discretion where it could have been avoided by transferring the case to another judge as requested by the parties. The issue of forfeiture was not raised on appeal in *Santamaria* until the People filed a petition for rehearing, which prompted the court to add a footnote to its opinion stating that the

magnitude of the trial judge's abuse of discretion rendered the lack of an objection "irrelevant." (*Id.* at p. 279, fn. 7.) However, our Supreme Court has since noted the *Santamaria* opinion "did not purport to abrogate the duty to object generally." (*Ochoa, supra*, 26 Cal.4th at p. 440; see *Johnson, supra*, 19 Cal.App.4th at p. 792 [characterizing *Santamaria* footnote "ambiguous and possibly misleading dictum"].)

Additionally, the recess in *Santamaria* occurred during jury deliberations, which the court characterized as "the most critical period in the trial." (*Ochoa, supra*, 26 Cal.4th at p. 281.) As the *Santamaria* court itself recognized, "Had the adjournment occurred in midtrial, counsels' recapitulation of the evidence during argument might have nullified or minimized the effect of the delay on the jurors' recall. Because the prolonged interruption at issue occurred after argument and during deliberations, common sense and experience tell us that the delay undoubtedly had some significant effect on jurors' ability to remember complicated facts, as well as on their recall and understanding of instructions." (*Santamaria, supra*, 229 Cal.App.3d. at p. 282.)

Even assuming there may be situations in which a continuance is so grave an abuse of discretion that no objection is required to preserve an appellate challenge, this is not such a case. Both breaks were taken well before the conclusion of the prosecution's case-in-chief. To the extent the breaks posed a risk the jurors' memories would fade, this would seem to work more to the prosecution's disadvantage, as the breaks were taken before the defense case began. After the breaks, the jurors heard closing arguments and were able to request readbacks of testimony and ask to examine exhibits during deliberations. There is no indication any of the jurors discussed the case or were subjected to outside influences during the breaks, and we have no reason on this record to deviate from the usual rule that an objection is required to challenge a continuance in the trial court.

D. *Exclusion of Miranda's Out-of-court Statement (Miranda)*

Miranda argues the trial court abused its discretion in excluding on hearsay grounds evidence of a statement he made shortly before the shooting. We disagree.

Miranda's cousin, Christian Valencia Amador, testified that at about 6:00 p.m. on the day of the shooting, Miranda and a number of his family members had gathered at the house where Miranda lived with his aunt and were planning to walk to another family member's birthday party. As the group was leaving, a new car pulled up and Miranda got inside and left. Miranda never came to the party.

The prosecutor moved to exclude additional evidence that before he got into the car, Miranda told Valencia Amador he would see him later at the party. Counsel argued the statement was relevant to the conspiracy count because it tended to show that when Miranda got into Ruiz's car, he planned to go to a party, not to kill anyone. Counsel argued the statement was either nonhearsay because it was not offered for its truth or hearsay subject to the state of mind exception under Evidence Code section 1250. (See *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389 [discussing distinction between state of mind hearsay exception and nonhearsay circumstantial evidence of declarant's state of mind].) The court ruled the evidence was inadmissible because, in light of the time gap between the statement and the murder (about an hour), "that's still not inconsistent with the fact that he, at a later time, would have formed the state of mind to conspire to commit murder."¹¹

We agree with the People that the trial court's ruling was based on relevancy, rather than hearsay grounds. Evidence is relevant when it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has broad latitude in determining relevance and we will reverse its ruling only when an abuse of discretion is shown. (*People v. Howard* (2010) 51 Cal.4th 15, 31–32.)

The court did not abuse its discretion here. Even if Miranda believed he would attend the party when he said goodbye to his family, this does not logically tend to show he did not conspire with Ruiz, Flores and Torres once inside the car. Assuming Miranda

¹¹ The court specifically put aside the question of the trustworthiness of the statement, which is necessary for hearsay to be admitted under Evidence Code section 1250.

did not know about or intend to participate in the shooting when he was picked up by Ruiz, circumstances had changed by the time of the shooting. Evidence of a declarant's state of mind may be excluded when "the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense." (*People v. Karis* (1988) 46 Cal.3d 612, 637.)

