

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM COOK,

Defendant and Appellant.

F066847

(Super. Ct. No. BF136576B)

OPINION

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EDWARD SMITH,

Defendant and Appellant.

F066872

(Super. Ct. No. BF136576A)

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant Adam Cook.

Charles M. Bonneau, Jr., under appointment by the Court of Appeal, for Defendant and Appellant James Edward Smith.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, Wanda Hill Rouzan, and Jamie Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

On August 1, 2011, an information was filed in Kern County Superior Court, charging Adam Cook and James Edward Smith (Cook and Smith, respectively; defendants, collectively) as follows:

Count 1 (both defendants): Premeditated murder committed for the benefit of a criminal street gang, in which Smith/a principal intentionally and personally discharged a firearm, proximately causing great bodily injury or death; and with the special circumstance that the murder was intentional and committed while the defendant was an active participant in a criminal street gang and was carried out to further the activities of the gang (Pen. Code,¹ §§ 186.22, subd. (b)(1), 187, subd. (a), 189, 190.2, subd. (a)(22), 12022.53, subds. (d) & (e)(1));

Count 2 (both defendants): Conspiracy to transport or sell a controlled substance after previously having been convicted of a specified drug-related offense, in Smith's case for the benefit of a criminal street gang (Health & Saf. Code, § 11370.2, subd. (a); §§ 182, subd. (a)(1), 186.22, subd. (b)(1));

Count 3 (Smith only): Possession of a firearm for the benefit of a criminal street gang after previously being convicted of a felony (§ 186.22, subd. (b)(1), former § 12021, subd. (a)(1));

¹ All statutory references are to the Penal Code unless otherwise stated.

Count 4 (Smith only): Possession of ammunition for the benefit of a criminal street gang after previously being convicted of a felony (§ 186.22, subd. (b)(1), former § 12316, subd. (b)(1));

Count 5 (both defendants): Possession of marijuana for sale, in Smith's case for the benefit of a criminal street gang (Health & Saf. Code, § 11359; § 186.22, subd. (b)(1)); and

Count 6 (both defendants): Active participation in a criminal street gang (§ 186.22, subd. (a)).

As to each count, it was further alleged Cook had suffered a prior conviction of a serious felony (§ 667, subd. (a)) that was also a strike (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), and that he had served three prior prison terms (§ 667.5, subd. (b)). Smith was alleged to have suffered a prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and served five prior prison terms (§ 667.5, subd. (b)).

Defendants were jointly tried. At the conclusion of the People's case-in-chief, the trial court granted a motion for acquittal (§ 1118.1) on count 5 as to each defendant. The jury subsequently acquitted Cook of murder in count 1, but convicted him of voluntary manslaughter. (§ 192, subd. (a).) The jury acquitted him of counts 2 and 6, and found not true all gang enhancement allegations. The jury similarly acquitted Smith of murder in count 1, but convicted him of voluntary manslaughter and found he personally used a firearm. (§§ 192, subd. (a), 12022.5, subd. (a).) The jury further convicted Smith of counts 2 through 4, but acquitted him of count 6, and found not true all gang enhancement allegations. Following bifurcated court trials, all prior conviction and prison term allegations were found to be true as to both defendants.

Prior to sentencing, defendants moved, inter alia, for a new trial, and requested dismissal of their prior strike convictions. The motions were denied. Cook was sentenced to a total term of 13 years in prison, while Smith was sentenced to a total term

of 38 years eight months in prison, and each was ordered to pay various fees, fines, and restitution.

Defendants each raise multiple issues on appeal, and join in certain of each other's claims. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.) We now hold: defendants were not entitled to severance and/or bifurcation of the gang allegations; Cook's conviction of voluntary manslaughter, and Smith's conviction of conspiracy, are supported by substantial evidence, and Smith was given adequate notice of the alleged offense; the trial court did not err by failing to instruct on involuntary manslaughter; defendants are not entitled to a new trial based on newly discovered evidence or the prosecution's alleged failure to disclose exculpatory evidence; reversal is not required due to cumulative prejudice; Smith's juvenile adjudication was properly found to constitute a strike, and the trial court did not abuse its discretion by refusing to dismiss it under section 1385; and defendants are entitled to a reduction in the amount of the restitution fines imposed under section 1202.4, subdivision (b)(1) and the corresponding parole revocation restitution fines imposed but suspended under section 1202.45. Accordingly, we modify the judgments in that regard, and affirm as modified.

FACTS

I

PROSECUTION EVIDENCE

On the night of April 20, 2011, Daniel Nathaniel Jones was found shot to death at the Royale Palms Motel in Bakersfield.²

² Undesignated references to dates in the statement of facts are to the year 2011.

Witness Accounts

Richard Loran

On the night of April 20, Richard Loran and a friend, “Tall,” were in room 223 of the motel, watching television, when Loran heard some scuffling, like a little fight, to the left (north) of his room. As it was a common occurrence, he paid no attention. It stopped, then started again a few minutes later. It stopped again, and almost simultaneously, Loran heard a single gunshot. He waited about 30 seconds, then peeked out the door. He saw Jones on his knees, hanging over the second-floor railing. Jones was saying, “Oh, oh.” Loran did not see anyone else and had not heard any voices during any of the tussling.

Loran often saw Smith in a room a few doors away from Loran’s room. He saw Cook at the motel a few times, walking through the courtyard. He only saw defendants together once. They were standing outside, talking.

Rodney Stevenson

Rodney Stevenson was Smith’s brother-in-law, and was also acquainted with Cook, whose nickname was “Pee wee.”³ Stevenson visited the motel daily to purchase crack cocaine, most often from Smith, whose nickname was “Gangster.” Smith had a room at the motel, and would be in that room — room 220 — when Stevenson bought crack from him.⁴ The room was rented in Stevenson’s name, but Stevenson did not stay

³ Stevenson testified pursuant to a grant of immunity. He admitted having a number of prior convictions and, as of the time of trial, being addicted to narcotics.

⁴ According to Stevenson, the narcotics were sold “by preference,” meaning they could be purchased in various sizes. It was common to purchase a small piece of crack for \$10. This size rock was known as “[a] dime.” Stevenson had seen dime-sized rocks of cocaine on a table in front of Smith in room 220. Smith’s girlfriend, Pamela Wages, also sold narcotics from that room.

Stevenson denied working for Smith, other than to go to the store for him. He would take a walkie-talkie or radio with him in case he was at the store and forgot

there. It was in his name because Smith said he (Smith) needed a place. Smith had had a place up the street from the Police Athletic League (PAL) building, but had told Stevenson about a month and a half before the shooting that something was wrong with that place and he needed another one. Smith chose the Royale Palms. Stevenson provided the California identification card needed to rent the room, but Smith's name was also on the rental. Stevenson was not responsible for the rent.

Stevenson, who had been known as "Peanut" his entire life, had been friends with Jones for over 10 years. He frequently saw Jones at the Royale Palms, although not every day. Stevenson did not know Cook before renting room 220 for Smith. Stevenson saw Smith at room 220 every day. He saw Cook at room 220 perhaps three times in the month before the shooting, and at the motel several other times. Stevenson never saw Cook sell drugs in room 220, but he saw Cook there when Smith was selling drugs. Cook was there the day Jones was shot.

On the night of the shooting, Jones, Wages, Koreen "Frances" Tokunaga, defendants, and several other people were in room 220, smoking drugs and drinking. Stevenson had been there since early evening. He was outside, sitting on the stairs and smoking crack.

Jones came outside. He was angry and upset, because it was said he had stolen a few rocks that were on the floor and smoked them.⁵ Stevenson tried to speak with him about it in front of the door to the room, by some trash cans, but Jones grew angrier. He shoved Stevenson in the chest, Stevenson shoved him back, and the two engaged in a shoving match for 15 to 20 seconds. Stevenson told Jones to leave, but Jones did not.

something or needed to tell Smith the store was out of an item. He denied providing security for Smith, although he had a black belt in the martial arts.

⁵ Stevenson did not remember whether Jones was working for Smith. He denied ever urging Smith to get rid of Jones or spreading rumors about Jones stealing from Smith.

While this was going on, defendants were standing by the door to room 220. When the tussle ended, Jones and Smith went down the hallway and talked for four or five minutes. Stevenson, who remained by the trash cans, could not hear anything, and he lost sight of Cook.

Smith and Jones proceeded back toward room 220, then, at Stevenson's location near the garbage cans, defendants started fighting with Jones. They both were punching and stomping him.⁶ Stevenson did not intervene because he was scared. Jones, who did not fight back, was knocked to the ground. When he got up, he started to leave, but Smith brought a gun out of his left pocket and fired one shot, striking him. Cook was standing right next to Smith when the shot was fired.

