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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

NANCY MARIE BESENTY et al.,

Defendants and Appellants.

B237699

(Los Angeles County Super. Ct.  
No. TA115853)

APPEAL from the judgments of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant Nancy Marie Besenty.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant Francisco Ramon Lozano.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendants and appellants Francisco Ramon Lozano and Nancy Marie Besenty guilty in count 1 of the murder of Yesenia Quintanilla (Pen. Code, § 187, subd. (a))<sup>1</sup> and in count 2 of the attempted willful, deliberate, and premeditated murder of Carlos Quintanilla (§§ 664, 187, subd. (a)). The jury found true as to both counts that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subds. (b)(5), (b)(1)(C)). As to Lozano, the jury found that he personally and intentionally discharged a firearm, causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1) (counts 1 and 2)). The trial court found that Lozano served two prior prison terms within the meaning of section 667.5, subdivision (b).<sup>2</sup>

The trial court sentenced defendants to 50 years to life in prison on count 1, comprised of 25 years to life for murder and 25 years to life for the firearm use. As to count 2, defendants were sentenced to life in prison, plus a consecutive 25 years to life for firearm use. As to Lozano, the court additionally imposed two one-year prison terms for the priors under section 667.5, subdivision (b).

Besenty contends on appeal that her convictions must be reversed because they are based on uncorroborated accomplice testimony. Alternately, she argues that even taking the accomplice testimony into consideration, there is insufficient evidence to support her convictions on an aiding and abetting theory. Besenty additionally contends that the trial court's refusal to strike expert witness testimony violated her right to due process. Finally, she alleges prosecutorial misconduct and argues she was prejudiced by the cumulative errors at trial. Appointed counsel for Lozano filed an opening brief raising no issues but requesting this court to independently review the record for arguable contentions pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We address the issues

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

<sup>2</sup> The prosecutor dismissed the allegation that Lozano suffered one serious or violent prior felony or juvenile adjudication under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

raised by Besenty, in addition to undertaking a review of the record with respect to Lozano's convictions, as required by *Wende*. We affirm both judgments.

## FACTS

On the afternoon of November 25, 2010, Cindy Sanchez drove her boyfriend, Carlos Quintanilla, to the apartment of Carlos's sister, Yesenia Quintanilla.<sup>3</sup> The apartment was on the upper level of a fenced complex with a locked gate.

Carlos had been a member of the 18th Street gang for about 10 years and was tattooed with gang insignia on his forehead, arms, neck, and above his left eyebrow. Carlos had the gang moniker "Lil Crazy." Although she did not belong to the gang, Yesenia claimed the Los Players clique of the 18th Street gang and used the monikers "La Loca" and "La Crazy."

At around 10:00 p.m., Carlos ran out of beer and insisted on leaving the apartment to buy more. He ran down the stairs and jumped the fence. Yesenia ran after him. Both of them had been drinking and were intoxicated. Sanchez did not want them to walk to the store, so she grabbed her daughter and got into her car to go after them. She picked up the Quintanillas and drove them to a liquor store. Yesenia directed Sanchez to a second location, where she wanted to go to get money. Yesenia then asked to be driven to a location on 79th Street, which was within 18th Street gang territory. She told Sanchez "she needed to go talk to somebody, something personal."

When the group arrived, Yesenia and Carlos got out of the car and began yelling for Ada Zeledon,<sup>4</sup> using her 18th Street gang moniker, "Giggles." The Quintanillas did not get along with Zeledon. Zeledon had told Yesenia's friend she heard Yesenia had

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<sup>3</sup> Because they share the same last name, we refer to Yesenia and Carlos individually by their first names, and collectively as the Quintanillas.

<sup>4</sup> Zeledon was arrested for the charged offenses, but not charged. She was called as a prosecution witness at trial.

been “prostituting,” and making the gang look bad. Zeledon and her friend Janet had also “jumped” the Quintanillas’ younger sister, Susie.