Even if we were to conclude the statement was relevant and not inadmissible on hearsay grounds, its exclusion was harmless. Given the weight of the evidence, the jury was highly unlikely to be persuaded by the argument that because Miranda intended to go to a party with his family, he couldn't have additionally conspired to kill the victims. Applying the standard of review for state law error applicable to the exclusion of defense evidence, is not reasonably probable the jury would have reached a result more favorable to Miranda if the court had admitted Miranda's statement to Valencia Amador. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998–999 (*Cunningham*); see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

We reject Miranda's suggestion that the error, if any, should be reviewed under the more stringent harmless-beyond-a-reasonable-doubt standard for federal constitutional error. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) "Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right." (*Cunningham, supra*, 25 Cal.4th 926 at p. 999.)

E. *Predicate Acts for Gang Offense and Allegations (Ruiz and Miranda)*

Appellants argue the trial court abused its discretion under Evidence Code section 352 by allowing the prosecution to present evidence of seven offenses committed by Sureño gang members (so-called predicate offenses) to prove the substantive gang offense under section 186.22, subdivision (a), the gang enhancements under section 186.22, subdivision (b), and the gang special circumstances under section 190.2, subdivision (a)(22). We reject the claim.

1. Predicate Offenses—General Legal Principles

The substantive gang offense defined by section 186.22, subdivision (a) is committed when the defendant “actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” The gang enhancement under section 186.22, subdivision (b) applies to crimes committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . .” The gang special circumstance under section 190.2, subdivision (a)(22) may be imposed when a defendant who commits a first degree murder “intentionally killed the victim while the defendant was an active participant in a criminal street gang.”¹²

To prove the Sureños were a criminal street gang, “the prosecutor was required to establish that one of the gang’s primary activities was the commission of one or more of the crimes listed in section 186.22, subdivision (e), and that the gang’s members engaged in a pattern of criminal activity. [Citation.] ‘. . . [S]ufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.’ [Citation.] [A] ‘pattern’ is established by the commission of two or more enumerated offenses committed on separate occasions or by two or more persons. ” (*People v. Williams* (2009) 170 Cal.App.4th 587, 608–609 (*Williams*).)

2. Evidence Presented

The prosecutor initially sought to introduce nine predicate offenses to prove the gang offense and allegations. The court excluded evidence of a witness killing and

¹² The gang special circumstance may be applied to a defendant who is not the actual killer when that defendant acts with the intent to kill. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1085, overruled on other grounds in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1370–1371.) The jury was given CALJIC No. 8.81.22, which appropriately set forth that principle.

murder committed by Sureños, and the prosecutor elected not to present evidence of a 2006 auto theft involving Miranda. Officer Brady, an expert in the field of Norteño and Sureño street gangs in Contra Costa County, testified about five murders committed by Sureño gang members. Neither Ruiz nor Miranda were involved in any of these offenses, which can be summarized as follows:

(1) On February 2, 2007, Norteño gang member Ivan Santos was killed during a walk-up shooting by Ramon Alejandro, a member of the Easter Hill Locos set of the Sureño gang. Alejandro, who was in the company of two fellow gang members when he committed the shooting, was convicted of first degree murder with gang enhancements.

(2) On December 22, 2007, Antonio Centron and two other individuals were wearing red clothing in Norteño territory and were shot by Hector Molina Betances, a Sureño gang member. Betances, who was in the company of two fellow Sureño gang members, was convicted of murder with a gang enhancement.

(3) On January 26, 2008, Jose Mendoza-Lopez was shot by Jose Martinez, who was attending a Sureño party when he was told by others that Mendoza-Lopez, who was attending a different party in the same apartment building, was wearing red. Martinez was standing next to Fernando Garcia, an RST member, when he committed the shooting. Garcia was charged with murder but never located to be brought to trial.

