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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SALATIELU IFOPO et al.,

Defendants and Appellants.

B255922

(Los Angeles County
Super. Ct. No. TA126401)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Lew, Judge. Affirmed in part; reversed in part.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant Salatielu Ifopo.

Jerome McGuire, under appointment by the Court of Appeal, for Defendant and Appellant Tina Marie Monsivais.

Ahrony, Graham, & Zucker, Orly Ahrony and Chris W. Blaylock for Defendant and Appellant Jose Godinez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, Yun K. Lee and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendants Jose Godinez, Salatielu Ifopo, and Tina Marie Monsivais challenge their convictions for the attempted murder of Donald Hurston. Defendants demonstrate that the court erred in rejecting the jurors' initial verdict even though it was inconsistent. As a result, the gang firearm enhancement pursuant to Penal Code section 12022.53, subdivision (e), which the jurors initially found *not* true, must be reversed. Defendants demonstrate no other prejudicial error. As modified, the judgments are affirmed. The case is remanded for resentencing.

FACTS

1. The Defendants and Other Witnesses

This case involved three defendants: Godinez, Ifopo, and Monsivais. The sole victim was Hurston, who survived five gunshot wounds. The shootings occurred at the Gardena Motel, and most events occurred inside room 212. The room did not have an interior restroom, but a common restroom was located in the hallway. A camera was positioned in the hallway.

Defendants had different defenses. Godinez claimed that he shot Hurston under duress. He was afraid that if he did not shoot Hurston, Ifopo would shoot him. Ifopo claimed that he was misidentified, and Monsivais argued that she did not intend to assist in the attempted murder.

Detective Jason Hooker testified as a gang expert, and, as shall be described more fully, concluded Ifopo was a Gardena 13 gang member and one of its shot-callers (a person who commanded other gang members). Further, according to Hooker, Monsivais was a Gardena 13 associate and Godinez was a Gardena 13 gang member (a conclusion Godinez attempted to challenge).

Godinez had two friends who, at separate times, each accompanied Godinez to Hurston's home. Godinez did not know "Chato's" given name, but Chato accompanied Godinez on his first visit to Hurston's home. Roger Cano, who associated with Gardena 13 gang, accompanied Godinez on Godinez's second visit. These visits occurred after Godinez interacted with Hurston online. Godinez referred to himself as "Marco" online. Hurston did not learn Godinez's given name until later.

At the time of the shootings, Steven Simms was Hurston's roommate. Hurston referred to Simms as his cousin, and they were distantly related.

Omar Caprio, whose moniker was "Happy," also belonged to the Gardena 13 gang and was present during the shootings. Jesus Almanza may have been present during the shootings; he was a gang member and had a prominent tattoo on his head. In contrast to Almanza, Ifopo did not have tattoos on his head (though he had several gang tattoos in other locations).

Hurston was interviewed immediately after the shooting by Officers Fernando Pantoja and Dave Schnack, who testified for the defense. They spoke to Hurston for about 10 minutes, and he responded in short sentences with difficulty speaking. The prosecutor argued that their police reports were unreliable, and, as shall be described in detail, their reports conflicted with both Hurston's and Godinez's in-court testimony.

2. Hurston¹

In December 2012, Hurston worked as a dental technician. After visiting a website called "Marco's Space," Hurston spoke to "Marco," who he later learned was Godinez. Hurston visited the site to find someone with whom he could "party" and "play," which meant to engage in recreational drug use and have sex.

On December 9, 2012, Godinez and Chato went to Hurston's home, where they visited but did not use drugs. After they left, Hurston visited a friend in El Segundo. Hurston drank one or two alcoholic drinks. While in El Segundo, Hurston received a call from his roommate Simms, who reported that Simms's computer was missing. Hurston called Godinez, and Godinez confirmed that Chato had stolen Simms's computer. Godinez said he would help Hurston find Chato and retrieve Simms's computer.

With the assistance of a friend, Hurston picked up Godinez and Cano, and they went to Hurston's home. When they arrived, Simms was furious and immediately started

¹ The defendants' arguments require separately summarizing Hurston's and Godinez's testimony.

hitting Godinez. Hurston tried to intervene. Before Hurston could stop the fight, Godinez's face was cut badly near his left cheekbone. It bled profusely.

After making a few telephone calls, Godinez told Hurston he had located Chato. Godinez and Hurston left to find Chato, and Cano stayed with Simms. Godinez and Hurston were dropped off at the Gardena Motel. Godinez introduced Hurston to Ifopo and Monsivais, who were in room 212. Hurston assumed that Ifopo and Monsivais were married because they were in bed together.

Godinez told Ifopo that he was bleeding because Simms beat him up at Hurston's home. Monsivais was not present during that conversation. Godinez then left the room to attend to his cut, which was still bleeding.

Ifopo told Hurston that he had a bad day. When Hurston asked Ifopo what he meant by having a bad day, Ifopo responded, "It's too late for you" "I've already made a phone call."

Monsivais, who had returned to the room, gave Ifopo a gun. Hurston did not actually see the gun but saw Monsivais pass an object behind her back to Ifopo. Hurston observed Monsivais step up to Ifopo and stand next to him for a moment. Her arm went towards Ifopo's body and his arm reached her hand. After observing this passing motion, Hurston observed Monsivais hand Ifopo bullets. Hurston testified that Monsivais "brought on the violence."

It is not clear if Godinez was present when Monsivais handed Ifopo what Hurston believed was a gun, but Godinez returned to room 212 before telling Hurston, "I'm going to make you look like me." Godinez then hit Hurston under Hurston's left eye. Right afterwards, Ifopo "pistol-whipped" Hurston. Hurston fell to the ground, and Ifopo told him to get up. Ifopo shoved Hurston onto the bed. Ifopo and another person holding a knife tied Hurston with red tape. Hurston referred to the person with the knife as the "hype man" (and he was later identified as Caprio).

After Hurston was tied with red tape, Godinez called Simms. Ifopo took the phone and said, "I'm going to kill your cousin," and discharged the gun. At that time, no bullet hit Hurston. Using pliers, Ifopo tried to cut off Hurston's finger.

Hurston was able to break through the tape and tried to escape. Ifopo and the “hype man” ordered him back into room 212. When Hurston went back into the room, Ifopo shot him three times. Hurston was hit three times close to his belly button. Hurston heard Ifopo tell Godinez, “You shoot him.” Godinez hesitated before shooting. Godinez was standing about 10 to 12 feet from Hurston when he shot Hurston. Godinez hit Hurston in the neck. The “hype man” (Caprio) was holding a knife and standing next to Godinez as Godinez shot Hurston.

After Godinez shot Hurston, Hurston ran down the stairs. He called 911. As he was on the phone he saw Ifopo and Monsivais enter a black Chrysler 300 (which was registered to Monsivais).

As a result of the shootings, Hurston spent a month in the intensive care unit. He suffered three gunshot wounds to his stomach, one to his neck, and one to the back of his thigh.

Hurston testified he never told officers that he smoked marijuana the day of the shootings, and he did not smoke marijuana that day. Hurston initially told detectives that the shooter was Hispanic but later described him as Samoan. Hurston did not remember his conversation with the officers who first arrived at the scene shortly after he called 911.

When Hurston was recalled to testify, he testified that he was sure that Godinez shot him after Ifopo shot him. He denied telling officers that Marco had a gun in his waistband. Hurston testified that during one interview he could answer questions only by shaking and nodding his head because he had a tracheotomy and was medicated.