After the shot was fired, everyone scattered. Stevenson went downstairs and was going to jump the wall around the back parking lot, when Smith called his name and asked him to get rid of a gun. Stevenson believed it was a .38 caliber. Smith tossed Stevenson the gun, which Stevenson caught with his shirt, then Stevenson used his foot to dig a hole and buried the gun near a tree in the parking lot. Tall was with Smith.

Stevenson jumped the wall, then realized he had forgotten his bag. He went back into room 220 to get the black duffel bag in which he kept his toiletries and personal items. He walked over to Jones, who was motionless. Stevenson then headed to his sister's house, where he was staying. On his way out, he went inside the motel office and talked to the clerk.

About 50 feet from the motel, he was stopped by officers in a police car. They questioned him about the shooting, as the motel clerk had seen him leave. The officers let him go, and he went to his sister's house.⁷ Stevenson did not contact the police or

⁶ Detective Hale, the lead investigator in this case, did not observe any injuries to Smith's hands when Smith was brought in for questioning.

⁷ Hale could find no record of any such contact.

make any attempt to check on Jones's status. Once police learned the motel room was in Stevenson's name, however, they came to his house and took him to the police station for an interview.

Stevenson was interviewed by police on April 22 and again on April 23. Although they asked about the gun in the first interview, he did not tell them he knew where it was. When asked where the gun came from, he said he had no idea. Stevenson was scared and did not want to get shot or killed for talking to the police. During the second interview, Stevenson continued to deny any knowledge of the gun. When the police told him Smith confessed to shooting Jones and said he threw Stevenson the gun, Stevenson still did not immediately tell them where the gun was.⁸

⁸ Stevenson was interviewed by Hale on three occasions. Early in the first interview, Stevenson identified Smith as the person he had seen shoot Jones, although Stevenson expressed concern that if he told the police what he observed or knew, he would be dead. Stevenson described a fight of sorts that occurred on the landing. Prior to being shot, Jones said something like, "I'm leaving. I'm going. I'm leaving." Stevenson said he had heard Cook tell Smith that Jones was stealing from him. Stevenson related that he saw the fight; Cook started it by punching Jones in the face, then both defendants punched Jones simultaneously. Stevenson said Jones fell against the wall, but was trying to fight back. Eventually, he was able to stand straight up and began to try to get away from defendants. That was when Jones said he was leaving.

During the second interview, which took place several hours after the first, Stevenson said he knew where the gun was. He asked if he told the truth which side of the fence that put him on. Told it put him on the police's side, he said it was by a palm tree at the Royale Palms, where Smith had thrown it. Based on other evidence the detectives had developed, Detective Heredia confronted Stevenson and told him not to lie. Stevenson then said Smith had thrown him the gun. Eventually, he said he buried it.

During all the interviews, it appeared Stevenson was trying to minimize his involvement with respect to certain things. He was dishonest with Hale, and only admitted something that was more honest than his previous statement when confronted by Hale with, for example, statements by other witnesses. At no time did Stevenson voluntarily admit he lied about something and say he now wanted to tell the truth. It appeared to Hale that Stevenson did not want to get in trouble with the law, but also did not want to get in trouble with people involved in the incident.

Stevenson was placed in the Witness Protection Program, because his life was threatened on several occasions. Starting in May, he began to receive money for food, rent, his cell phone, and incidentals. From May through the time he testified (October 2012), with only a break between June 2012 and September 2012, Stevenson received approximately \$1,300 per month, with \$450 going to him to live on and the rest being paid directly for his rent.

Joan Lavender

Joan Lavender and James Kennon resided in room 221 of the motel. Lavender first met Smith when she visited his neighbors at 527 and 529 Villa Street. She was aware he had lived in room 220 of the motel for about two months. She knew, from the amount of foot traffic and what he told her, that he sold narcotics from the room. She once saw a large amount of cash on the bed and crack on the table in his room. Although Lavender never saw Smith with a gun, he told her that he had guns.⁹

Lavender knew Cook only as Peewee. She knew him through Smith. She saw them both when she visited Smith and Wages at 529 Villa. Lavender was also acquainted with Jones, who frequented the Royale Palms. She usually saw him twice a week or sometimes every day. She also knew Stevenson, but by the nickname Peanut. She saw him in the hallways of the Royale Palms almost every day. Sometimes she saw him at room 220. She did not recall ever seeing Cook at the Royale Palms.

Lavender sometimes saw Jones working with Smith at the motel. Jones would be downstairs, sometimes on the staircase, with a walkie-talkie, and he would call upstairs on the walkie-talkie to Smith before a person reached room 220. Lavender also sometimes saw Stevenson working like that with a walkie-talkie, acting as a lookout for

⁹ Lavender told Hale, when she was interviewed, that during a conversation at the motel weeks earlier, Smith told her he was “packing.” Hale interpreted this as meaning he possessed a firearm. Lavender also told Hale that Smith maintained the house at 529 Villa and resided in room 220 of the motel at the same time.

the criminal activity that was going on inside the room. Lavender saw Stevenson doing it more often than Jones.

On the night Jones was shot, Lavender and Kennon were in their room, watching television. Lavender heard arguing between men and women, although she did not recognize any voices.¹⁰ She then heard stomping by what sounded like more than one person going past her window, toward room 222. There was silence for about 30 seconds, then arguing by men and women again, then more stomping past her window, then one gunshot.

Kennon sent Lavender into the bathroom for her protection. She was in there less than a minute. She did not hear anything else. When she came back out, Kennon had opened the door. He said he had gone outside and seen Jones hanging over the banister, and he could hear gurgling. Lavender went out and saw Jones on the ground. This was about a minute to a minute and a half after the gunshot. Lavender and Kennon waited with Jones until the first officer arrived and started resuscitation efforts. While they were waiting, Lavender saw Stevenson on the staircase landing. He went into room 220 and came back out with a black bag. He went directly to the staircase, then held his head and said, "Oh, my God. Oh, my God. What happened?" Lavender told him Jones got shot and she thought he was dead. Stevenson said, "Oh, shit," and left. He never went over to check on Jones.

Koreen "Frances" Tokunaga

Tokunaga, a prostitute, was acquainted with defendants.¹¹ Smith lived in room 220 at the Royale Palms. Tokunaga went to his room every day to buy crack. So far as she knew, Smith had had the room for a couple of months. She once saw him at his house toward the PAL center, when she was invited there to see Cook. Tokunaga saw

¹⁰ Earlier that night, Lavender had seen Smith and Wages inside room 220.

¹¹ Tokunaga testified pursuant to a grant of immunity.

Cook at the Royale Palms every day she was there. A few times, she saw him at room 220. Tokunaga was also acquainted with Jones, whom she sometimes saw in Smith's room at the Royale Palms. Jones did various jobs for Smith. Tokunaga also knew Stevenson, whom she also saw every day at the Royale Palms. Sometimes, he would be working for Smith. At some point, Stevenson took some money from Smith. After that, Stevenson stayed away for a couple of weeks, then returned shortly before the shooting and told Tokunaga he wanted his job back. His job had been taken over by Jones, however. Tokunaga did not trust Stevenson, who was always up to something. Three or four days before the shooting, she heard Smith tell Stevenson that Jones was stealing his dope. Stevenson was agreeing with Smith.

The day of the shooting, Tokunaga started off in room 251, then followed Cook to room 220.¹² When she entered, Stevenson, Cook, Jones, Smith, Wages, and another female were in the room. Tokunaga she said she wanted to buy a rock, but Smith told her to wait with Wages. Tokunaga got the impression Jones had been on crack for a couple of days, as he was "running off at the mouth." It appeared that was getting on Smith's nerves, because Smith kept taking deep breaths.¹³

After Smith told Tokunaga to wait, he reached under the bed and pulled something out. Tokunaga was not sure what it was, but knew that was where he kept his gun.¹⁴ Smith then motioned with his hand to tell Stevenson, Cook, and Jones to go outside. He

¹² When interviewed by Hale on April 23, Tokunaga said that on at least two occasions, she purchased \$20 rocks in room 220, then returned to room 251 to smoke the crack.

¹³ When interviewed by Hale, Tokunaga related that on the night of the shooting, when everyone was in room 220, she heard Smith tell Cook that he (Smith) believed Jones had been stealing narcotics from him (Smith).

¹⁴ Tokunaga had seen the gun before. It was 10 to 12 inches long and looked like a .22. Tokunaga also thought the gunshot sounded like it came from a .22. Although she subsequently told Hale that she had previously seen Smith with a gun, she said she did not see him with a firearm on the night of the shooting.

said, "Come on. Let's go," and the men went outside with him. Tokunaga immediately heard arguing and some scuffling. Someone said, "Man, I don't know what you're talking about," then there was one gunshot right outside the door. It all happened very quickly.