Zeledon came out of the house and argued with Yesenia. Carlos tried to hit Zeledon with a bottle. Both Carlos and Yesenia challenged Zeledon to come out and fight, but she refused. At one point, Zeledon called her friend Mala, who was also an 18th Street gang member. She also called Lozano to come over and help her, but he did not show up. The Quintanillas left when Zeledon’s mother came out of the house.

After the Quintanillas got back in the car, Yesenia directed Sanchez to drive her to a fourth location, on 82nd Street, which was another area known to Sanchez as claimed by the 18th Street gang. Yesenia wanted to look for Lozano, an 18th Street gang member known by the moniker “Stormy,” who had the word “eighteen” tattooed on his stomach. Sanchez had previously seen Carlos talk to Lozano. Carlos knew Lozano was a “shot caller” for the Los Gangsters clique. Carlos testified that a shot caller is a gang member with the authority to tell other gang members what to do. Susie had dated Lozano, but they had an unfriendly breakup about a month before Thanksgiving.

As Sanchez passed Hoover Street, the Quintanillas jumped out of the moving car. Sanchez saw the Quintanillas heading toward Lozano, who was standing in front of the gate of an apartment. There were about 15 other people outside the apartment.

Carlos tried to punch Lozano, but Lozano ducked. Yesenia did not want the two to fight, so she approached Lozano and pepper-sprayed him. Yesenia yelled profanities at Lozano.

A couple of minutes after Lozano was pepper-sprayed, Besenty, who identified herself by the moniker “Casper,” came over. Carlos knew Besenty to be a shot caller. Yesenia and Lozano were arguing loudly about nearby graffiti on a wall at Vermont and 82nd Street. The statement, “Bitch, you ain’t from my ‘hood,’” was written on the wall, and Yesenia’s gang moniker “La Crazy” was crossed out. Yesenia asked Lozano why he crossed out her name. Lozano told Yesenia that she was not from the 18th Street gang, that she needed to stop claiming the gang, and that he did not like her.

Besenty and Carlos also argued for over an hour. Sanchez got out of her car in the middle of the argument because Besenty punched Carlos in the face. Yesenia asked Besenty why she hit Carlos, and Sanchez told Besenty not to ever punch Carlos because it was disrespectful to her and her daughter. Besenty told Carlos that she was “an OG from 18th Street.” Yesenia asked her brother if he wanted her to fight Besenty, but he said no. Besenty asked Carlos, “Man, you know you talking to the main head?” Besenty took out her cell phone and called Yesenia Escobar, known as “Shorty,” and told her to come over. She gave Lozano “a look.” Lozano warned the Quintanillas to “watch tomorrow” several times and said that he was going to get them. The Quintanillas returned to Sanchez’s car. They drove back to Yesenia’s apartment, where they spent the night.

In the middle of the next day, Zeledon called Lozano because she was upset that the Quintanillas “disrespected” her house and that her mother had to see “all this nonsense.” Zeledon told Lozano what happened to her, and Lozano told Zeledon that Yesenia had pepper-sprayed him. He told Zeledon that he wanted to beat up Yesenia. Zeledon also wanted to beat up Yesenia.

Later that night, Zeledon, her friend Mala, and Lozano got into Besenty’s car and drove around looking for Yesenia. Besenty drove them to Yesenia’s apartment. Zeledon saw Escobar in her car with two women named “Patty”<sup>5</sup>—Patricia Acosta and Patricia Ortiz.

After they arrived at Yesenia’s apartment complex, Zeledon, Lozano, and Mala got out of Besenty’s car and jumped over the gate. Besenty remained in the vehicle. Escobar and one of the “Pattys” also got out of their car, jumped the gate, and went up to Yesenia’s apartment.

Sanchez, her daughter, Yesenia, her children, and Carlos were having dinner when they heard a loud knock on the door. Yesenia told her brother to open the door. Before

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<sup>5</sup> Zeledon did not know the women well and referred to them as “the two Pattys.”

doing so, the Quintanillas asked who was there. Someone outside the apartment answered, “Hey, what’s up? It’s me.”

They opened the door to find Escobar and Acosta<sup>6</sup> outside. The two women entered the apartment and asked Yesenia why she pepper-sprayed Lozano.