3. Godinez

Forty-three year old Godinez testified in his defense. He described his educational background and his work history, testifying that he lacked two classes toward earning his associate’s degree. Godinez previously had worked for the district attorney’s office and U.P.S. (which Godinez states in his opening brief on appeal stands for the United States Postal Service). Godinez testified that he was addicted to methamphetamine and that he was bisexual. He admitted to having several Gardena 13 gang tattoos, but claimed that

he had obtained that tattoos only to “cover up [his] bisexuality.” Later he testified that he was tattooed because of his deceased brother, who had been a gang member. Godinez testified that he was affiliated with the Gardena 13 gang and acknowledged that his moniker was “Smiley.” Godinez knew that Gardena 13 members often stayed at the Gardena Motel. He testified that he was aware everyone at the motel was “from Gardena or else they wouldn’t be there.”

On December 8, 2012 (the day before the shooting), Godinez went to the Gardena Motel to meet Chato, and they smoked methamphetamine together. The next morning Godinez and Chato went to Hurston’s home. After they left, Chato showed Godinez Simms’s computer, which Chato had stolen.

When Godinez next saw Hurston, he apologized for Chato’s conduct. Godinez and Cano went to Hurston’s home, and as soon as they entered, Simms started beating Godinez. Simms cut Godinez’s face. Once Simms stopped, Godinez called a few friends and learned that Chato may be at the Gardena Motel. Godinez and Hurston went to the motel to look for Chato. Godinez was afraid to leave Cano with Simms because he thought Simms may beat up Cano.

When they arrived at the Gardena Motel, Godinez and Hurston knocked on doors, hoping to find Chato inside one of the rooms. Ifopo opened the door to room 212. Monsivais was inside room 212 on the bed. Godinez introduced Hurston to Ifopo and Monsivais. Godinez told Ifopo and Monsivais that Hurston tried to stop Simms from hurting him. Godinez went to the restroom to clean his wound, and when he returned, Hurston offered a pipe filled with methamphetamine to Ifopo and Godinez. Hurston smoked the methamphetamine.

Ifopo asked Godinez to get tape, and Godinez complied, returning to room 212 with red tape. Godinez again went to the restroom to clean his wound, and upon returning he heard a gunshot inside room 212. When he entered room 212, Godinez saw that Hurston had been tied with the tape Godinez earlier retrieved. Ifopo told Godinez to call Simms, and Godinez did. Ifopo warned Simms that Cano (who was still at Simms’s home) “better be okay.”

Using pliers, Ifopo tried to cut off Hurston's finger. Godinez was afraid of Ifopo because Ifopo was acting "crazy." Ifopo shot Hurston three times. Ifopo told Godinez: "Fuck this. You brought the mother fucker. Finish him off, or else we're going to do you."

Caprio (the hype man) also was in the room and was holding a knife. Godinez testified that he knew Caprio for a long time, though Godinez referred to him by his moniker Happy.

Godinez testified that he fired the gun because Ifopo ordered him to shoot Hurston, but according to Godinez he did not aim at Hurston. He fired twice. Hurston was laying on the floor when Godinez shot the gun. Godinez closed his eyes and shot twice. Godinez was scared of Ifopo. Godinez did not want to hurt Hurston. Godinez was afraid he would be killed if he did not shoot Hurston. Godinez testified he felt trapped.

Godinez testified that after these events, he was beaten at a funeral by Gardena 13 gang members. They complained that he "brought heat to their hangout" and their "headquarters." They also said that the beating was because he failed to kill Hurston.

Ifopo's counsel's cross-examination of Godinez emphasized the numerous inconsistencies between Godinez's in-court testimony and his prior statement to police officers, which is summarized below. Godinez admitted that he lied several times. He also admitted that he had the gun and did not walk out of the room, but explained that he was ordered to shoot. Godinez reaffirmed that Ifopo, not Caprio, shot Hurston.

During cross-examination by the prosecutor, Godinez identified persons in the video at the Gardena Motel. He identified himself holding a gun. He identified Ifopo and Monsivais. Godinez did not testify that the video was blurry or that he was unable to identify the persons portrayed in the video.

Two character witnesses testified that Godinez was not violent. Cano testified that Hurston saved his and Godinez's life when Simms was assaulting them. Cano was afraid when Godinez and Hurston left him with Simms, but he managed to escape.

4. Gang Expert

Detective Hooker testified as a gang expert. He explained that a “moniker” is a gang nickname, and an “associate” is a person who spends time with gang members. “Work” refers to committing crimes for the benefit of the gang. “Homeboy” means a gang member’s fellow gang member. A “shot-caller” is a leader of the gang who orders other gang members to commit crimes. If a gang member learns that a fellow gang member is beaten, violent retaliation is likely. Hooker testified that female gang members often conceal weapons for male gang members. The primary activities of the Gardena 13 gang included murder, attempted murder, carjacking, robberies, felony assaults, auto theft, narcotics and weapon trafficking. Gang members usually “earn” their tattoos by committing crimes to benefit the gang.

Detective Hooker testified that Godinez is a self-admitted gang member and has several gang tattoos. He based his opinion that Godinez was a self-admitted gang member on a field interview documented by another officer. Yet Hooker acknowledged he had no contact with Godinez prior to this case. Hooker never saw Godinez with a gun or committing an act of violence. Further, Hooker testified that a person who is bisexual may not be permitted to actively participate in a gang. According to Hooker, Monsivais associates with the Gardena 13 gang. Ifopo was a self-admitted gang member with numerous gang tattoos. Additionally, Ifopo was a shot-caller.

According to Detective Hooker, the Gardena Motel was the Gardena 13 headquarters. When asked a hypothetical based on the facts of this case (which shall be described more fully in the Discussion), Hooker opined that shooting Hurston was in retaliation for Godinez’s beating.

5. Police Testimony

Detective Logan Hwang testified that he interviewed Hurston. Hwang testified that Happy’s given name is Omar Caprio. On cross-examination by the prosecutor Hwang testified that he had notes from which he wrote his report and the computer software he used maintained those notes. Defense counsel requested Hwang’s original notes and the prosecutor did not object. Hwang provided the notes that day.

Officer Pantoja testified that Hurston reported Marco shot him. Hurston further reported Marco was married, Hispanic, and had tattoos on his head. Almanza fit the description provided by Hurston, but Pantoja concluded Almanza was not involved in the crimes. Pantoja recovered a cell phone from room 212.

Following questions by Ifopo's counsel, Officer Mambasse Patara testified that he recorded an interview of Monsivais. He did not testify as to the contents of that interview. Patara testified that a pink cell phone, a spent bullet and a battery to a cell phone were booked into evidence, but were later lost. Patara was questioned about his detective's case log.

Officer Patara spoke with Hurston at the hospital and Hurston repeatedly cried and appeared to be in shock. According to Patara, Hurston reported that he met Marco, who visited him in his home. When Marco advised him that he located the laptop and Hurston accompanied him to the motel, Hurston realized he had been "set[] up." Marco shot him. Hurston tried to escape, and Marco shot him again. Hurston said that there was a male Hispanic, bald and heavy-set in room 212 with his wife. Hurston reported the male Hispanic said, "I'm going to tie you up." Hurston said that the male Hispanic and Marco tied him up with duct tape and then Monsivais opened a toolbox and handed something to the male Hispanic. Hurston told Patara that Monsivais "retrieved a gun and started to load it" and then handed it to the male Hispanic.

Hurston still did not mention Ifopo. Officer Patara testified that his case log reported Hurston said, "Marco was the only guy with the gun in his waistband, he's the one that shot at me, and he chased me down the hall and he fired at me." His police report, however, did not document this statement. Patara testified that as Hurston improved, he was able to learn more information from Hurston.