Tokunaga started screaming and hollering at Wages that they should go. Tokunaga did not know what to do or who shot whom; she just wanted to get out of there. Wages packed something in a backpack, and the two left and walked down the street to Wages's house, which was four or five blocks from the motel. Smith subsequently arrived. He said Tall, whom Tokunaga had seen in the motel parking lot before the shooting, had given him a ride. Smith went to talk to Wages in the bedroom. Tokunaga heard him tell her to do something, pack something, or get something. Then Cook showed up. Tokunaga did not see how he got there.

Smith came out of the bedroom and told Tokunaga that he had shot someone. He said this was not the first time he had gotten away with a shooting, and that he had given the gun to Stevenson.

Tokunaga telephoned a friend and asked to be taken to the truck stop. The friend picked her up right away, and took her, Smith, Cook, and Wages to a motel. Tokunaga learned Jones was the person who had been shot from a report she saw on television. At some point, Smith told Tokunaga that Jones was stealing from him. Tokunaga stayed at the motel for a couple of hours, then went to a truck stop to make some money. From there, she returned to Bakersfield by herself.¹⁵

Anthony Walker

Anthony Walker and Jones were friends.¹⁶ Walker, who used crack cocaine, was sometimes at the Royale Palms with Jones. About three weeks before the shooting,

¹⁵ Tokunaga told Hale that she and Cook left the motel around 9:00 a.m., and that Cook got a ride from a friend and went to school.

¹⁶ Walker testified pursuant to a grant of immunity.

Walker was at the motel when Smith showed him a small, dark-colored revolver that looked like a .22. Smith, who brought the gun out of his room, did not say why he had it.

James Kennon

Kennon lived with Lavender in room 221 of the Royale Palms.¹⁷ Smith lived next door in room 220. Cook's face was familiar to Kennon, but he was not sure if he had seen him at the motel. Kennon saw Jones at the motel all the time, but did not really know him.

On the night of the shooting, Jones was sitting on the stairs when Kennon came home. Kennon was in bed, almost asleep, when he heard the gunshot. He did not hear anything out of the ordinary before he heard the shot.¹⁸ Kennon only heard one shot; it was close to his room.

Kennon told Lavender to get in the bathroom, then he opened the door. He saw Jones leaning against the railing, kind of sucking in air. Kennon told him to put his finger in the hole, then went back inside and called 911. While he was inside, he heard someone on the walkway say, "How do you like me now, Cuz?" or "how did you like me now?" Kennon had not seen anyone but Jones outside, and did not recognize the voice.¹⁹

Kennon went back outside. By this time, Jones was on the ground. Kennon saw the back of a person in the southwest corner of the motel courtyard, walking away. He

¹⁷ Kennon testified pursuant to a grant of immunity.

¹⁸ Kennon explained that it was normal at night to hear people moving up and down the walkway outside his room — sometimes loudly — or even fighting.

¹⁹ Kennon testified he did not believe he would recognize Smith's voice. When interviewed by Hale a few days after the shooting, however, Kennon said he heard "a squabbling kind" of commotion, someone running, and a tussle or wrestling on the landing outside his room. He then heard what he thought was a gunshot. A person Kennon thought was Smith, although he was not completely certain, said, "How do you like me now, Cuz?" Kennon then walked outside and saw Jones leaning against the railing.

could not tell if the person was male or female, and did not see anything in the person's hands.

Within two and a half to three minutes after the shooting, Stevenson came up the stairs and asked what happened. Kennon said something to the effect that Jones had been shot or was dead. Stevenson, who seemed shocked, said, "Oh, man," or something of that nature. He then went into room 220, came out with a duffel bag, and left. Although Stevenson was not running, he was moving quickly and did not get close to Jones or offer to help.

The Investigation

At approximately 10:25 p.m. on Wednesday, April 20, Bakersfield Police Officer Grogan responded to the Royale Palms Motel, which was located in the 200 block of Union Avenue, regarding a shooting. He found Jones's body on the second floor walkway of the motel's inner courtyard, between rooms 220 and 221. Jones had suffered a single gunshot wound to the left back.

Detective Heredia and other officers searched room 220 around 6:15 a.m. on April 21. No firearms, ammunition, or cocaine in any form were located. However, two walkie-talkie units and a hand-held radio were found in the room. In one of the dresser drawers was a covered container with some marijuana in it. Currency totaling \$787, as well as some change, was found in a shoe box.

A firearm was found shallowly buried in some dirt by a palm tree within the motel parking lot perimeter. Stevenson directed Heredia to its location. There were four live rounds and one spent casing in the revolver, which was a .38 Special with a barrel length of one and seven-eighths inches. A bullet recovered during Jones's autopsy was determined to have been fired by that revolver.

Cook was arrested on April 22, not far from the motel. When interviewed by Hale between Hale's first and second interviews of Stevenson, Cook said he lived at 529 Villa. He denied seeing the shooting, and said he had heard about it on the news while at home

on Villa the following morning. Cook said he was last at the Royale Palms around 3:00 p.m. to 5:00 p.m. on Wednesday.

On April 23, a search warrant was executed at 529 Villa Street, Bakersfield. No firearm was located in the residence. However, nine rounds of .22-caliber ammunition and three rounds of .25-caliber ammunition were found in the nightstand in the master bedroom.

Gang Evidence²⁰

When Smith was brought in for questioning in this case, he was wearing a blue belt with an “E” on the metal clasp.

Stevenson had known Smith for almost 30 years. He knew Smith to have tattoos that represented the Mid-City Crips, an Eastside Crip subset, although all the tattoos were old. Smith had had the nickname Gangster since he was young. Smith told Stevenson he was a member of Mid-City about two years before trial. Cook never told Stevenson he was a member of a gang. When Stevenson first met Cook, Cook introduced himself as Peewee, and Stevenson introduced himself as Peanut. It was common for people who lived on the street to refer to themselves by nicknames rather than their given names. Stevenson was aware there were prostitutes and drug users residing in the Royale Palms. There were also people from the West, the East, and the Country.

Tokunaga had known defendants for a couple of months at the time of the shooting. When she first met Smith, he told her he was a Crip. Cook never told her anything like that.

On August 20, 2010, Bakersfield Police Officers Gregory and Bender were patrolling the area of the 600 block of Martin Luther King Jr. (MLK) Boulevard for gang activity. They responded to the Aneese Market, a known hangout for members of the

²⁰ In light of defendants’ claims the gang charge and enhancements should have been severed/bifurcated, we recite the gang-related evidence in some detail, despite the jury’s rejection of those charges and allegations.

Eastside Crips criminal street gang. There, they made contact with Cook, Derrick Gage, and Demetre James. The latter two were known to Gregory to be members of the Eastside Crips.

All told, Gregory was a member of the Gang Unit for three years. Aside from the day at the Aneese Market, Gregory had had no contact with Cook. He had never had contact with Smith. During the search of 529 Villa, he found nothing significant with respect to gang membership or association.

On January 21, 2009, Officer Lantz, who was then a member of the Gang Unit, came in contact with Cook in the 400 block of MLK Boulevard. A vehicle made an abrupt turn, then, when Lantz and his partner, Officer Hawk, attempted to effect a traffic stop, failed to yield to their lights and siren. It pulled into the parking lot of Roy's Market, a location frequented by members of the Eastside Crips, whereupon the front seat passenger exited the vehicle, ran from Hawk, and discarded a firearm prior to being detained. Eugene Cooks was the driver, Tyrone Pogue was the front seat passenger who ran, Cook was seated behind the driver, and Jamal Thompson and Christopher Langston were also in the backseat. All the vehicle's occupants were arrested.

All told, Lantz was a member of the Gang Unit for about five and a half years. Prior to the date of the vehicle stop, he had had no contact with Cook, although the four other subjects were known to him to be Eastside Crips. Lantz was not aware of having had any contact with Smith. None of the numerous gang members with whom Lantz had spoken over the preceding 10 years ever identified Smith as a member of the gang.

Lantz did not know how many persons were members of the Eastside Crips. In his experience, one could become a member by being brought in by family members. Other times, the person went to school or otherwise associated with members. Ultimately, the person started doing "work," i.e., committing crimes with members, backing them up in fights, and the like. Lantz had seen people in their late 20's become involved.

According to Lantz, people who were members or associates of a street gang when younger generally did not completely cut ties from the gang, and always had an association with it to some extent. However, Lantz had never known the Eastside Crips to be one of the gangs in which attempting to walk away constituted an immediate death sentence. If an individual associated with the Eastside Crips when younger and, now in his 40's, had nothing more to do with the gang, that individual might be left alone by the gang if it was his choice to be left alone. Lantz was aware of some gang members who currently held jobs and continued to be influential within the gang, so in his opinion, it depended on the individual.