(4) On February 16, 2008, Luis Perez was shot and killed. Three VFL gang members were convicted of this murder with gang enhancements: Jorge Camacho, Hector Molina Betances and Jose Mota-Avadano. Perez was not affiliated with the Norteños but was wearing red when he was shot.

(5) On April 26, 2008, Rico McIntosh was fatally shot by Javier Gomez, a Mexican Locos Sureño who was in the company of Jose Mota-Avadano and Oscar Menendez of the VFL set. McIntosh was wearing red when he was shot. Gomez and Mota-Avadano were convicted of murder with gang enhancements.

In addition to the five murders committed by other Sureño gang members, the prosecution presented evidence of two crimes involving Miranda.¹³ On March 11, 2009, police found Miranda and Sureño gang member Heriberto Montano working on various stolen cars at Miranda's home, in what appeared to be a "chop shop" operation. On July 18, 2009, while in possession of a baseball bat, Miranda and another man assaulted and attempted to rob two men at a taco stand, and Miranda used the bat to try to hit the victims and break the windows of the car belonging to one of them. Miranda was later stopped in the alleyway behind Ruiz's house and was identified by one victim as the man with the bat. The same victim indicated that Ruiz had been a passenger in the car with Miranda, but had not participated in the attempted robbery.

The jury was given CALJIC No. 17.24.3, a limiting instruction concerning the appropriate use of the evidence of other gang offenses: "Evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crime[s] for which defendant[s] [are] on trial. [¶] Except as you will be otherwise instructed, [this] evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that [he] has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose."

¹³ Because neither of these two predicate acts resulted in a conviction, the evidence was introduced through percipient witnesses.

3. No Abuse of Discretion

We review a claim that gang evidence was unduly prejudicial for abuse of discretion. (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1434 (*Rivas*.) “A trial court abuses its discretion when its ruling falls outside the bounds of reason.” (*Ibid.*)

The court did not abuse its discretion in allowing the prosecution to present evidence of seven predicate offenses. Section 186.22, subdivision (e) “speaks of a ‘pattern’ and permits the prosecution to introduce evidence of ‘two or more’ offenses.” (*Rivas, supra*, 214 Cal.App.4th 1410 at p. 1436 [no abuse of discretion in allowing evidence of six gang crimes].) Additionally, the commission of several enumerated offenses within a relatively short period of time may satisfy the requirement that those offenses are one of the gang’s “primary activities.” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1225.) In light of defense efforts to portray appellants’ membership in the Sureños as something more akin to participation in a social club, the court could reasonably conclude that holding the prosecution to the minimum number of offenses required to prove a pattern of criminal activity would paint an incomplete picture of the nature of the organization. (See *ibid.*; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1137–1138 [no abuse of discretion in admitting eight predicate offenses].)

The decision in *Williams, supra*, 170 Cal.App.4th 587, does not require a different result. In *Williams*, the prosecutor introduced evidence of eight crimes committed by gang members to prove the predicate offenses necessary to support a gang offense and gang enhancement. At one point the trial court observed that the prosecutor’s evidence from the day before had been a repeat of previous evidence but, “the [district attorney] is entitled to the full force of their evidence. If they want to over-prove their case or put on all the evidence that they have, that’s their right.” (*Id.* at p. 610.) On appeal, the appellate court “strongly disagreed” with the view that prosecutors are entitled to over-prove their cases and concluded the trial court had abused its discretion in admitting “cumulative evidence concerning issues not reasonably subject to dispute.” (*Id.* at p. 611.) Though deeming the error harmless, the court found the volume of the challenged evidence extended the trial “beyond reasonable limits” and resulted in a

“virtual street brawl” and “endless discussions” among counsel regarding its admissibility. (*Id.* at p. 611.) In contrast, the court in this case did not decline to exercise its discretion. Like the trial court in *People v. Hill, supra*, 191 Cal.App.4th at page 1139, “[t]he trial court here exercised its discretion and eliminated two offenses the prosecution sought to introduce. This ruling created neither a ‘street brawl’ nor ‘endless discussions.’ No error occurred.”