In his reports, Officer Patara did not mention Ifopo. When Hurston referred to a man and his wife, Patara assumed that he was referring to Rene Dominguez and Monsivais because the two of them had registered for room 212 at the Gardena Motel.

Officer Patara initially thought there was only one shooter but later learned there was more than one. He admitted that by reading his report one would believe that

Dominguez tried to kill Hurston. He filled in the name Dominguez based on the motel registration cards. Patara admitted that he “made a lot of assumptions” in his reports. He could not remember which parts of his reports were based on facts and which parts were based on assumptions.

Officer Schnack interviewed Hurston immediately after the shooting. In that interview, Hurston described the shooter as a male Hispanic with tattoos on his head. Hurston said that Marco was the shooter. Hurston reported that he smoked marijuana in the motel. Hurston did not mention Ifopo.

6. Stipulation Regarding Videotape

The parties stipulated that Alex Supall would have testified that he downloaded the video at the Gardena Motel and that it was working properly. “[T]he only note he made was that the video was 20 minutes behind realtime.”

The court noted that the light was not good in the video, but Hurston testified he was able to discern the contents of the video. The prosecutor questioned Hurston at length regarding the video and used it to provide a chronology of events at the motel. As noted, Godinez also identified the defendants in the video.

PROCEDURE

1. Information

Monsivais, Ifopo, and Godinez each were charged with one count of attempted willful, deliberate, and premeditated murder. It was alleged that the offense was a serious or violent felony. It was alleged that a principal was armed with a firearm. (Pen. Code, § 12022, subd. (a)(1).)² It was further alleged that Ifopo and Godinez personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d). It was further alleged that the attempted murder was 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. It was alleged that a principal personally used, discharged, and discharged causing great

² Undesignated statutory citations are to the Penal Code unless otherwise noted.

bodily injury with a firearm within the meaning of section 12022.53, subdivisions (b), (c), (d) and (e)(1). Finally, it was alleged that Ifopo suffered numerous prior convictions, including 10 prior serious or violent felony convictions pursuant to section 667, subdivision (a)(1), three prior serious felony convictions pursuant to section 667.5, and two prior prison terms.

2. Godinez's Pretrial Interview and Statement

In a pretrial interview, Godinez initially told officers he was never at the Gardena Motel. Later he admitted going to the motel and stated that he had four or five “homies” around who asked what happened to him. Godinez also acknowledged hearing gunshots but indicated that he did not see the shooter because he was in the bathroom. He emphasized that he did not see who shot Hurston. Godinez later modified his story again, explaining that he observed Ifopo shoot Hurston. Ultimately, Godinez admitted that he also shot the gun but claimed to have aimed at the wall. He said that he “had to do it or else they were going to fuck me up.” Ifopo gave him the gun he used to shoot Hurston.

Godinez told officers that he did not “really” consider himself a member of the Gardena 13 gang. But later he acknowledged that he used the monikers Kaboom and Smiley. During the interview, an officer described someone as a “[f]ucking mean motherfucker” with “murder arrests before, that’s why he was in prison for such a long time.” Godinez’s response to that comment was unintelligible.

In a written statement, Godinez indicated that Ifopo told him to finish off Hurston. “I was scared all the homies looking at me I was trying not to aim at him and shot twice.” (*Sic.*)

3. Godinez's Motion for Severance

Prior to trial Godinez’s counsel moved to sever Godinez’s trial from his codefendants’ trial. The trial court denied the motion as well as Godinez’s renewed motion. The three defendants were tried together.

4. Defendants' Motion to Dismiss and Motion for a Mistrial

The court denied defense counsels’ midtrial motion to dismiss and motion for a mistrial based on the officers’ failure to preserve a cell phone, battery and spent bullet.

The prosecutor responded that none of the defense attorneys requested that evidence, suggesting that it was not important to the case. Defense counsel also argued that they did not receive Detective Hwang's case log identifying Ifopo as the shot-caller and indicating there was only one shooter until trial had started and the prosecution had completed its case. The prosecutor noted that Hurston returned to testify so that defense counsel could question him based on Hwang's case log.

5. Arguments

Referring to Ifopo, Godinez's counsel argued that this case is about a "psychopathic, maniacal, sociopathic killer." He argued this was not a gang case. According to Godinez's counsel, Ifopo took matters into his own hands. Counsel argued Godinez did not want anything to happen to Hurston. Counsel downplayed Godinez's tattoos, arguing they were to show bravado, and arguing that his contacts to the gang were through his brother.

Godinez's counsel relied on the video to explain that there was a lot of movement outside the room where Hurston was shot. Godinez's counsel argued that Godinez was forced to shoot Hurston and was afraid that the others would hurt or kill him. He argued that Godinez blindly shot at Hurston and saved Hurston's life. Counsel argued Godinez was not guilty of attempted murder if he acted under duress. He emphasized the duress instruction quoted below.

Monsivais's counsel argued she did not have a sufficient connection to the case to be convicted. Counsel argued Monsivais did not know or share Ifopo's intent.

Ifopo's counsel argued that this case was not a gang case. Counsel argued Ifopo was not a shot-caller. Ifopo pointed out that there was late discovery and emphasized the instruction on late discovery. Counsel argued Ifopo was misidentified. Counsel emphasized that Hurston identified someone else initially (based on the police reports). Counsel argued that Hurston believed in his misidentification and Godinez simply lied to benefit himself.

6. Instructions

Jurors were instructed that they must consider the evidence as it applied to each defendant and decide each charge for each defendant separately. The court instructed jurors: “The burden is on the state or People to prove beyond a reasonable doubt not only that the crime was committed, but also that the defendant was the one who committed it. In this regard, you are instructed that it is not necessary for a defendant to prove that another person may have committed the crime, nor is the burden of a defendant to prove his innocence. If the evidence raised a reasonable doubt as to whether the defendant was the person who committed the crime charged, then you must find the defendant, not guilty.”

Jurors were instructed that the People failed to disclose the detective’s case log and information that defendant Ifopo was the shot-caller for Gardena 13. Jurors were instructed that in evaluating the significance of the evidence, they could consider the late disclosure.

Jurors were instructed on duress as follows: “The defendant Jose Godinez is not guilty of attempted murder if he acted under duress. The defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger or he feared that his person we be subjected to great bodily injury if he refused a demand or request to commit the crime. The demand or request may have been express or implied.” Jurors were further instructed: “The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of attempted murder.”

The court denied Godinez’s request to instruct jurors as follows: “Evidence of duress may be relevant to determining whether the defendant acted with the required mental state even if insufficient to constitute a complete defense.

7. Jurors Convicted All Defendants and Ifopo Admitted the Prior Convictions

Jurors requested to watch the video at the Gardena Motel. During their deliberations, jurors asked: “Can a defendant be found not guilty on attempted murder but guilty on other counts for use of a firearm, intentionally discharging a firearm and

causing great bodily harm[?]" The court told jurors the "short answer" was "no." The court then explained that only one substantive crime was alleged and the other allegations "come into play if you find that an individual committed the crime."

As explained in more detail below, the court rejected the initial jury verdict finding it internally inconsistent. Although jurors found the gang enhancement true and the personal use and discharge of a firearm true, jurors found the gang firearm enhancement not true.

In the final verdict, Godinez and Ifopo were convicted of willful, deliberate, premeditated attempted murder. Jurors found that they personally used, discharged, and discharged causing great bodily injury with a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d). Jurors found the gang enhancement true. Jurors found that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1) true and that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1). Jurors further found a principal intentionally discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivisions (d) and (e)(1).

As to Monsivais, jurors found that she committed willful, deliberate, and premeditated attempted murder. Jurors found the gang allegation true. Jurors found that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1), a principal personally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1)), and a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (d) and (e)(1).