As of the time of trial, Bakersfield Police Officer Beagley was assigned to the FBI Kern County violent crime gang task force. Prior to that, he was a member of the Bakersfield Police Department Gang Unit for three years.

On January 26, 2011, Beagley contacted Cook, along with Frank Wright, Jerry Dawson, Deondray McGregory, Mary Young, Bruce Hall, Eugene Cooks, and Edwin Smith directly across the street from the Aneese Market. Although Beagley had not had contact with Cook before that day, Wright, Dawson, McGregory, Hall, and Cooks were all known to him to be Eastside Crips. Cook was arrested, although not for committing a new offense, and searched. No drugs or firearms were found.

As of the time of trial, Bakersfield Police Officer Harless had been assigned to the Gang Unit for almost three years. He had formalized training with respect to gangs, and also spoke with gang members and other officers about gangs and gang members on a daily basis.²¹ Harless had previously qualified as an expert on all local Black gangs

²¹ Sometimes Harless spoke with gang members he arrested. He asked them about their territories, rivalries, and their activities. Sometimes he interviewed gang members during consensual contacts. He also spoke with them during debriefing situations, when a gang member decided to stop being a gang member and to assist law enforcement.

Harless had found that some members of one gang might be related to members of rival gangs. This generally resulted from the area the person grew up in, as the area and

(Eastside Crips, Country Boy Crips, Westside Crips, and Bloods), and the local Sureño (southern Hispanic) gangs.

Harless contacted Eastside Crips more than any other gang, because their territory and membership were the largest. The Eastside Crips claimed the geographic area north of East Belle Terrace and east of Union Avenue. There was no real border to the east or north, because there were no rival gangs in those areas. Directly west were the Westside Crips, while to the south were the Country Boy Crips. Those gangs were both rivals of the Eastside Crips, as were the Bloods.²² When being booked into jail or prison, however, gang members often claimed just “Crip” in general, because once in custody, the street rivalries were mostly set aside, and the rivals then were the Crips and the Bloods.

Harless explained there were a number of ways a person could become a member of a gang. They could get “jumped in[.]” They could “put in work” by committing crimes for the gang. They could be “graced” or “blessed” into the gang by having family members from the gang and essentially being born into it. Within the gang, there were different levels of participation, with different people doing different types of crimes. Younger members would often commit lots of burglaries. Certain members would mostly just sell drugs. The highest level — the most respected members — were called

people with whom they associated while growing up usually dictated what gang they went to when they became gang members. However, not everyone who lived in gang territory was a gang member. Similarly, some gang members had a moniker, which basically was a nickname. Not all did, however, and not everybody with a nickname was a gang member.

²² Harless explained there was a loose alliance between the Westside and Country Boy Crips. This alliance arose for protection, because the Eastside Crips were so much larger than the other two gangs. In addition, the Eastside Crips carried out a shooting at Casa Loma Park in 1999 or 2000, at a wake for a person who had Westside and Country Boy Crip relatives present. The fact there were victims from both of those gangs helped forge the alliance.

the shooters, as they were the ones who were willing to go out and shoot rival gang members for their gang. There were also different levels of authority within the gang. The younger or newer members had less authority, while the older, more experienced members had more authority to tell other gang members what to do, and had more respect. Once gang members reached their mid-to-late 30's or 40's and had not been sent to prison for the rest of their lives, they would have lots of status if they were still active as gang members.

Harless explained that respect was probably the most important thing to gang members. It was how they got their authority, and how they were able to live their lives and commit their crimes without fear of retaliation or of being reported to law enforcement. Gang members gained respect by committing crimes, but particularly by committing violent crimes. When they committed an assault or a shooting, they raised their status within the gang, and also raised the status of the gang by instilling fear in rival gang members and members of the community. Essentially, fear equated to respect for gang members. Respect could be lost through acts of disrespect, however. For example, if a gang member was disrespected by someone and did not respond in a way to gain back that respect, he would lose respect within the gang. Generally, the way to get back the respect was through violence.

Graffiti was the most common way for a gang to mark its territory. Harless explained common Eastside Crip-related graffiti, which might indicate the Eastside Crips as a whole, disrespect for rival gangs, or indicate a specific gang subset. He further explained that a subset was a smaller clique or group within a gang. Although sometimes members from multiple subsets within the Eastside Crips would commit crimes together, generally the members from the subsets were the ones who most commonly worked together in that regard. Subsets of the Eastside Crips — which were somewhat of a gang themselves, but were all part of the larger Eastside Crips — were the Projects, the Mid-

City Crips, the Kincaid Block, the Lakeview Gangster Crips, the Spoonie G Crips, and the Stroller Boy Crips.

According to Harless, the main activities of the Eastside Crips were drug sales; theft-related offenses such as burglary, auto theft, and carjacking; murder; violent assaults, usually (but not always) of rival gang members; and assaults with firearms.²³ Harless was familiar with the concept known as “team sales,” in which two or more individuals were involved in selling narcotics. Often, one person would hold the drugs while another person conducted the transactions, or another person held the money. It was common to find narcotics sales involving Eastside Crips in the motels along the eastern side of Union Avenue, between Brundage and California; in front of the markets along MLK Boulevard; and in residences within the gang’s territory. Those motels and markets were also within the gang’s traditional territory. If rival gang members or drug dealers came into that territory, they would be met with violence.

It was common to find firearms associated with narcotic sales, and, based on Harless’s conversations with law enforcement officers and gang members, this was common knowledge. Harless explained that firearms were used to protect the drug dealers from individuals who might want to steal their narcotics and from rival gang members, and to enforce retaliation or punishment for any theft of narcotics. It was important for a gang member involved in narcotic sales to prevent the theft of his product, because stolen product amounted to loss of money. More importantly, the theft of product would set a precedent for other people to steal, and failure to retaliate with some level of violence or threat of violence would cause loss of respect within the gang.

From interviewing rival gang members, Harless had learned that not only members within one gang knew what that gang was doing, but their rivals also knew.

²³ Harless summarized: “Basically, they sell drugs, they steal things, and they hurt people.”

From speaking with members of the community, he learned that they also were aware of what was going on, and that gang members' commission of crimes could instill fear in members of the community and prevent nongang members from reporting crimes to law enforcement.

Harless used several ways to try to determine if someone was a member of the Eastside Crips. Talking to that person was one. In addition, he looked for gang-related tattoos, researched the person's history and what the person claimed when booked into jail, looked for where the person was frequently contacted by law enforcement and with whom he was contacted, and researched whether the person had ever told anyone from law enforcement that he was a member of a gang. Harless found that members of the Eastside Crips tended to associate with other members of the Eastside Crips, and he participated in investigations on a daily basis in which Eastside Crips committed crimes together.

Harless reviewed booking information, offense reports, and other law enforcement information with respect to Smith. There were 21 bookings, of which Harless found six significant.²⁴ The oldest was from April 14, 1997. The booking information related Smith said he belonged to or associated with Mid-City Crips, and asked to be kept away from Bloods. In the next one, dated December 11, 2002, he claimed ex-Crips and asked to be kept away from Bloods. The next was dated February 26, 2004. Smith again claimed ex-Crip and asked to be kept away from Bloods. In the booking dated June 23,

²⁴ This meant that of the 21 bookings, Harless found six that supported his opinion Smith was an active gang member in 2011. In one dated August 28, 2008, which Harless found not significant, Smith did not claim a gang.

Harless acknowledged the first gang question on the booking sheet asked, "do you belong to or associate with any gang in or out of jail," and that despite the fact this was a compound question, it was merely answered "yes" or "no." He also acknowledged that associating with a gang was different than belonging, as associating could refer to a family association or merely associating with friends who were gang members.

2004, Smith again claimed ex-Crip and asked to be kept away from Bloods. Booking information from February 21, 2010, reported Smith claimed Crip. There was no keep-away listed. When arrested and booked in the current case, Smith claimed Eastside, with the subset being Mid-City. Asked if he needed to be kept away from anyone, he said North.²⁵

Harless also looked at Smith's tattoos. Smith had numerous that were not gang related. He also had "E" and "S," which stood for Eastside, on the front of his shoulders. He had "MCC," which stood for Mid-City Crips, on his abdomen. On the back of each arm, he had a one, with the one and one making "11" and standing for 11th Street. The 11th Street Project Crips were essentially the same subset as the Mid-City Crips. All appeared to Harless to be old tattoos.²⁶

²⁵ If someone was a former member of a gang, he probably would still be in danger if placed with members of a rival gang, especially if he had old gang tattoos. Harless did not know what the booking deputy would do if someone said he was in a gang 20 years earlier, or had relatives in a gang, or said he was from a certain neighborhood or geographical area, such as the east side. He also did not know if booking deputies ever simply went back to an older booking sheet and copied it.