F. Booking Statement Admitting Gang Affiliation (*Miranda*)

Over defense objection, the prosecution was permitted to introduce evidence that appellants admitted their affiliation with the Sureños gang when they were booked into jail without any prior advisement of their rights under *Miranda, supra*, 384 U.S. 436. *Miranda* correctly contends evidence of these statements was inadmissible.¹⁴ In *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), our Supreme Court held that a defendant’s answers to booking questions acknowledging gang affiliation do not fall under the narrow booking exception to *Miranda* and may not be admitted during the prosecution’s case-in-chief without violating a defendant’s rights under the Fifth Amendment. (*Elizalde*, at pp. 527, 538 & fn. 9.)

The People do not dispute that the booking statements should have been excluded, but maintain the error was harmless. We agree. As noted in *Elizalde*, the admission of a defendant’s statement in violation of the Fifth Amendment is reviewed under the standard set forth in *Chapman, supra*, 386 U.S. at p. 24, which requires the government “ ‘to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” (*Elizalde, supra*, 61 Cal.4th at p. 542.) As in *Elizalde*, that burden is satisfied here because *Miranda*’s gang affiliation was “convincingly established” by evidence other than his booking statement. (*Ibid.*)

Miranda had several Sureño tattoos, including three dots in a triangle under his left eye, “Smile now, cry later,” two dice showing a “1” and a “3,” and a blue Playboy bunny.

¹⁴ Ruiz does not make the same argument, most likely because his testimony at trial admitting his membership in the Sureño gang rendered the evidence patently harmless.

Officer Reina, the prosecution's gang expert, testified that no one who was not a Sureño would get the tattoo of the three dots under his eye. Miranda had downloaded Sureño images onto his cell phone just three days before the shooting, including a blue clown face with "Sureño" and the number 13. He associated with Ruiz, who admitted his membership in the Sureño gang, and had been detained at Ruiz's home, where Sureños congregated, for a prior assault and attempted robbery on July 18, 2009. On March 11, 2009, the police had found Miranda and Sureño gang member Heriberto Montano working on stolen cars at a "chop shop" at Miranda's house.

Most tellingly, the murder victims in the case were Norteños and were shot dead by Flores, a Sureño. Even if the jury had a reasonable doubt as to whether the second gunman inside the bar was Miranda or Torres, Miranda was in the company of three Sureño gang members in the moments leading up to the shooting and was discovered by police at the home of one of them, where evidence of the shooting was being destroyed and hidden. On this record, we can say beyond a reasonable doubt that Miranda's admission of gang affiliation to the booking officer did not contribute to the verdict. (*Elizalde, supra*, 61 Cal.4th at p. 542.)

G. Denial of Jury Instruction on Accessory as Lesser Related Offense (Ruiz)

Ruiz argues the trial court committed prejudicial error when it denied his request for an instruction on accessory after the fact as a lesser related offense of the charged murders and conspiracy to commit murder. He submits that his testimony provided substantial evidence from which the jury could infer that while he assisted Flores in fleeing the scene and concealing evidence, he did not know in advance that Flores was going to shoot the victims. (See § 32 ["Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape arrest, . . . having knowledge that said principal has committed such felony . . . , is an accessory to such felony."].) We disagree.

Accessory after the fact is a lesser related, not a lesser included, offense of murder. (See *People v. Majors* (1998) 18 Cal.4th 385, 408–409.) As Ruiz acknowledges, our Supreme Court has held that a court may not give an instruction on a lesser related

offense, even one supported by substantial evidence, where the prosecution objects. (*People v. Birks* (1998) 19 Cal.4th 108, 136 (*Birks*); see *People v. Kraft* (2000) 23 Cal.4th 978, 1064; *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.) We are bound to follow this authority. (*People v. Martinez* (2002) 95 Cal.App.4th 581, 586, citing *Auto Equity, supra*, 57 Cal.2d 450.)