Ifopo admitted the alleged prior convictions.

8. Sentence

The trial court denied Godinez's posttrial motion for juror identifying information and sentenced all defendants. Godinez had argued that there was good cause for the juror information because "there is reason to believe that one, some or all of the jurors did, in

fact, harbor a reasonable doubt as to [Godinez's] *mens rea* and nonetheless convicted him.”

Godinez and Monsivais were sentenced to prison for 40 years to life. The sentences consisted of 15 years to life for the attempted murder and 25 years to life for the section 12022.53, subdivisions (d) and (e)(1) enhancement.

Ifopo was sentenced to prison for 85 years to life. The sentence consisted of an indeterminate term of 15 years to life tripled for two strike priors. An additional consecutive 25 years to life was imposed pursuant to section 12022.53, subdivision (d). An additional 15 years was imposed for three prior convictions pursuant to section 667, subdivision (a)(1). The court did not impose or strike the section 667.5, subdivision (b) prison priors.

DISCUSSION

1. Severance (Godinez and Ifopo)

Godinez argues the trial court erred in denying his motion to sever his trial from his codefendants. Ifopo argues that he received the ineffective assistance of counsel because his counsel did not seek severance. As we shall explain, neither argument has merit.

a. Legal Principles

The “classic case” for a joint trial is when defendants are charged with the “same crimes arising from the same events.” (*People v. Bryant* (2014) 60 Cal.4th 335, 379.) Section 1098 provides: “When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial.”

“Because it ordinarily promotes efficiency, joinder is the preferred course of action. When the statutory requirements are met, joinder is error only if prejudice is clearly shown. [Citations.] [¶] “In determining whether a trial court abused its discretion . . . in declining to sever properly joined charges, ‘we consider the record before the trial court when it made its ruling.’” [Citations.] “The relevant factors are whether (1) the evidence would be cross-admissible in separate trials, (2) some charges are unusually likely to inflame the jury against the defendant, (3) a weak case has been joined with a strong case, or with another weak case, so that the total evidence may unfairly alter the outcome on some or all charges, and (4) one of the charges is a capital offense, or joinder of the charges converts the matter into a capital case.” [Citation.] “[I]f evidence underlying the offenses in question would be ‘cross-admissible’ in separate trials of other charges, that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court’s refusal to sever the charged offenses.”” (*People v. Scott* (2011) 52 Cal.4th 452, 469-470.)

A joint trial is not unfair “[s]imply because the prosecution’s case will be stronger if defendants are tried together, or that one defense undermines another” (*People v. Bryant, supra*, 60 Cal.4th at p. 379.) Although the presence of antagonistic defenses may permit separate trials it does not necessarily require separate trials. (*Id.* at p. 380.) “[A] trial court, in denying severance, abuses its discretion only when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty. If, instead, “there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.”” (*Ibid.*)

b. Godinez

Godinez argues that he was prejudicially associated and possibly confused with codefendant Ifopo. Godinez emphasizes that he was never arrested for gang-related activity and claims he was found to have committed the crime in association with the gang only because Ifopo was a shot-caller. Godinez further contends that there were

conflicting defenses because he claimed that he acted under duress imposed by Ifopo. As we shall explain, Godinez demonstrates no error.

This was a classic case for joinder. The defendants were charged with a single count of attempted murder involving the same occurrences and the same victim. All of the relevant factors supported a joint trial. A joint trial promoted efficiency because the charges against each defendant were based on common events. The case against each defendant involved substantially the same charge with none more likely to inflame jurors. Godinez identifies no evidence that would not have been cross-admissible. No charge was particularly likely to inflame the jurors. A weak case was not joined with a strong one. And there was no capital offense. Godinez demonstrates no abuse of discretion in the denial of his motion for severance. (*People v. Soper* (2009) 45 Cal.4th 759, 774 [trial court's decision is reviewed for abuse of discretion].)

Not only was the ruling correct at the time it was made, but Godinez demonstrated no gross unfairness resulting from the joint trial. The record as a whole cannot support Godinez's claim that he was confused with Ifopo. Although the initial police reports appear to be based on incorrect assumptions of the identity of "Marco," the evidence at trial clearly distinguished between Ifopo's conduct and Godinez's conduct. Godinez's testimony was consistent with Hurston's on this critical issue. Both testified that Ifopo fired first, and Godinez fired next only at Ifopo's urging. While Godinez argues he could have been mistaken for the shooter, that argument is particularly weak in light of his admission that *he* shot Hurston.

Additionally, the joint trial did not cause Godinez to be prejudicially associated with Ifopo. The evidence that Ifopo was a shot-caller as well would have been admissible even if Godinez had been tried separately. The gang evidence also would have been admissible in a separate trial because it was relevant to the gang enhancement, which was alleged against Godinez. Godinez fails to show any evidence he claims prejudicially associated him with Ifopo would not have been admissible in a separate trial.

Further, Godinez used Ifopo's role to his benefit, arguing that all of the shootings were caused by Ifopo, who ordered Godinez to shoot Hurston. Thus, had that evidence been excluded, Godinez's duress defense would have been substantially weakened. Even though jurors must have rejected Godinez's defense, the defense was buttressed by the gang evidence in general and specifically the description of Ifopo as a shot-caller. Thus, Godinez demonstrates no prejudice from the evidence he argues was unfairly admitted in the joint trial.

Finally, even if Godinez's defense conflicted with Ifopo's defense, he fails to show that severance was required under the circumstances of this case. Assuming that the defenses conflicted, there was sufficient independent evidence of Godinez's guilt. Hurston identified Godinez as one of the shooters. Hurston met Godinez prior to the shooting and his identification was strong. The videotape further corroborated the identification because it showed that Godinez was present at the motel at the time of the shooting.

c. Ifopo

Ifopo argues that he suffered prejudice from the joint trial, and his counsel rendered ineffective assistance by failing to seek severance. Ifopo emphasizes that his defense was misidentification. Ifopo argues that in the joint trial, Godinez corroborated Hurston's identification. Ifopo further argues that the admission of Godinez's tape-recorded interview prejudiced him. As we shall explain, Ifopo demonstrated neither that his counsel was deficient nor that he suffered prejudice from the alleged deficiency. (*People v. Jones* (2010) 186 Cal.App.4th 216, 234-235 [test for ineffective assistance of counsel requires both showing that the representation fell below an objective standard of reasonableness and showing prejudice].)

As noted, this is a classic case for a joint trial because it involved a single crime. The great bulk of the evidence would have been cross-admissible in separate trials. The crime was the same and so no crime was particularly inflammatory. A weak case was not joined with a strong case. No capital offense was involved.

No doubt Godinez's identification of Ifopo was harmful to Ifopo especially because Godinez knew Ifopo prior to the shooting (which is clear because he introduced Ifopo to Hurston). But this damaging evidence would have been admissible in a separate trial of Ifopo. Although Godinez's pretrial interview may not have been admissible in a separate trial, that evidence was helpful to Ifopo as it caused Godinez to admit that he lied numerous times. It was the primary evidence used to discredit Godinez's identification.

Assuming Ifopo's defense (misidentification) conflicted with Godinez's defense (duress imposed by Ifopo), there was sufficient independent evidence of Ifopo's guilt. Hurston identified Ifopo and described Ifopo's conduct in detail. Ifopo was on the video. This was strong independent evidence undermining Ifopo's claim that severance would have been required had his counsel sought it. Therefore the assumed antagonistic defenses would not have compelled severance. (*People v. Bryant, supra*, 60 Cal.4th at p. 379.) Because a motion for severance would not have been successful, Ifopo's counsel was not required to bring it. (*People v. Szadzewicz* (2008) 161 Cal.App.4th 823, 836 ["Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance."].)