Escobar left the apartment but came back about two minutes later with Mala, who was a member of Columbia Lil Cycos clique of the 18th Street gang. Mala said she came to Yesenia’s apartment because she had heard that someone was claiming her “hood.” Mala asked Yesenia, “Aren’t you from Columbia?” Yesenia responded, “No. I’m from Los Players.” Carlos also replied, saying he was from either Lil Cycos or Columbia. Each of these cliques were subsets within the 18th Street gang.

The women told Yesenia that they wanted her to go outside. She refused, saying that she had her family inside and that if they wanted to tell her something, they could do it right there.

Mala asked Carlos to go outside, and he agreed. When Carlos stepped out of the apartment, he saw Lozano putting on the hood of his jacket. Afraid of what Lozano might do, Carlos tried to turn around to go back inside the apartment, but Escobar pepper-sprayed him. Mala grabbed Carlos by the shirt. Mala, Zeledon, and Acosta beat up Carlos. Sanchez could hear Carlos struggling and screaming. Carlos tried to go back into the apartment but couldn’t because Zeledon was holding the collar of his shirt and punching him. Yesenia tried unsuccessfully to pull Carlos back into her apartment.

Lozano pulled out a gun wrapped in a sock and without saying anything, he shot Carlos in the head. Carlos collapsed, and Acosta, Mala, and Zeledon fled, jumping over the fence.

Sanchez heard Yesenia yelling, “Don’t do this. I have kids.” Sanchez ran with the children to Yesenia’s bedroom, where she heard a gunshot. Sanchez did not close the door. Lozano, who was wearing a hooded sweater with the hood up, pointed a sock-

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<sup>6</sup> Acosta testified as a prosecution witness after entering a plea to a charge of burglary and a 12-year state prison sentence, which was to be imposed after her testimony.

covered gun at Yesenia's head. She screamed, he shot her in the head, and she fell on the floor. After Yesenia was shot, she ran to her bathroom and tried to close the door.

Lozano ran behind Yesenia toward the bathroom. He then walked into Yesenia's bedroom, where Sanchez was squatting down on the mattress. He aimed for Sanchez's head with his arm stretched out, his hand covered with a sock, and his four fingers clenched and thumb upwards. Sanchez kicked Lozano and moved her head around because he was trying to aim for her head. After a couple of minutes, Lozano left without saying anything. Sanchez, Zeledon, and Mala ran to Besenty's car, where she was waiting. Besenty quickly drove them back to her house in another neighborhood.

Sanchez waited about 30 seconds and then went to Carlos, who was on the floor by the front door, bleeding from the left side of his head from a bullet wound. Carlos asked Sanchez to take him to his sister's bathroom because his eyes were still burning from the pepper spray and he wanted water. Carlos asked to see his sister, so Sanchez moved him to the bathroom, where Yesenia was on the floor with her eyes closed.

An ambulance and police officers arrived on the scene. The Quintanillas were taken to the hospital. Yesenia died as a result of the gunshot wound to her head a few days later.

The prosecution's gang expert, Officer Gabriel Gonzales, testified that he knew Lozano was an active 18th Street gang member. Officer Gonzales opined that Lozano was a shot caller for the Los Gangsters clique of the 18th Street gang and also belonged to the Wall Street clique. Officer Gonzales also testified that shortly after the preliminary hearing, he learned from two informants that Besenty was also an active 18th Street gang member, with "OG shot caller" status.

Besenty and Lozano did not testify.

## DISCUSSION

### I

#### Besenty's Appeal

##### A. *Accomplice Testimony*

At the close of the prosecution's case-in-chief, Besenty's counsel moved for dismissal under sections 1118.1 and 1111 on the basis that the testimony of accomplices Zeledon and Acosta was not corroborated by sufficient independent evidence to sustain the judgment. Besenty challenges the denial of her motion.

Section 1111 prohibits conviction on the basis of accomplice testimony absent independent evidence that "tend[s] to connect the defendant with the commission of the offense . . . ." The statute further dictates that independent corroborative evidence showing only that the crime occurred or showing only the circumstances of the crime is not sufficient to support accomplice testimony. (*Ibid.*) If corroborating evidence is insufficient, the trial court must enter a judgment of acquittal at the close of evidence pursuant to section 1118.1.