Deputy King, a classification gang deputy at the Kern County Sheriff's detention facility, had been a booking officer and had observed the process more recently. Based on his experience, it was possible classification information would be carried over from a prior booking if a person refused to answer questions. If someone said he associated with the Mid-City Crips 20 years ago, still had a lot of friends in the group, and had tattoos that could get him in trouble, King would house him as a Crip, and put "yes" in answer to the booking sheet question about associations. If the person said he was not a gang member, but was from the Eastside and had relatives who were Crips, King would ask if he would feel more comfortable housing in a Crip environment or needed to go into protective custody. If the person said he would be more comfortable housing in a Crip environment, the person would be given a Crip housing code and a keep-away from Bloods. King would also put "yes" in answer to the association question on the booking sheet.

²⁶ Harless believed Smith was around 45 years old.

Smith had no street checks.²⁷ Harless reviewed seven offense reports for him; six were significant because of the area in which Smith was contacted, the people with whom he was contacted, and the activity in which he was involved when contacted.

In 2002, Smith was contacted with Leroy Kelly, an Eastside Crip. They were on MLK Boulevard, a common area for Eastside Crips to frequent and sell drugs.

On June 23, 2004, Smith was contacted within Eastside Crip territory. He was seen discarding an item that turned out to be a cigarette pack containing 40 bindles of cocaine base. He was arrested and stated he possessed the cocaine base for sales. Sales of cocaine base was one of the primary activities of the Eastside Crips.²⁸

On August 28, 2008, Smith was contacted in MLK Park, a common hangout of the Eastside Crips. Although he was merely arrested for having an open container, the location was significant.

On February 14, 2010, Smith was contacted within the traditional boundaries of the Eastside Crips. He was cited for marijuana possession. Again, the location of the contact was significant.

On February 21, 2010, Smith was arrested for domestic violence at a location in the center of Eastside Crip territory. Once again, the location was significant.

To Harless's knowledge, he had never had contact with Smith, although he had spoken with other officers about him. Based on all the information, Harless opined Smith was an active Eastside Crip, specifically from the Mid-City Crips subset. His nickname was Gangster.

²⁷ A street check is documentation of a contact. The officer may document his or her contact with someone even if no crime has been committed. In contrast, a general offense report is typically a report that has been completed because a crime has been committed.

The fact there were no street checks meant that insofar as Harless knew, no gang member ever claimed Smith was a gang member.

²⁸ No gang charge was filed against Smith in that case.

Harless also reviewed information concerning Cook, with whom he had had contact and about whom he had talked to other officers. He reviewed 16 bookings, of which 12 were significant. In the one dated August 11, 1997, Cook stated he was a prior Crip and needed to be kept away from Bloods. In others, the booking sheet reflected Eastside Crip membership or association — specifically 11th Street Project Crips — and keep-away from Bloods.

With respect to tattoos, Cook had “Eastside 11th Street Crip” on one arm. On his back he had a street sign depicting the intersection of Lakeview and East 11th, which was squarely within the traditional boundaries of the Eastside Crips. In the same picture was a man with a tattoo on his chest that said “Mid-City.” On Cook’s lower back was the word “Eastside.” On the backs of his arms were the letters “M” and “C,” which stood for Mid-City. Cook had some tattoos that were not gang related. Some of his tattoos were relatively old. Harless did not know when Cook got any of his tattoos, although Lakeview Avenue was renamed MLK Boulevard approximately 10 years before trial.

Cook had only one street check, which Harless did not find significant. There were 13 offense reports, of which 10 were significant because of the location at which Cook was contacted, the individuals with whom he was contacted, and the activity in which he was involved.²⁹

On December 8, 2007, a traffic stop was conducted at the southern end of Eastside Crip territory. Cook was contacted with two other Eastside Crip members. They had just left the Elks, a club at which Eastside Crips congregated. The significance was that Cook was in Eastside Crip territory with Eastside Crip gang members, and had just left an Eastside Crip hangout. The individuals were searched; nothing illegal was found on any

²⁹ Some of the offenses involving Cook and the predicate offenses (*post*) were also testified to by other officers, as described *ante*.

of them. Cook was arrested on an outstanding warrant and his residence was searched. No contraband or gang paraphernalia was located.

On January 21, 2009, Cook was a passenger in a vehicle that was stopped at Roy's Market, one of the hangouts of the Eastside Crips. During the traffic stop, Tyrone Pogue fled the vehicle and discarded a loaded firearm. Cook, Pogue, and the three other individuals in the car were all Eastside Crip members. All were arrested, and a number of convictions resulted. Cook was convicted of being an accessory. Of those in the vehicle, Cook was the only one whose conviction did not involve a firearm or a gang. During his contact with the officers, Cook stated he was an ex-member of the Mid-City Crips and was no longer active. Nothing illegal was found in a search of his person.

On August 20, 2010, Cook was contacted in front of the Aneese Market, a common hangout of the Eastside Crips. The significance to Harless was that Cook was arrested in Eastside Crip territory in the company of Eastside Crip members. Cook was searched and did not have anything illegal on him. The other individuals were also searched; nothing was found. However, Harless could not say whether they had anything illegal, since people who stand in front of the Aneese Market sell drugs all day, every day.

On September 21, 2010, Cook was contacted by an animal control officer responding to MLK Park for a report of dogs fighting. The significance to Harless was the fact Cook was contacted in Eastside Crip territory. Harless did not know whether he was engaged in criminal activity.

The next report, dated November 4, 2010, Harless found to have no significance. Cook was cited for having a small bag of marijuana. The location of the contact was in Westside Crip territory.

On January 18, 2011, Harless contacted Cook in front of the Aneese Market. He was in the company of two Eastside Crips. Harless searched Cook but did not find any contraband on his person. On this date, Cook was residing at 529 Villa Street.

On January 26, 2011, Cook was contacted in front of the Aneese Market, in the company of three other men. Although nothing illegal was found on any of them, Harless found it significant that Cook was contacted in Eastside Crip territory in the company of Eastside Crip members.

During a contact on March 2, 2011, Cook's address was reported to be a homeless shelter. The clerk of the Royale Palms called police regarding Cook and Bruce Hall, who were in room 248 of the motel.

On March 10, 2011, Cook was contacted as a possible witness to a stabbing at 617 Union Avenue. Cook was contacted at 505 Union Avenue, which was in Westside Crip territory. Harless did not find this contact to have any significance.

Harless opined Cook was an active member of the Eastside Crips, specifically the Mid-City subset. He acknowledged Cook occasionally spent time in Westside Crip territory. Although usually it would be dangerous for an active Eastside Crip to frequent Westside Crip territory, sometimes the person might "get passes." A pass was when a person had a relationship with members of a rival gang, and so the gang allowed the person to go in and out of its territory or associate with certain members. Generally, a pass was given through a family or social (such as dating) relationship. Harless had no information whether Cook had a pass, or any family members or social relationships with anyone living in Westside Crip territory.

Harless also reviewed the following predicate offenses³⁰:

On June 23, 2004, Smith discarded an object that was found to be 40 individually packed bindles of cocaine base. Smith said he possessed the cocaine for sales.

On November 30, 2006, officers responded to a location in response to a report someone was armed with a firearm. Upon arriving, they observed several subjects who

³⁰ It was Harless's understanding that the purpose of predicate offenses was to establish there was such a gang as the Eastside Crips.

fled into one of the apartments. A search of the apartment revealed 2.5 grams of cocaine base that Carl Jones had concealed on his person. Jones, an Eastside Crip, was in the company of four other Eastside Crips. All five were arrested, and Jones was later found guilty of possession of narcotics for sales and gang participation.

On January 21, 2009, Tyrone Pogue fled from a vehicle that officers had stopped, and he discarded a loaded firearm. Cook was in the vehicle. Eugene Cooks, the driver, was subsequently convicted of possession of a firearm by a felon and gang participation.

On June 16, 2009, officers contacted Leroy Kelly, an Eastside Crip. He attempted to flee on his bicycle, then discarded 4.6 grams of cocaine base. Kelly was convicted of transportation and sale of narcotics.

On July 18, 2009, Davion Colen and Otis Francisco, both Eastside Crips, conducted a robbery with a firearm in Eastside Crip territory. When chased by officers, Colen discarded a loaded .22-caliber firearm. He was later convicted of robbery and gang participation.