Ifopo also fails to show prejudice from his counsel's alleged deficient failure to move for severance. It is not reasonably probable Ifopo would have obtained a more favorable result had he been tried separately. (See *People v. Jones, supra*, 186 Cal.App.4th at p. 235 [prejudice on ineffective assistance claim asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"].) Both Godinez and Hurston identified Ifopo, and his presence was corroborated by the videotape. While the initial police reports supported his misidentification defense, the assumptions in those reports were thoroughly

discredited. More importantly, regardless of whether he was tried separately or together with Godinez, the critical evidence would have been the same.³

2. Alleged Brady Error (All Defendants)

Defendants argue that Detective Hwang's failure to provide his case log prior to the start of trial constituted *Brady* error and requires the reversal of their convictions.

(*Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*)). We disagree.

a. Background

When Detective Hwang testified, he stated that he had interview notes in the form of a case log. Defense counsel requested the case log. Hwang provided the case log he used to assist in writing his reports. Defense counsel used the case log in the course of their cross-examination of Hwang. Following his testimony, Hwang was asked to remain on call. Hurston was recalled. Counsel for Ifopo stated: "I'm sorry to bring you back here today, but . . . we got a new detective's case log report . . . after you had already testified, so I need to ask you some questions on that."

b. Analysis

A *Brady* violation occurs only when three conditions are met: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." [Citation.] Under this standard prejudice focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citation.] In the case of impeachment evidence, materiality requires more than a showing that 'using the suppressed evidence to discredit a witness's testimony "*might* have changed the outcome of the trial" [citation].' [Citation.] Rather, the evidence will be held to be material 'only if there is a reasonable probability that, had the evidence

³ Even if Ifopo was misidentified as the shooter, the evidence that he ordered Godinez to shoot Hurston is evidence that he aided and abetted the attempted murder. The prosecutor argued this theory during her closing argument. That evidence also would have been admissible in a separate trial. There was no claim that Ifopo was misidentified as the person who gave this direction.

been disclosed to the defense, the result of the proceeding would have been different.” (*People v. Lucas* (2014) 60 Cal.4th 153, 274 (*Lucas*), disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.)

The critical rule here is that for purposes of *Brady*: “[E]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery.” (*Lucas, supra*, 60 Cal.4th at p. 274; see *People v. Morrison* (2004) 34 Cal.4th 698, 715.) Here, because the evidence was presented at trial and effectively used at trial, defendants cannot demonstrate a *Brady* violation. Even though Detective Hwang’s case log should have been turned over sooner, defense counsel received it during trial and used it as part of their cross-examination of Hwang and Hurston.

Reversal is not required for the independent reason that defendants fail to demonstrate the evidence affected the result of the proceeding. Like the police reports, the case log was used to suggest that Hurston provided inconsistent statements describing the incident, particularly the description of the shooter. Hurston was recalled so that he could be questioned additionally about his statement to officers. This evidence was vetted at trial and jurors must have credited Hurston’s in-court testimony and rejected the questionable police reports. The challenged evidence was presented and the claim that the evidence would have led to a different result is not supported by the record.

3. Alleged Trombetta Error (California v. Trombetta (1984) 467 U.S. 479, 489 (Trombetta)) (Godinez)

Godinez argues his right to due process was violated because police failed to preserve a pink cell phone, a battery to a cell phone and a spent bullet. He speculates that the phone may have belonged to Monsivais and may have had contacts assisting authorities in finding the person Hurston described as the “hype man.” Assuming Godinez preserved the issue, he fails to show error.⁴

⁴ Ifopo’s counsel argued that the destruction of the evidence was *Brady* error. All counsel joined. No one argued that there was *Trombetta* error.

Law enforcement officers are required to preserve evidence that “both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [that is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (*Trombetta, supra*, 467 U.S. at p. 489.) Godinez fails to show that the cell phone, battery, or spent bullet possesses an exculpatory value (regardless of whether it was apparent before it was lost) and fails to show that he could not obtain comparable evidence by other reasonably available means.

First, Godinez makes no claim with respect to the cell phone battery or bullet and the record does not support a claim that these items could have led to exculpatory evidence. Second, Godinez’s argument that the cell phone could have led to exculpatory evidence is unpersuasive because it is based on his speculation that the phone belonged to Monsivais, for which there is no record support. He also speculates that she would have had a contact for the “hype man” identified as “Happy,” another assumption for which there is no support. But even assuming that it was Monsivais’s phone and her phone contained “Happy’s” contact information, Godinez fails to show he could not otherwise obtain this information. Godinez testified he knew Happy for a long time. Happy also was identified as Caprio. Therefore, had Godinez wanted to locate him, he could have followed those leads.

More fundamentally, Godinez fails to show how Caprio could have provided exculpatory evidence. Godinez testified that he shot Hurston. His defense was duress. That defense requires evaluating Godinez’s state of mind. Caprio could not have testified as to what Godinez was thinking at the time he shot Hurston. Thus even if Godinez’s speculation regarding the cell phone is credited, he fails to show the phone had any exculpatory value.

4. Sufficiency of the Evidence (*Monsivais*)

Monsivais argues that the record lacks substantial evidence that she intended to kill Hurston. We disagree.

““On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence

that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] “[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” [Citation.] “The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] ‘Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.’”” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572.)

“[U]nder the general principles of aiding and abetting, “an aider and abettor [must] act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” [Citation.] [Citation.] When the offense is a specific intent offense, ““the accomplice must “share the specific intent of the perpetrator”; this occurs when the accomplice “knows the full extent of the perpetrator’s criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.”””” (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 851.)

The evidence amply supported the conviction of Monsivais for attempted murder. Hurston testified Monsivais handed Ifopo a gun. Hurston watched as Monsivais handed Ifopo bullets. Although Hurston may not have seen the gun, he observed the passing motion from Monsivais to Ifopo and his conclusion that Monsivais was passing a gun could have been credited by a reasonable jury especially since she handed Ifopo bullets shortly after passing the object Hurston concluded was a gun. Even if Monsivais did not hand Ifopo a gun, the fact that she provided the bullets alone supported the inference that she intended Ifopo kill Hurston as the bullets were used in the shooting and were indispensable to it. Further, there was evidence that Monsivais was an associate of the Gardena 13 gang and the gang’s primary activities included murders and attempted

murders. Jurors could infer that as an associate Monsivais would be aware of the gang's primary activities and further could have concluded that she concealed the weapon for Ifopo, a common role for female gang members. Additionally, after the shooting Monsivais fled with Ifopo in her vehicle. Monsivais's challenge to the sufficiency of the evidence lacks merit.

5. Evidentiary Issues (*Godinez and Monsivais*)

Godinez raises several evidentiary issues, which we discuss seriatim. As we explain, none has merit. Monsivais argues that the court erred in admitting evidence that her pretrial statement was recorded. No description of the content of her statement was provided, and her argument also lacks merit.

a. Surveillance Video (Godinez)

Godinez's argument that a surveillance video at the Gardena Motel was improperly admitted because it was blurry borders on the frivolous.⁵ First, the argument is forfeited because Godinez did not object on this ground in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

Second, Godinez fails to show that the blurriness of the video affects its admissibility rather than the weight of the evidence. (Cf. *People v. Garcia* (1988) 201 Cal.App.3d 324, 329 [fact that photograph could lead to conflicting inferences goes to weight rather than admissibility].) Jurors asked to see the videotape and could have determined for themselves whether the contents were sufficiently clear to be reliable.