"To determine if sufficient corroboration exists, [an appellate court] must eliminate the accomplice's testimony from the case, and examine the evidence of other witnesses to determine if there is any inculpatory evidence tending to connect the defendant with the offense." (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543 (*Falconer*)). Corroboration is insufficient "if it *requires interpretation and direction* to be furnished by the accomplice's testimony to give it value . . . ." (*People v. Reingold* (1948) 87 Cal.App.2d 382, 393.) However, "[t]he corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, so long as it tends to implicate the defendant by relating to an act that is an element of the crime. [Citations.] The independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies [citation] and need not establish every element of the charged offense [citation]." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022.) In

reviewing corroborating evidence, “[w]e view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor.” (*Id.* at p. 1013.) We will not disturb the trial court’s finding on the issue of corroboration unless the independent evidence “could not reasonably tend to connect a defendant with the commission of a crime . . . .” (*Falconer, supra*, at p. 1543.)

In this case, there is no dispute that Zeledon and Acosta were accomplices, nor does Besenty argue that the jury was not properly instructed that accomplice testimony requires corroboration. The only challenge Besenty raises is whether the independent evidence sufficiently corroborates the accomplice testimony of Zeledon and Acosta. We conclude that it does.

Both Sanchez and Carlos testified regarding the events of the day prior to the shootings, which precipitated the events that followed. Besenty was not a mere bystander. Sanchez testified that Besenty appeared after Yesenia pepper-sprayed Lozano and loudly identified herself by the gang moniker “Casper.” Besenty then argued with Carlos for more than an hour, at one point punching Carlos in the face. Sanchez heard Besenty announce that she was an “OG” from the 18th Street gang. When Lozano told Carlos repeatedly that he had better “watch tomorrow,” Besenty gave Lozano “a look.” Carlos testified that Besenty was a “shot caller” for the 18th Street gang and had authority to tell other gang members what to do. He recounted that Besenty had punched him hard in the face in the course of the argument, and that she announced she was, “the main head.” Besenty then called Escobar and told her to come to the location where the altercation was taking place.

This independent evidence tends to connect Besenty to the crimes by showing that Besenty had motive to commit the crimes and the authority to order other gang members to carry them out. Besenty was angry and reacted to Carlos verbally and through physical violence one day before the shootings. She made it known that she was not only affiliated with the 18th Street gang, but that she had the power to direct other gang members to retaliate for the incident. Moreover, Escobar, the person Besenty contacted to come to the altercation, was a key participant in the shootings the next day, pepper-

spraying Carlos to disable him prior to the shooting, and hitting him to prevent him from getting back into his sister's apartment.

We are not persuaded by Besenty's argument that these facts are analogous to other cases in which corroborating evidence was determined to be insufficient. The independent evidence in the cases Besenty cites did not tend to show the defendant was *connected* to the crime, but only that the defendant was somehow connected to a person involved in the crime, had some knowledge of the victims, or matched a general description of the perpetrator. (See *Falconer*, *supra*, 201 Cal.App.3d at p. 1543 [independent evidence showed that the defendant was the father of one of the perpetrators, visited the scene of the crime eight or nine months before the incident, and knew the victim grew marijuana]; *People v. Rios* (1985) 163 Cal.App.3d 852, 870 [independent witness saw a "short Mexican-appearing man" running in the area where the crime was committed]; *People v. Martinez* (1982) 132 Cal.App.3d 119, 132-133 [independent witness indicated the defendant's complexion was exactly like that of the perpetrator]; *People v. Boyce* (1980) 110 Cal.App.3d 726, 737 [independent evidence showed that a burglary occurred; the defendant knew the victims, the location of their home, and their schedules; and the defendant was a friend of the testifying accomplice and had been to the accomplice's home at about the time stolen goods were delivered].)<sup>7</sup> Here, evidence of Besenty's motive to commit the crimes and her stated authority to order others to carry them out tends to connect her to the crimes. Such evidence is sufficient to corroborate Zeledon and Acosta's testimony.