On May 15, 2010, Anthony English, an Eastside Crip, was contacted in front of the Aneese Market. He was in the company of another Eastside Crip, and was seen handing what turned out to be marijuana to a third individual. He was searched and found to be in possession of the keys to a nearby vehicle that contained additional marijuana and English's identification. He was later convicted of possession of marijuana for sale and gang participation.

In response to a hypothetical question, Harless opined that the activity shown by the prosecution's evidence in this case described a crime committed for the benefit of, at the direction of, or in association with the Eastside Crips. Harless explained that narcotics sales by Eastside Crips were common at the Royale Palms, which was in their territory; possession of firearms was a common activity of Eastside Crips, as was possession of firearms while selling narcotics; and in order not to lose respect as gang members and for their gang, gang members were required to respond to someone stealing

from them with a threat or act of violence.³¹ In addition, the fact two gang members participated in the assault showed Harless they were mutually benefiting each other by assaulting the thief, and they were associating with each other by committing the assault. When the assault did not pan out and the thief attempted to flee, allowing him to flee without escalating the violence would result in them losing the respect they were attempting to recover by assaulting him. Thus, it would be common for them to escalate the violence to the next level, in this case shooting the thief. Because gang members were required to back each other up, the person who was not the seller and not the shooter essentially was required to participate in the assault, to assist his fellow Eastside Crip in responding with violence to correct the loss caused by the theft. The fact the Eastside Crip who was not the seller started the assault showed the two gang members were associating with each other and the nonseller was benefiting the seller by assaulting the thief. If the nonseller did not participate, he could lose respect within the gang. In addition, the actions of the two Eastside Crips in assaulting the thief let other purchasers of narcotics know they would not be allowed to steal from the gang members.³²

Harless opined that if a person was selling narcotics at the Royale Palms Motel, that person was acting in association with the Eastside Crips. This was so because it was Eastside Crip territory, specifically a motel controlled by Eastside Crips. They controlled the narcotics that were sold there, and they reaped the benefits of the narcotics that were sold because it was in their territory.

Harless was assigned to be the gang officer on this case shortly after defendants were arrested. He was never asked to, and did not, undertake a gang workup for anyone

³¹ Harless was aware that drug activity had gone on at the Royale Palms for years, and that many people there who used drugs were not gang members. He did not know if any nongang member sold drugs there.

³² Harless acknowledged he did not see, in the reports he reviewed of the shooting, any gang questions asked of witnesses, including if they knew Smith was a gang member. However, “cuz” was a term used by Crip gang members when talking to each other.

other than defendants. It did not matter to him whether Stevenson, who reportedly was given the gun by Smith, was a gang member. Harless “[a]bsolutely” had experience with a gang member committing crimes with nongang members, although it sometimes was true that a gang member committing a crime would not want to include a nongang member in the offense.

Harless explained that “aging out” refers to someone who grows up and decides he or she does not want to be a gang member anymore. He was aware of situations in which a person was involved with a gang when younger, but then reached his or her mid-30’s or 40’s and was no longer involved in the day-to-day activities of the gang. Harless surmised such a person would have a certain amount of respect and be allowed certain latitude, such as being allowed to sell drugs in his gang’s territory without drawing retaliation. Harless found it contradictory, however, for someone to say he stopped being a gang member but still sold drugs in his gang’s territory. If someone stopped being a gang member, then that person would stop participating in gang activity like selling drugs. Harless acknowledged that a gang member could sell drugs without it necessarily being for the benefit of the gang.³³ Harless reviewed reports concerning the search, and photographs taken, of room 220, and did not see anything that appeared to be gang paraphernalia. He participated in the search of the Villa residence and did not find any gang paraphernalia.

³³ With respect to the present case, although it was his opinion the crime was done for the benefit of the Eastside Crips, it also benefited individuals within the Eastside Crips. There was a greater benefit for the individuals who were involved than for the gang as a whole.

II

DEFENSE EVIDENCE

Anthony Thomas met Stevenson in 2012.³⁴ Sometime around July 2012, Thomas got a room at the Tower Motel. Stevenson had his own room at that motel.³⁵ Thomas would smoke crystal methamphetamine, while Stevenson would smoke crack. As the days progressed, the two became friendlier and started talking. Stevenson was “going through some stuff.” When Thomas asked what was going on, Stevenson said he was “stressing,” and that he did something. Thomas asked what he did; Stevenson replied that he shot somebody. When Thomas questioned him further, Stevenson said he did not want to talk about it, then he got higher. In the following days, Thomas asked again, and Stevenson said he shot somebody at the Royale Palms. Later, Stevenson said he “jumped on” (beat up) someone named Danny, over a misunderstanding about drugs. Stevenson said he (Stevenson) was taking stuff from “the dope dealer.”

Thomas was from the Los Angeles area and visited Bakersfield about once a year to see his relatives. Although he did not claim a gang while in Bakersfield, he did not get along with the Eastside Crips, because he was “on the Westside.”

Records from the Kern County Sheriff’s detention facility at Lerdo showed Thomas was housed in a two-man cell in a pretrial pod. Cook had been his cellmate for approximately three weeks as of the date Thomas testified.

Sarah Elliott was the manager of the Tower Motel, which accommodated single-night and long-term clientele. Stevenson lived there for about a year, until approximately April 2012. His rent was \$780 per month; it was paid by the district attorney’s office.

³⁴ Thomas, who was incarcerated on a pending case at the time of trial, testified against his attorney’s advice. He did not receive any promises, grants of leniency, or immunity agreements.

³⁵ In May 2011, Hale contacted the district attorney’s office to have Stevenson relocated for protective purposes. Stevenson was relocated to the Tower Motel. So far as Hale knew, this information was not disseminated by the police department.

Stevenson was evicted and banned from the property, because he was “[a] lot of trouble” as a tenant. There was a lot of traffic and a lot of noise, and too many people in his room all the time. There was also a problem with drug use. During the several months following his eviction, Stevenson was caught on the property at least seven or eight times.

Elliott did not remember anyone named Anthony Thomas. Someone who stayed at the motel for a month and a half would be considered a fairly short-term client, however, and Elliott remembered her long-term clients better than the short-term ones.

DISCUSSION

I

BIFURCATION AND SEVERANCE

Defendants contend the trial court erred by refusing to sever the gang charge (count 6) and bifurcate the gang allegations. We conclude there was no error, and in any event, no prejudice.

A. Procedural History

Defendants moved, in limine, to bifurcate the gang charge and enhancements, and to exclude and/or limit such evidence.³⁶ Conversely, the People sought to introduce gang evidence, not only to prove the gang charge and allegations, but also on the issue of motive. With respect to the existence of the gang itself, the People sought to introduce six predicate offenses, all of which involved either narcotic sales or gun possession. Two of the offenses involved Cook, while one involved Smith.

An Evidence Code section 402 hearing was held, at which Harless testified. The purpose of the hearing was to establish Harless’s qualifications to render an expert opinion on the subject, and to elicit his opinions concerning why this was a gang case.

³⁶ Each defendant was deemed to have joined in any objection or motion made by the other defendant. Accordingly, we sometimes refer to both defendants when, in reality, only one defense attorney presented an objection or argument.

Harless testified consistently with his testimony at trial, set out *ante*, including with respect to defendants' various street checks and bookings.

At the conclusion of the hearing, defendants conceded that if Harless's testimony was consistent at trial, they had no real argument with respect to relevance or prejudice versus probative value under Evidence Code section 352. Accordingly, the court granted the People's motion to admit the evidence.

Turning to the issue of bifurcation, defendants argued the gang enhancement was a "mere afterthought," what took place had nothing to do with a gang, and the gang allegations were merely a means to get in substantial prejudicial information so jurors would dislike defendants. The prosecutor argued the evidence presented during the Evidence Code section 402 hearing was sufficient to defeat the bifurcation argument. The court recognized the prejudicial effect allegations of criminal street gang involvement had, but also noted case law establishing that if gang membership was relevant to the motive a defendant may have had for committing the charged crime, it could have strong probative value. The court found Harless's testimony provided evidence of a motive for the force escalating from assault to a shooting, and for one gang member assisting another. The court found there would be no undue consumption of time, and that the prejudicial effect did not substantially outweigh the probative value. It did not believe lack of bifurcation would deny defendants a fair trial, as it was satisfied the subject of criminal street gangs could be sufficiently addressed in voir dire so as to identify and remove potential jurors who were prejudiced on that issue. Accordingly, it denied the motion.

B. Analysis

Throughout the course of this case, the parties have not always distinguished between bifurcation and severance. Technically speaking, substantive counts are severed, while enhancement allegations are bifurcated. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 946, fn. 5.)