Third, to the extent Godinez is arguing no identification could be made from the video, his own testimony belies his argument. Godinez himself identified persons in the video without any claim that it was blurry. He testified that the video showed Hurston running out of the motel. Godinez identified himself exiting room 212. He testified that as he was exiting the room, he was holding a gun in his left hand, which he could observe

⁵ The court described the video as “not . . . really clear in terms of who is doing what.” The court then stated with the help of a witness identifying the persons on the video the jurors could determine “what’s going on[.]”

in the video. Godinez identified himself holding the tape that was used to tie Hurston's hands and feet. Godinez also identified the other defendants and explained what was happening during the video. Additionally, Godinez's counsel repeatedly relied on the videotape during his closing argument. Godinez's own testimony completely undermines his appellate argument that the videotape was too blurry to be reliable.

Fourth, any error in admitting the videotape was harmless beyond a reasonable doubt because Hurston and Godinez both testified consistently with the videotape and the videotape did not bear on Godinez's duress defense. Stated otherwise, the videotape was not probative of whether Godinez acted in fear of his life when he shot Hurston, the principal issue with respect to Godinez.

b. Prior Criminal Record (Godinez)

Godinez's counsel sought to admit evidence to show that Godinez had only a minimal criminal record. The court found Godinez's past criminal record irrelevant. It permitted Godinez's counsel to ask the gang expert if he ever personally arrested Godinez. During closing argument, Godinez's counsel argued that Godinez had "no incidents of any violence in his record whatsoever. If he had, I guarantee you would have heard about it. There is no—no incidents of gun use, there was no incident of violence, of anything even relating to being a bad person."

On appeal, Godinez argues that his criminal history should have been admitted because "it raises substantial doubt [as] to . . . whether [he] was motivated to act under gang capacity." We disagree. He neither shows that his criminal history was admissible nor that he suffered prejudice from the failure to admit it. While he shows that character evidence may be admissible to show nondisposition to commit a crime this character evidence must be "in the form of an opinion or evidence of his reputation." (Evid. Code, § 1102.) But turning to this case, Godinez fails to show that the specific acts he sought to admit were admissible.

Godinez also shows that *People v. Lankford* (1989) 210 Cal.App.3d 227, 240, held that a "defendant who chooses to introduce false or misleading evidence of his credibility risks prosecution rebuttal of that evidence by proof of relevant specific acts of his

conduct.” Here, Godinez neither sought to admit the specific conduct as rebuttal nor did the prosecution provide false or misleading evidence of his prior record. Thus, Godinez fails to show his record was admissible under *Lankford*.

Second, even assuming the court erred in failing to admit defendant’s criminal record, Godinez cannot demonstrate prejudice. The gang allegation requires that the current crime be committed for the benefit, at the direction of, or in association with a criminal street gang. (§ 186.22.) Here Godinez admitted that he shot Hurston at Ifopo’s direction, and it was undisputed that Ifopo was a member of the Gardena 13 gang. Therefore, Godinez acted at the direction of a criminal street gang when committing this crime. Godinez was not required to be a gang member for the gang enhancement to apply. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 505 [“[W]hether defendant . . . was a member or associate of a gang is not an ultimate issue of fact in a gang enhancement allegation: gang membership is not an element; nor does one need to be a gang member or associate to commit an act for the benefit of, in association with, or at the direction of a street gang.”].)

c. Employment History (Godinez)

Next Godinez argues that the court erred in excluding evidence of his work history. It appears, however that the court admitted evidence of his work history. In any event, Godinez fails to demonstrate prejudice from the assumed error.

Godinez testified that he went to school and was two classes short of his associate’s degree. He testified that he previously worked for the district attorney’s office. In describing that job, he further testified that he worked at the “Bureau of Child Support Operations, Division 4. What I did there, I started off as a student worker, and . . . they gave me the opportunity to take the test for Bureau of Family Support Operations It would be the people that actually interview the absent parent to get information for us to open a case. [¶] I was there for approximately three years.” Next his attorney sought to ask, “[W]hile you were working for the Los Angeles County District Attorney’s Office, were you working side by side with deputy district attorneys,” and an objection was sustained. Godinez then reaffirmed that he worked for three years

at the district attorney's office. He next testified that he worked for U.P.S. When asked if he worked anywhere else, the court sustained an objection. Godinez's counsel argued that Godinez "worked for a bank, he worked for U.P.S., he worked for the district attorney's office, and the children's support unit."

On appeal, Godinez argues that the court erred in sustaining the objections because his work history was relevant to whether or not he was a gang member "during the incident." He argues that his work for the district attorney's office and for U.P.S. undermines the gang allegations because those entities "would not tarnish their brand and reputation by hiring a violent gang member" and both require background checks. Godinez's argument is based on purported information not included in the record. There is no support for his claim that the district attorney's office and U.P.S. investigated and determined that he was not a gang member.

But even assuming that his employment history undermined the gang allegation, that evidence was before jurors. He testified at length about his work at the district attorney's office. The only question that was not permitted was whether he worked alongside district attorneys. Although Godinez was not permitted to testify regarding any *other* work experience, he fails to show how any other work experience (assuming he had other experience) was relevant or why the failure to exclude it prejudiced him. Moreover, his claim that his work history undermines the gang allegation is weak in light of his admission that he associated with the gang, had gang tattoos, and knew that the Gardena Motel was where gang members interact.

d. Hypothetical to Gang Expert (Godinez)

Godinez argues that the prosecutor's hypothetical to the gang expert was improper and prejudiced him. His argument lacks merit.

i. Background

The prosecutor asked Detective Hooker a hypothetical based on the following facts: "A Gardena Trece [Gardena 13] gang member shows up to his gang headquarters. He has been beat up and has a serious injury to his face. He shows up with the roommate and close friend of the person who beat him up. And his fellow gang members and

associates learn that the person who showed up with the beat-up gang member is close to the actual beater. It's his roommate, a good friend he calls cousin." The prosecutor asked, "Based on the facts that I set out, the hypothetical, in your background, training, and experience, how would you expect a gang to react in that situation?"

Detective Hooker responded, "[t]he fellow gang members would feel disrespected, that their gang had been disrespected, and they would want to retaliate against whoever disrespected their gang." He testified that a gang member would retaliate even if the person in front of them was not the one responsible for the beating. Hooker further testified that the retaliation may consist of a beating, a severe beating, or a killing.

ii. Analysis

Godinez argues that the hypothetical "contained facts and conclusions not based in evidence to help the expert conclude that the incident was instigated because of gang rivalry by claiming that the motel was considered a Gardena 13 headquarters." Godinez is correct only insofar as he argues that a hypothetical question must be rooted in the evidence at trial. (*People v. Boyette* (2002) 29 Cal.4th 381, 449.) As we shall explain, assuming the issue is preserved even though no counsel objected on the specific ground raised on appeal, Godinez's argument lacks merit.

Contrary to Godinez's premise—the hypothetical was rooted in evidence in the case. Ample evidence demonstrated that the motel was considered a headquarters. Not only did Detective Hooker—the gang expert—testify it was the headquarters, but Godinez corroborated Hooker's testimony. Godinez testified that he was beat up for bringing "heat" to the gang's headquarters. Thus, there is no basis for his argument raised for the first time on appeal that the prosecutor's hypothetical was not rooted in the evidence because it suggested the Gardena Motel was the gang's headquarters.