### **B. *Insufficient Evidence of Aiding and Abetting***

Besenty argues the prosecution failed to proffer sufficient evidence that she was guilty of the crimes charged on an aiding and abetting theory. She argues she was not

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<sup>7</sup> In her reply brief, Besenty also cites to *People v. Perry* (1972) 7 Cal.3d 756 in support of her contention. The facts of the case are not discussed in the briefing; however, the case supports a contrary conclusion.

present at the scene of the shootings and merely drove Lozano and the other participants to and from Yesenia's apartment. Her contention is without merit.

In California, any "person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; § 31.) "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*)). Moreover, "[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

"The 'act' required for aiding and abetting liability need not be a substantial factor in the offense. "Liability attaches to anyone 'concerned,' however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal." [Citation.]' [Citation.]" (*People v. Swanson–Birabent* (2003) 114 Cal.App.4th 733, 743.) Thus, lookouts, getaway drivers, and persons present at the scene for the purpose of diverting suspicion are principals under the law. (*Ibid.*) When assessing whether a defendant aided and abetted a crime, we consider several factors, including "presence at the crime scene, companionship, and conduct before and after the offense." (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5.) "Whether [the] defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and

reasonable inferences must be resolved in favor of the judgment.’ [Citation.]”  
(*Campbell, supra*, 25 Cal.App.4th at p. 409.)

In determining whether sufficient evidence supports a conviction, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . ‘We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Here, substantial evidence supports the judgment. As discussed above, Besenty’s actions on the day prior to the shootings tended to connect her to the crimes. Evidence was presented that she argued loudly and at substantial length with Carlos the day before, even going so far as to strike him in the face. When she did so, both Yesenia and Sanchez challenged her—Yesenia made it known that she was ready to fight Besenty, and Sanchez warned her never to hit Carlos again. In response, Besenty announced she was an “O.G.” and the “main head,” someone who had authority to order other gang members to retaliate. Besenty then called Escobar, a gang member and key participant in the crimes the following day, and summoned her to the scene. From these facts, the jury could reasonably infer that Besenty had motive to harm the Quintanillas and the ability to do so without having to directly participate in any violence herself. The jury could also reasonably infer that, as an “O.G.” or “shot caller,” Besenty would necessarily be aware of any plans that other gang members would have to harm the siblings, because, as Officer Gonzales testified, shot callers orchestrate all crimes committed by the gang.

Moreover, evidence was presented that, prior to going to Yesenia's apartment on the day of the shootings, Besenty drove Lozano, Zeledon, and Mala around the area, looking for Yesenia. Besenty then drove the three to Yesenia's apartment and waited as the others scaled the locked gate to enter the apartment complex. When the three came running from the scene, again scaling the gate, she drove them to her house in another neighborhood at a high speed. The jury could reasonably infer that Besenty was involved in the crimes as a planner and a getaway driver, and that she was aware of and encouraged an attack on the Quintanillas by multiple gang members. Even if Besenty had been unaware that Lozano was armed, great bodily injury and death were reasonably foreseeable consequences of the crimes she encouraged. Accordingly, we conclude that substantial evidence supports her conviction as an aider and abettor.

### ***C. Suppression of Evidence***

Besenty contends the trial court erred in refusing to strike the testimony of the prosecution's gang expert, Officer Gonzales, because Officer Gonzales's opinion that Besenty was an OG with shot caller status within the 18th Street gang was based on information gleaned from two informants whose existence had not been disclosed to the defense. At the preliminary hearing, Officer Gonzales had testified that he was unable to discover any information with respect to Besenty's alleged gang affiliation, despite using city, county, and state law enforcement resources. At trial, however, Officer Gonzales opined that Besenty was an OG with shot caller status within the 18th Street gang, based on information he received from informants at two different agencies approximately one month after the preliminary hearing. To obtain this information, Officer Gonzales utilized ATF, FBI, and INS resources, which had not been available to him through the police department. Although the prosecution had no independent recollection of it, Officer Gonzales testified that he shared the information with the district attorney's office at the time he received it. The defense had no knowledge that the informants existed prior to Officer Gonzales's testimony at trial. Besenty asserts that the prosecution's

failure to timely disclose information concerning the informants was a violation of her due process rights requiring reversal of her conviction under *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*).