Turning first to the legal principles applicable to severance, there is no dispute that the offenses charged in the present case satisfied the statutory requirements for joinder. (§ 954; *People v. Burnell, supra*, 132 Cal.App.4th at p. 946.)³⁷ “When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant’s severance motion. [Citations.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161.) In exercising its discretion, the trial court “weighs ‘the potential prejudice of joinder against the state’s strong interest in the efficiency of a joint trial. [Citation.]’ [Citation.]” (*People v. Merriman* (2014) 60 Cal.4th 1, 37.) In determining whether the trial court abused its discretion, we consider the following factors: “(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citation.]” (*People v. Mendoza, supra*, 24 Cal.4th at p. 161.) The burden is on the defendant to establish the trial court’s ruling exceeded the bounds of reason, all of the circumstances being considered. (*People v. Merriman, supra*, 60 Cal.4th at p. 37; *People v. Gimenez* (1975) 14 Cal.3d 68, 72.)

A determination the evidence was cross-admissible “ordinarily dispels any inference of prejudice. [Citations.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 28.) “[T]he issue of cross-admissibility “is not cross-admissibility of the charged offenses but rather the admissibility of relevant evidence” that tends to prove a disputed fact. [Citations.]’ [Citation.]” (*People v. Capistrano* (2014) 59 Cal.4th 830, 849.) Complete (so-called two-way) cross-admissibility is not required. (*Ibid.*) Conversely, “the

³⁷ Section 954 provides, in pertinent part: “An accusatory pleading may charge two or more different offenses connected together in their commission, ... under separate counts”

absence of cross-admissibility does not, by itself, demonstrate prejudice. [Citation.]’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 856.) “The state’s interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence. [Citation.]” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.)

An appellate court evaluates claims a trial court abused its discretion by denying a motion for severance “in light of the showings made and the facts known by the trial court at the time of the court’s ruling. [Citations.]” (*People v. Merriman, supra*, 60 Cal.4th at pp. 37-38.) Even if the ruling was correct when made, however, reversal will be required if “the joint trial resulted in such gross unfairness as to amount to a due process violation. [Citation.]” (*People v. Capistrano, supra*, 59 Cal.4th at p. 853.)

Turning to bifurcation, section 1044 gives a trial court discretion to bifurcate proceedings. (*People v. Calderon* (1994) 9 Cal.4th 69, 74-75.)³⁸ With respect to whether bifurcation of gang enhancement allegations generally should be ordered, the California Supreme Court has distinguished between a prior conviction allegation, which relates to the defendant’s status and may have no connection to the charged offense, and a criminal street gang allegation, which “is attached to the charged offense and is, by definition, inextricably intertwined with that offense.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*)). Because of this difference, less need for bifurcation of a gang enhancement allegation usually exists. (*Ibid.*)

This does not mean bifurcation should never be ordered, however. (*Hernandez, supra*, 33 Cal.4th at p. 1049.) “The predicate offenses offered to establish a ‘pattern of criminal gang activity’ [citation] need not be related to the crime, or even the defendant,

³⁸ Section 1044 provides: “It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.”

and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt. [¶] In cases *not* involving the gang enhancement, [the Supreme Court has] held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation — including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like — can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]” (*Id.* at pp. 1049-1050.)

The court went on to say that “[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself — for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged — a court may still deny bifurcation.” (*Hernandez, supra*, 33 Cal.4th at p. 1050.) The court analogized the issue to the severance of charged offenses, in which judicial economy is a factor to be considered. (*Ibid.*) ““When the offenses are joined for trial the defendant's guilt of all the offenses is at issue and the problem of confusing the jury with collateral matters does not arise. The other-crimes evidence does not relate to [an] offense for which the defendant may have escaped punishment. That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the

court that these countervailing considerations are outweighed by a substantial danger of undue prejudice.’ [Citation.]” (*Ibid.*) The court recognized that “[t]he analogy between bifurcation and severance is not perfect” (*ibid.*), but concluded that “the trial court’s discretion to deny bifurcation of a charged gang enhancement is ... broader than its discretion to admit gang evidence when the gang enhancement is not charged. [Citation.]” (*Ibid.*)

The state Supreme Court has observed that “[a]lthough evidence of a defendant’s gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged — and thus should be carefully scrutinized by trial courts — such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect. [Citation.]” (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; see *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193 [applying same principles to gang evidence in general].)

In the present case, the active participation charge was based on other offenses committed at the same time.³⁹ (See *People v. Burnell*, *supra*, 132 Cal.App.4th at p. 946 [noting appellate court’s failure to find any case in which joinder of active participation count with trial of other offenses committed at same time was held to be prejudicial error].) It is true there was no evidence of intergang rivalry or retaliation, as is often seen in cases in which evidence of gang membership or activity is relevant to motive. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 654-655; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1194-1195.) Nevertheless, and contrary to defendants’ assertions, at least some of the gang evidence was relevant to show defendants’ motive for attacking Jones

³⁹ The information charged both defendants with actively participating in a criminal street gang on or about April 20, 2011. The other charged offenses were alleged to have occurred on or about the same date, except the conspiracy charged in count 2 was alleged to have occurred on or about and between January 1, 2011, to April 20, 2011.

and escalating the level of force. Since the evidence was relevant to motive, it was also inferentially relevant to identify Smith, as opposed to Stevenson, as the shooter. (See *People v. Williams* (1988) 44 Cal.3d 883, 911.) The evidence was also probative of whether the homicide was a natural and probable consequence of an unarmed assault, as far as Cook was concerned, and whether defendants were guilty of the charged conspiracy. This being the case, at least some of the evidence would have been admissible even if the gang charge and enhancement allegations had been tried separately. (See, e.g., *People v. Montes* (2014) 58 Cal.4th 809, 859; *People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 20-21.)

That the jury did not find the active participation charge or gang enhancement allegations proven beyond a reasonable doubt does not mean the evidence was irrelevant, the trial court abused its discretion by denying the severance/bifurcation motions in the first instance, or defendants' due process rights were violated as a result of the unified trial. Defendants offered evidence to show neither they nor the offenses were related to the Eastside Crips, and the resolution of conflicting evidence was a matter for the jury. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) The gang evidence — including the predicate offenses, and offense reports and street checks involving defendants — was no more inflammatory than the evidence related to the nongang offenses.

To the extent the evidence may have implied defendants were persons of bad character or criminal disposition (see *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345), the trial court instructed, prior to Harless testifying about his review of offense reports: “During this trial evidence may be introduced for the purpose of showing criminal street gang activities and of criminal acts by gang members other than the crimes for which the defendants in this case are on trial. This evidence, if believed, may not be considered by you to prove that the defendants in this case are persons of bad character or that the defendants have a disposition to commit crimes. It may be considered by you

only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members. For the limited purpose for which you may consider this evidence you must weigh it in the same manner as you do all other evidence in the case.” The admonition was repeated when the trial court instructed the jury, at which time jurors additionally were told they could not consider such evidence for any other purpose. These instructions cured any potential prejudice. (*People v. Homick* (2012) 55 Cal.4th 816, 866-867; see *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168; see also *People v. Jones* (2013) 57 Cal.4th 899, 927 [where jury returns guilty verdict of lesser crime or fails to convict at all on some charges, reviewing courts are “confident” jury differentiated among defendant’s crimes].)⁴⁰

Defendants have failed to establish the trial court abused its discretion by refusing to sever the active participation count and/or bifurcate the gang allegations. Nor have they satisfied the “high constitutional standard” of showing this case “presents one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered [their] trial fundamentally unfair.” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229, 232.)⁴¹

⁴⁰ Defendants’ claims the gang evidence influenced the jury to return a compromise manslaughter verdict, rather than an acquittal, and to decide Smith rather than Stevenson was the actual shooter, are speculative at best.

⁴¹ In his reply brief, Cook chides the Attorney General for ignoring the fact the prosecutor stated to the jury that if it was a gang crime, Cook could be equally liable for shooting the gun. The record clearly shows the prosecutor was discussing the firearm discharge enhancement under section 12022.53, subdivisions (d) and (e)(1). The jury returned no finding on that allegation, and was not asked to make a firearm use finding as to Cook with respect to voluntary manslaughter. The Attorney General had no reason to discuss the prosecutor’s statement.

For the first time in his reply brief, Smith contends the gang expert’s use of out-of-court statements to support his claim of gang involvement ran afoul of the confrontation

II

SUFFICIENCY OF THE EVIDENCE

Cook challenges the sufficiency of the evidence to sustain his manslaughter conviction, while Smith claims his conspiracy conviction must be reversed for lack of sufficient evidence of an overt act and notice of the alleged offense. We find no cause for reversal as to either defendant.