Moreover, even assuming that there was no evidence the motel was the headquarters, the error in posing the question was harmless. The important part of the hypothetical was not the location of the fight but that the fight constituted retaliation for the beating of Godinez. That gang members retaliate when another gang member is beaten was material to this case. The fact that the beating occurred at the gang's

headquarters does not add anything material to Godinez’s guilt on either the substantive charge or the enhancements. Therefore, even if the hypothetical were improper for the reason advanced by Godinez, he fails to show he suffered prejudice from the assumed improper hypothetical.

e. Monsivais’s Pretrial Statement (Monsivais)

Monsivais argues that Detective Hwang’s testimony and Officer Patara’s testimony that they had no knowledge whether Monsivais’s pretrial statement had been recorded prejudiced her. But she acknowledges that her counsel stated he had no objection to asking Hwang if Monsivais’s pretrial statement had been recorded. Patara later testified without objection that he believed the interview with Monsivais was recorded.

Arguably, any error was both invited and forfeited; but assuming it is preserved, Monsivais’s arguments are not rooted in the record. The fact that Monsivais was interviewed before trial did not suggest that the contents of the interview were adverse to her. This is true regardless of whether her interview was recorded. The mere statement that she had been interviewed did not bear on her right against self-incrimination as it was not a comment on her decision to refrain from testifying. No counsel commented on her decision not to testify.⁶ Nor did the evidence that her statement was recorded implicate *Miranda*⁷ as she implies. The record does not suggest that Monsivais was given *Miranda* warnings and chose to remain silent.

In any event, even assuming that the admission of the evidence constituted error, Monsivais demonstrates no prejudice. Evidence that her statement was recorded is not

⁶ The prosecutor argued that she had the burden of proof and the defendants are not required to testify. She argued to jurors: “[Y]ou can’t hold it against them if they didn’t testify.” Moreover, jurors were instructed: “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 deliberations or let it influence your decision in any way.”

⁷ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

probative of her guilt or innocence. The key evidence against her was that she handed the gun and bullets to Ifopo and the evidence that her statement was recorded neither supported nor undermined that critical evidence. The record reveals no prejudice from the assumed error in admitting testimony that Monsivais's statement was recorded.

6. Duress Instruction (Godinez)

Godinez argues that the court erred in refusing to instruct jurors that "duress may negate the specific intent requirement." As previously noted, the court denied Godinez's request to instruct jurors as follows: "Evidence of duress may be relevant to determining whether the defendant acted with the required mental state even if insufficient to constitute a complete defense."

Godinez's argument lacks merit for several reasons. First, his claim that the duress defense applies to attempted murder is questionable. Our Supreme Court has held that it does not apply to murder, explaining: "A person can always choose to resist rather than kill an innocent person. The law must encourage, even require, everyone to seek an alternative to killing. Crimes are often committed by more than one person; the criminal law must also, perhaps especially, deter those crimes. California today is tormented by gang violence. If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts. Accepting the duress defense for any form of murder would thus encourage killing." (*People v. Anderson* (2002) 28 Cal.4th 767, 777-778.) Godinez fails to show that this reasoning would not apply to attempted murder, especially in the context of this case involving the defense of a gang order to kill an innocent person.

Additionally, Godinez fails to acknowledge our high court's holding that duress does not reduce murder to manslaughter, which appears to us to apply with equal force to the attempted premeditated murder for which Godinez was convicted. (*People v. Anderson, supra*, 28 Cal.4th at p. 770.) The high court reasoned that "a killing under

duress, like any killing, may or may not be premeditated, depending on the circumstances. If a person obeys an order to kill without reflection, the jury might find no premeditation and thus convict of second degree murder. [T]his circumstance is not due to a special doctrine of duress but to the legal requirements of first degree murder.” (*Id.* at p. 784.) Consistent with this reasoning, jurors here were instructed on premeditated attempted murder and concluded that Godinez committed the attempted murder willfully, deliberately, and with premeditation.⁸ Jurors also were properly instructed on the specific intent for attempted murder, i.e. that the defendant “intended to kill that person.” Thus, jurors necessarily rejected Godinez’s testimony that he did not intend to hurt Hurston but shot at Ifopo’s command aiming at the wall. Instead, to convict Godinez jurors necessarily concluded that Godinez intended to kill Hurston.

Moreover, even assuming that the trial court should have instructed jurors that the defense of duress may negate premeditation, here the assumed error was harmless beyond a reasonable doubt. Under the instructions given, jurors necessarily determined that Godinez did not act in duress. As noted, jurors were instructed as follows: “The defendant Jose Godinez is not guilty of attempted murder if he acted under duress. The defendant acted under duress if, because of threat or menace, he believed that his life would be in immediate danger or he feared that his person would be subjected to great bodily injury if he refused a demand or request to commit the crime. The demand or request may have been express or implied.” Jurors were further instructed: “The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of attempted murder.” Under this instruction, they were required to acquit Godinez if they concluded

⁸ Jurors were instructed as follows: “If you find the defendant guilty of attempted murder in Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] The defendant acted willfully if the defendant intended to kill when the defendant acted. The defendant deliberated if the defendant carefully weighed the considerations for and against his or her choice and, knowing the consequences, decided to kill. The defendant premeditated [if he] or she decided to kill before acting.”

he acted under duress. Because jurors convicted Godinez, they must have concluded he did not act under duress.

7. Jury Verdict (All Defendants)

As we shall explain, defendants persuasively argue that the court erred in requesting jurors reconsider their verdict. The issue is not forfeited because an objection is not necessary to preserve the claim that a defendant's substantial rights have been violated. (*People v. Espiritu* (2011) 199 Cal.App.4th 718, 725 (*Espiritu*).

a. Background

Defendants were charged with a violation of section 12022.53, subdivision (e). Section 12022.53, subdivision (e)(1) provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [(the gang enhancement)]. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

Following trial, the jury foreperson announced that jurors had their verdicts. The court reviewed the forms and called counsel to a sidebar stating: "The jury either made a clerical error or they don't quite understand the issue of the enhancements versus the— because what they did was they found, the gang firearm enhancement not true but they found the personal firearm enhancement true. [¶] [Y]ou have inconsistent verdicts is what you have." The court further explained: "if you find a gang allegation true, you got to find a gang firearm enhancement true if you found the personal [use] true"

The court then told jurors: "I think you'll all recall the enhancement about use of a firearm, right, personal use of a firearm. That was one of the enhancements and it was also personal discharge of a firearm, that was another enhancement. [¶] And then there was personal discharge causing great bodily injury. That was another enhancement, correct. Then there was a gang enhancement, correct. And then there was a gang firearm enhancement, correct. [¶] Okay. Now, the gang firearm enhancement that comes into play where a principal either used, discharged or discharged a firearm causing great bodily injury, okay. It's not personal use or personal discharge or personal discharge

causing injury. [¶] It's a principal in the crime personally—not principal in the crime used, discharged or discharged a firearm causing great bodily injury.”

The court then gave an example based on the judge and another court employee committing a robbery because their gang needed money. Under the scenario described by the court, the employee used a gun but the judge did not. The court explained: “Now, there's a definition in the instructions of who is a principal. In other words, who is called a principal and who is not. . . . [¶] So if the gang enhancement is found to be true, and you find that a principal in the crime used a firearm, discharged a firearm or discharged a firearm causing great bodily injury, then if you found me guilty and you found the gang allegation against me to be true, and you find a personal—a principal discharged, used or discharged causing great bodily injury then you find that enhancement true as to me. Because that enhancement doesn't say I personally used or I discharged or I discharged a firearm causing great bodily injury. [¶] It just says I'm found to have committed this crime for the benefit of the gang. And also, it's found that in the commission of this crime, a principal—any principal personally used, personally discharged, personally discharged causing great bodily injury, okay.”