In *Brady, supra*, 373 U.S. 83, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” (*Id.* at p. 87.) Under *Brady* and its progeny, the prosecution is required to disclose any material, favorable evidence, even in the absence of a discovery request. (*Ibid.*; *United States v. Bagley* (1985) 473 U.S. 667, 678 (*Bagley*); *United States v. Agurs* (1976) 427 U.S. 97, 106-107; *In re Sassounian* (1995) 9 Cal.4th 535, 543.)

“The scope of this disclosure obligation extends beyond the contents of the prosecutor’s case file and encompasses the duty to ascertain as well as divulge ‘any favorable evidence known to the others acting on the government’s behalf . . . .’ [Citation.] Courts have thus consistently ‘decline[d] “to draw a distinction between different agencies under the same government, focusing instead upon the ‘prosecution team’ which includes both investigative and prosecutorial personnel.”’ [Citation.]” (*In re Brown* (1998) 17 Cal.4th 873, 879, fn. omitted.) Accordingly, the prosecution must disclose evidence that is actually or constructively in its possession or accessible to it from other agencies, including the police department. (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380.)

“Evidence is ‘favorable’ if it hurts the prosecution or helps the defense[.]” (*People v. Earp* (1999) 20 Cal.4th 826, 866; *In re Sassounian, supra*, 9 Cal.4th at p. 544), that is, if it is exculpatory or has impeachment value. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282 (*Strickler*)). Moreover, “the prosecution’s duty of disclosure extends to *all* evidence that reasonably appears favorable to the accused . . . .” (*People v. Morris* (1988) 46 Cal.3d 1, 30, fn. 14, disapproved on other grounds in *In re Sassounian, supra*, at pp. 543-545, fns. 5 & 6.)

Evidence is material where “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” (*Bagley, supra*, 473 U.S. at p. 682.) The defendant need not show that disclosure of the evidence would have resulted in acquittal; rather, “[t]he question is . . . whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” (*Kyles v. Whitley* (1995) 514 U.S. 419, 434 (*Kyles*)). A *Brady* violation thus occurs where the undisclosed favorable evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” (*Id.* at p. 435, fn. omitted.)

On appeal, the burden is on the defendant to establish the elements of a *Brady* violation. (*Strickler, supra*, 527 U.S. at pp. 289, 291.) We review independently the trial court’s legal determinations concerning whether the elements have been met. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

Although we agree with Besenty that the prosecution should have disclosed the information from the two informants to the defense, we conclude that the evidence was not material, and thus no *Brady* violation has occurred. Had the existence of the informants been disclosed to the defense, it is not reasonably probable that the outcome of the trial would have been different. Officer Gonzales’s testimony was not the only evidence tending to show that Besenty was a member of the 18th Street gang, an OG, and a shot caller. Sanchez testified that Besenty loudly referred to herself by her gang moniker, “Casper,” during the confrontation on the day before the shootings and announced that she was an OG from the 18th Street gang. Carlos identified Besenty as a shot caller for the 18th Street gang and testified that she warned him she was “the main head” during their confrontation. Besenty made a phone call to Escobar, telling her to come to the altercation, from which it can be inferred that she had some authority over Escobar. Moreover, Besenty was in the company of 18th Street gang members, including Lozano, who was known as a shot caller to both Carlos and Officer Gonzales, on both the day of the shooting and the previous day. She drove Lozano and two others to and from

Yesenia's apartment where the shootings took place and housed several of the people involved in the incident there afterward. Besenty's connection to the gang and her role in it were evidenced in multiple ways by different witnesses entirely independent of the informants upon which Officer Gonzales's opinion relied, such that if his opinion were eliminated, the evidence would not reasonably have been taken in a different light.