Seeking to avoid this rule, Ruiz argues the trial court should have ordered the information amended to include a charge of accessory. We disagree. As noted in *Birks, supra*, 19 Cal.4th at page 134: “It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from the ‘ “complex considerations necessary for the effective and efficient administration of law enforcement.” ’ [Citations.] The prosecution’s authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch.”

Ruiz suggests the court had the authority to amend the information under section 1009, which provides, in relevant part: “The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination.”

The addition of an entirely new or different offense, even a lesser related offense, would amount to more than a mere correction of a “defect or insufficiency” under section 1009. Counsel has cited us to no case in which the court made such a substantive amendment on its own motion without the consent of the prosecution. (E.g., *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1056 [prosecutor asked that defendant initially charged with attempted robbery be bound over on robbery charge when evidence at preliminary hearing showed completed robbery; information that mistakenly charged

defendant with only attempted robbery was amended by court on its own motion to charge robbery].) Were we to accept Ruiz's argument, we would eviscerate the holding of *Birks*.

Nor are we persuaded by Ruiz's citation to *People v. Hall* (2011) 200 Cal.App.4th 778, at page 782 (*Hall*), in which the court stated, "The ultimate decision of whether to give an instruction on an uncharged lesser related offense should not be removed from the trial court." This statement was made in the context of affirming the trial court's refusal to instruct on a lesser related offense even though the defense and prosecution had stipulated to the instruction, and it in no way suggests a trial court has discretion to give such an instruction over the prosecution's objection.

H. *Sufficiency of the Evidence (Ruiz)*

Ruiz argues his convictions must be reversed because the evidence against him was "gossamer, diaphanous, beguiling and insufficient." He notes he was not in the bar when the victims were shot and suggests that if his cohorts had been his brothers rather than fellow gang members, he would not be legally accountable for their actions. We are not persuaded.

To evaluate a claim of insufficient evidence, "we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—that would support a rational trier of fact in finding [the defendant guilty] beyond a reasonable doubt." (*People v. Lewis* (2001) 25 Cal.4th 610, 642.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

Ruiz acknowledged that on the day of the shooting, he left his parents' home in Vallejo between 5:00 p.m. and 6:00 p.m. and drove directly to his house at 2501 Gaynor Avenue, a trip that takes about half an hour. He told police he took a route that went past the Alvarado Gardens Bar where the murders were committed. Elena Martinez testified

that she and the victims stepped outside the bar to smoke cigarettes about 45 minutes before the shooting, and it was reasonable to infer Ruiz saw them at this time. Ruiz admitted at trial that after taking his children home, he left his house again and picked up Flores, Torres and Miranda in his car. He acknowledged dropping them off at a location near the bar, driving them to his house after learning they had shot some Norteños, and assisting them by hiding the guns used in the shooting. Clothing worn by the others was found burning in the garage, in an obvious attempt to destroy evidence connected to the shooting. A motive for the shooting was supplied by evidence that Ruiz and his cohorts were all affiliated with the Sureño gang and the victims were Norteños.

Although Ruiz claimed he did not see guns until Flores and Miranda returned to the car after the shooting and did not know about the shooting in advance, the Mossberg shotgun used by Flores was too long to be easily concealed and the jury could have readily concluded Ruiz was not credible on this point. The jury could also conclude Ruiz had supplied the guns used in the shooting, as they were hidden in his home next to guns Ruiz admitted owning. The serial number on the Mossberg shotgun had been obliterated, as had the serial number on Ruiz's .45-caliber pistol, further suggesting he was the owner of both weapons. Ample evidence supports a determination that Ruiz conspired with and aided and abetted Flores in committing the murders, and that his conduct amounted to active participation in a criminal street gang under section 186.22, subdivision (a).

III. DISPOSITION

The judgments are affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A139127)