The court then asked jurors, “Do you want me to take these verdicts or do you want to look them over . . . ?” Jurors indicated they wished to review their verdicts. Jurors then brought new verdicts, and those were entered.

b. Analysis

Section 1161 provides: “When there is a verdict of conviction, in which it appears to the Court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the court *cannot* require the jury to reconsider it.” (Italics added.) Section 1161 and procedures for receiving a jury verdict “are intended to reduce the likelihood of a trial court unduly, even if inadvertently, influencing the jury to reach a particular outcome.” (*People v. Carbajal* (2013) 56 Cal.4th 521, 531 (*Carbajal*)). “The mechanical, prescriptive character of the process for eliciting and receiving a jury verdict reflects the

Legislature’s judgment that the risk of jury coercion outweighs the risk of jury error.”
(*Ibid.*)

Section 1161 makes plain that the court cannot ask jurors to reconsider a verdict of acquittal. (*Carbajal, supra*, 56 Cal.4th at p. 531.) A court may ask jurors to clarify a verdict only when an inconsistency renders the verdict unintelligible. (*People v. Bryant, supra*, 60 Cal.4th 335, 450; *Carbajal, supra*, at p. 532.) “Mere inconsistency does not provide a valid reason for courts to reject a jury verdict.” (*Carbajal*, at p. 532.)

Such inconsistency may result through “‘mistake, compromise, or lenity.’” (*Espiritu, supra*, 199 Cal.App.4th at p. 727.) “Thus, apart from the limited circumstance specified in section 1161—where ‘it appears to the Court that the jury have mistaken the law . . .’ in initially rendering ‘a verdict of conviction’—a trial court may not decline to accept a jury verdict, or refuse to hear the verdict, simply because it is inconsistent with another verdict rendered by the same jury in the same case.” (*Carbajal, supra*, 56 Cal.4th at pp. 532-533.) “‘And this must be true, even though reconsideration by the jury results in a verdict more accurately reflecting the jury’s intentions.’” (*Id.* at p. 533.)

Here, jurors initially acquitted defendants on the section 12022.53, subdivision (e)(1) enhancement. The court found the finding inconsistent with the jurors remaining findings and explained the inconsistency to jurors. In doing so, it violated the dictates of section 1161 and “effectively controlled the verdict and implicitly directed a verdict” on that enhancement. (*Espiritu, supra*, 199 Cal.App.4th at p. 728.) As a result, the section 12022.53, subdivision (e) enhancement must be reversed.⁹

⁹ Respondent’s argument, which fails to consider our high court’s analysis of section 1161 in *Carbajal*, is not persuasive. Dicta in *Bigelow v. Superior Court* (1989) 208 Cal.App.3d 1127, 1136, that a trial court may ask jurors to clarify an inconsistent verdict is irreconcilable with our Supreme Court’s subsequent decision in *Carbajal*. Contrary to respondent’s argument, this case is not similar to *People v. Keating* (1981) 118 Cal.App.3d 172 because in *Keating* jurors rendered both guilty and nonguilty verdict forms—an error creating an unintelligible verdict. (*Id.* at pp. 181-182.) Here the verdict was not unintelligible, it was simply inconsistent.

With respect to Ifopo, the error did not affect his sentence as the court did not sentence him pursuant to section 12022.53, subdivision (e). With respect to Godinez and Monsivais, the error affected their sentence, and the case must be remanded for their resentencing.¹⁰

8. Identity of Jurors (Godinez)

Godinez argues that the court erred in denying his posttrial motion for juror identifying information. His argument is based on the assumption that the jury was confused and improperly influenced. As we shall explain, his premise and argument lack merit.

a. Background

As noted, at the end of trial jurors asked whether “a defendant [may] be found not guilty on attempted murder but guilty on other counts for use of a firearm, intentionally discharging a firearm, and causing great bodily harm.” Based on this question, Godinez’s counsel hypothesized that jurors did not believe Godinez was guilty of attempted murder. Then based on his hypothesis, counsel requested juror identifying information in order that he may speak to the jurors. The court concluded that regardless of the jurors’ question, they reached a unanimous verdict and it must be presumed that they followed the court’s instructions. The court denied Godinez’s counsel’s motion for juror identifying information.

b. Analysis

Code of Civil Procedure section 237, subdivision (a)(1) provides: “The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.”

¹⁰ Because we conclude this enhancement must be reversed, the argument in Monsivais’s supplemental brief concerning her sentence is moot.

Code of Civil Procedure section 237, subdivision (b) provides: “Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish *good cause* for the release of the juror’s personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.”

Godinez did not show good cause for release of personal information because he did not make a preliminary showing of juror misconduct. (*People v. Santos* (2007) 147 Cal.App.4th 965, 977.) Godinez sought the information in order to establish misconduct but demonstrated no misconduct. To the extent he is arguing that the jurors’ question about whether it could convict for the enhancements without the substantive offense demonstrates misconduct his argument is not persuasive. The fact that jurors were initially confused by the distinction between the substantive crime and the enhancement does not show they failed to consider the elements of each crime as applied to each defendant. Jurors were instructed that they must consider the evidence as it applied to each defendant and decide each charge for each defendant separately. We must presume jurors ““comprehend and accept the court’s directions.”” (*People v. Dykes* (2009) 46 Cal.4th 731, 795.) Absent a showing of good cause for confidential juror information “the public interest in the integrity of the jury system and the jurors’ right to privacy outweighs the defendant’s interest in disclosure.” (*People v. Diaz* (2015) 235 Cal.App.4th 1239, 1244; see *People v. Cook* (2015) 236 Cal.App.4th 341, 346 [“Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported.”].)

Godinez also argues that his constitutional rights to an impartial jury and a fair trial were implicated because “there may have been a handful of jurors that were biased or impartial, or did not understand the nature of the instructions given. His argument lacks merit for several reasons. First, section 237 and its good cause requirement does “not infringe on the fundamental liberty interest in the right to an impartial jury.” (*People v. Santos, supra*, 147 Cal.App.4th at p. 980.) As a result “defendant’s claim is reduced to a matter of state law, under which . . . ‘strong public policies protect discharged jurors from improperly intrusive conduct’” (*Ibid.*) Second, there is no record support for Godinez’s assumption that jurors were biased, impartial, or failed to understand the instructions. Third, “petitions to access confidential juror records “should not be use as a ‘fishing expedition’ to search for possible misconduct.”” (*People v. Diaz, supra*, 235 Cal.App.4th at p. 1244.) In short, Godinez fails to show the court erred in denying his motion for juror identifying information.

9. Prior Prison Term Enhancement (Ifopo)

Respondent argues the trial court failed to either impose or strike Ifopo’s prior prison term enhancements pursuant to section 667.5, subdivision (b). Resentencing for Ifopo is appropriate for the trial court to exercise its discretion. (*People v. Irvin* (1991) 230 Cal.App.3d 180, 183, 190.)

DISPOSITION

The section 12022.53, subdivision (e)(1) enhancement is reversed as to all defendants. In all other respects, the judgments are affirmed. The case is remanded for the resentencing of all defendants.

With respect to Ifopo, the court shall either impose or strike the two prior prison term enhancements pursuant to section 667.5, subdivision (b). The trial court shall strike the section 12022.53, subdivision (e)(1) enhancement. Striking the section 12022.53, subdivision (e)(1) enhancement does not require further modification of Ifopo’s sentence because he was not sentenced under that subdivision.

With respect to Godinez, the court shall strike the section 12022.53, subdivision (e)(1) enhancement. The court shall sentence him under section 12022.53, subdivision (d) instead of under subdivision (e)(1).

With respect to Monsavais, the court shall strike the section 12022.53, subdivision (e)(1) enhancement.

Following resentencing, the trial court shall prepare and forward a certified copy of the modified abstract of judgments to the Department of Corrections and Rehabilitation.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.