Additionally, the trial court instructed the jury under Judicial Council of California Criminal Jury Instructions (2010-2011) CALCRIM No. 306 as follows: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose information from a confidential informant that Officer Gonzales relied on in his opinion regarding Ms. Besenty's alleged gang membership or status. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure." The jury is presumed to understand and follow the instructions given to it and to be capable of weighing opinion testimony in light of the knowledge that information regarding confidential informants was not timely disclosed to the defense. (See *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502.) There is no reason to believe that it failed to do so here.

#### **D. Prosecutorial Misconduct**

On direct examination, Carlos testified that he "guessed" Besenty was a shot caller. Defense counsel moved to strike the response as speculative. The prosecutor responded, "Your Honor, if Ms. Besenty wants to testify—." The trial court cut the prosecutor's statement short, stating: "Now, let's not start talking about if Ms. Besenty wants to testify. Let's not get into that." The prosecutor then said, "Well, your Honor, I

ask that she be admonished.”<sup>8</sup> The court treated the prosecutor’s statement as an objection and overruled it, telling counsel, “Just relax and sit there.”

After defense counsel cross-examined Carlos, the trial court admonished the jury to disregard the prosecutor’s statement concerning Besenty, explaining, “[the prosecutor] realized that he should not have said that and brought it to my attention that he wished me to tell you that he knew that he should not have said that being the ethical prosecutor that he is. And, so, disregard that.”

Prior to the close of the People’s case-in-chief, defense counsel moved for a mistrial based on the prosecutor’s statements. The trial court denied the motion but determined to instruct the jury regarding a defendant’s right not to testify.

After the presentation of evidence, the trial court instructed the jury pursuant to CALCRIM No. 355, as follows: “A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.”

Besenty argues that the combination of the prosecutor’s comment and the nondisclosure of the informants upon whose information Officer Gonzales based his opinion testimony violated her due process and Fifth Amendment rights.

In *Griffin v. California* (1965) 380 U.S. 609, 613-614 (*Griffin*), the Supreme Court held that the prosecution is prohibited from commenting on a defendant’s exercise of his Fifth Amendment right not to testify. Our Supreme Court has interpreted *Griffin* to “forbid[] argument that focuses the jury’s attention directly on an accused’s failure to testify and urges the jury to view that failure as evidence of guilt. [Citation.]” (*People v. Avena* (1996) 13 Cal.4th 394, 443.) *Griffin* “[prohibits] the prosecution from so much as suggesting to the jury that it may view the defendant’s silence as evidence of guilt.”

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<sup>8</sup> Later, during the motion for mistrial, the prosecutor elaborated that he became frustrated because Besenty had been “blurting things out” during Carlos’s testimony.

(*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1287-1288, citing *United States v. Robinson* (1988) 485 U.S. 25, 32.) “In conducting this inquiry[; however], we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” (*People v. Frye* (1998) 18 Cal.4th 894, 970.) We review the prosecutor’s comments to determine whether there is a reasonable probability the jury would be misled and draw inferences against defendant because of his failure to testify. (*People v. Lewis* (2001) 25 Cal.4th 610, 670-671.)

Here, it is not reasonably probable that the jury inferred guilt from the prosecutor’s comment. Taken in context, it is clear that the prosecutor was expressing frustration with Besenty’s interjections, combined with defense counsel’s objection to Carlos’s testimony. The prosecutor’s follow-up statement that Besenty should be admonished further emphasizes that he was commenting on Besenty’s disruption of the testimony and not on her silence. Moreover, any adverse inferences with respect to Besenty’s guilt were cured by the trial court’s immediate reprimand of the prosecutor, admonition to the jurors that the statement was improper and to be ignored, and instruction with respect to a defendant’s right not to testify. In light of the foregoing, we conclude that no *Griffin* error occurred.

For the reasons discussed earlier, we also conclude Besenty has failed to establish a denial of due process based on late discovery of statements from two informants that Besenty was a shot caller in her gang.

#### ***E. Cumulative Error***

Finally, Besenty contends that the cumulative error deprived her of due process. There was no cumulative error, as any error was inconsequential. (See *People v. Hines* (1997) 15 Cal.4th 997, 1075.)

**II**  
**Lozano's Appeal**

With respect to Lozano, we have examined the entire record, and we are satisfied that no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259.)

**DISPOSITION**

The judgments are affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.