A. General Legal Principles

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is “reasonable, credible, and of solid value.” (*People v. Johnson, supra*, at p. 578.) An appellate court must “presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96

clause. (See generally *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*)). Cook joins in this claim, and both note the issue is currently on review before the California Supreme Court in *People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted May 14, 2014, S216681. Neither defendant raised the *Crawford* issue in his opening brief; although Smith contended the trial court erred by allowing the introduction of gang evidence to show motive, he did so only in the context of his severance/bifurcation claim. While the issue was briefly mentioned in the prosecutor’s and Cook’s pleadings in the trial court, there was no specific argument or ruling on the subject. It would be unfair to the Attorney General for us to consider the issue under the circumstances, and we decline to do so. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 990; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11; *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2; *People v. Jackson* (1981) 121 Cal.App.3d 862, 873.)

Cal.App.3d 353, 367). An appellate court can only reject evidence accepted by the trier of fact when the evidence is inherently improbable and impossible of belief. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) “Where the circumstances support the trier of fact’s finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant’s innocence. [Citations.]” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

B. Cook’s Manslaughter Conviction

1. Background

Cook was convicted of voluntary manslaughter as an aider and abettor. The prosecution’s theory was that defendants beat Jones because he had been stealing drugs from Smith, then, when Jones tried to leave, Smith shot him.

Jurors were instructed on aiding and abetting and the natural and probable consequences doctrine in pertinent part as follows:

“A person aids and abets the commission of a crime when he or she, one, with knowledge of the unlawful purpose of the perpetrator and, two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime and, three, by act or advice aids, promotes, encourages, or instigates the commission of the crime. [¶] ... [¶]

“One who aids and abets another in the commission of a crime is not only guilty of that crime but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.

“In order to find Defendant Cook guilty of the crime of murder or manslaughter under this theory as charged in Count 1, you must be satisfied beyond a reasonable doubt that, one, the crime of simple assault was committed; two, that Defendant Cook aided and abetted that crime; three, that Defendant Smith committed the crime of murder or manslaughter; and, four, the crime of murder or manslaughter was a natural and probable consequence of the commission of the crime of simple assault.

“In determining whether a consequence is natural and probable, you must apply an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident.

“A natural consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. Probable means likely to happen.”⁴²

Jurors were then instructed on misdemeanor assault.

In his opening argument to the jury, the prosecutor first focused on Smith’s liability with respect to the homicide. Turning to Cook, he explained the difference between a perpetrator and an aider and abettor by giving an example in which a man decided to rob a bank and a woman agreed to drive the car. In part, he then stated:

“Aiding and abetting. You know a person intends to commit a crime. The guy intends to rob a bank. The girl helps the guy rob the bank by her conduct. She drives him to the bank so he can commit the robbery. The aider and abettor is guilty of that crime. Now, this is what’s sometimes called direct aiding and abetting. You directly help somebody commit the target crime.

“There’s an extension that’s sometimes been called indirect aiding and abetting.... And it’s called a natural and probable consequence doctrine. So the aider and abettor can be responsible for the crime that they actually help commit, and they can also be guilty of any crime committed by a principal which is a natural and probable consequence of the crime originally committed....

“In the aiding and abetting theory, the natural and probable consequence, the defendant is guilty of a target crime. During that crime a co-participant committed a nontarget crime. The commission of a nontarget crime was a natural and probable consequence of the target crime. [¶] ... [¶]

“Under the natural and probable consequence theory, the aider and abettor can be guilty of the bank robbery, the female, for driving the car, and she can be guilty of any other crime which is a natural and probable

⁴² CALJIC instructions were used at trial instead of CALCRIM instructions.

consequence. Under the right facts and circumstances, she can be just as guilty for the other guy shooting somebody in the bank that she never knew about if that shooting was a natural and probable consequence of the bank robbery.... [¶] ... [¶]

“So Smith and Cook are guilty of an assault [on Jones]. During that assault Smith committed a manslaughter or murder. The murder or the manslaughter was a natural and probable consequence of the assault.... The natural is defined as nothing unusual happens, basically. It’s not an unexpected result. It could happen. It’s not outside the realm of possibility. Expected result. Probable means that it’s likely.

“So the murder or manslaughter was a natural and probable consequence of the assault. And Cook, Cook, who did not fire the weapon and who participated in the assault, ... could be equally guilty of that murder based on his participation in the assault. If Cook hadn’t participated in the assault then he would not be liable at all for the murder. The question is whether or not the murder or manslaughter would be the natural and probable consequence of the assault.

“Going a little further, in this particular case a natural and probable consequence is one that a gang member in Mr. Cook’s position would know or should know is likely to occur if nothing unusual happens.”

Smith’s attorney argued the theory that Stevenson was the shooter. Cook’s attorney argued the prosecutor’s natural and probable consequences theory depended on Cook being a gang member, and he attacked Harless’s opinions. In rebuttal, the prosecutor argued in part:

“Aiding and abetting — direct aiding and abetting, I called it — doesn’t apply. I don’t believe there’s any evidence that shows that strictly straight-up direct aiding and abetting applies to Mr. Cook. There’s no indication, when Smith and Cook go outside that room, that Cook knows that Smith is going to kill [Jones].

“Indirect aiding and abetting. The natural and probable consequence doctrine. In this sort of a situation involving gang members, at a gang location, selling narcotics, they identify a person they believe to be a thief, they go out to assault the thief for the reasons that Officer Harless testified to. And when that assault is ineffective, there needs to be more force introduced into the equation to get the respect back and get the fear that they need in order to continue doing business. That escalation of violence

goes up to and including shootings. That’s what he testified to. Straight, normal, natural, and probable consequence doctrine.”

2. Analysis

In contending his manslaughter conviction must be reversed, Cook points to the prosecution’s theory of the case and the prosecutor’s rebuttal argument, *ante*, and claims that “under the prosecution’s own language in his argument to the jury, [Cook’s] conviction for voluntary manslaughter cannot be sustained.” In other words, because the jury acquitted both defendants of all gang-related offenses and enhancements, the evidence was insufficient to support a finding Cook was vicariously liable for Smith’s act of homicide, because the prosecution argued it could only be imputed to Cook if it were based on a gang crime.⁴³

Cook’s argument proceeds from a faulty premise. “It is elementary ... that the prosecutor’s argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1126; cf. *People v. Alexander* (2010) 49 Cal.4th 846, 921; *People v. Wickersham* (1982) 32 Cal.3d 307, 324, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.)⁴⁴ Thus, where, as here, there is no issue of the prosecutor making a factual

⁴³ Cook moved for a new trial in part on the same ground. After argument, the court found sufficient evidence and denied the motion.

In his briefs, Cook quotes the following statement by the prosecutor as showing the prosecution was “clear on the connection necessary for the application of the natural and probable consequences doctrine”: “See, if you find that the crime was gang-related under the Subsection (e) (1) then you can find Mr. Cook liable for Mr. Smith shooting and killing [Jones]. But it has to be a gang crime. [¶] If it’s a gang crime and all the other elements are met, Mr. Cook can be equally liable for shooting the gun.” Cook has misread the record. As we previously pointed out (fn. 41, *ante*), the prosecutor was discussing the firearm enhancement alleged under section 12022.53, subdivisions (d) and (e)(1). The record clearly shows the quoted comments were *not* made in the context of the substantive offense itself. Accordingly, they do not assist Cook.

⁴⁴ Indeed, jurors in the present case were instructed they could determine the facts only from the evidence presented at trial, and that statements of the attorneys — including their closing arguments — were not evidence.

election in argument that obviates the need for a unanimity instruction (see *People v. Brown* (2015) 240 Cal.App.4th 469, 472, petn. for review pending, petn. filed Oct. 23, 2015), we can uphold a conviction on any factual theory supported by the evidence: Reversal for insufficient evidence “is unwarranted unless it appears ‘that *upon no hypothesis whatever* is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331, italics added.) Accordingly, we examine the record to determine whether there is substantial evidence to support Cook’s voluntary manslaughter conviction without regard to the prosecutor’s theory.

“[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.” (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

The record contains ample evidence Cook and Smith both assaulted Jones, but no evidence Cook realized or intended Jones would be killed or directly aided and abetted Smith’s killing of him. As our state Supreme Court has explained, however:

““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.” [Citation.] ‘Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.’ [Citation.]

“A nontarget offense is a “natural and probable consequence” of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability “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.] Reasonable foreseeability ‘is a factual issue to be

resolved by the jury.’ [Citation.]” (*People v. Chiu* (2014) 59 Cal.4th 155, 161-162.)

In light of the foregoing, “when a particular aiding and abetting case triggers application of the ‘natural and probable consequences’ doctrine, ... the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant’s confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. & italics omitted.)

Had the jury found the killing was gang related, the evidence clearly would be sufficient to sustain Cook’s conviction on a natural and probable consequence theory. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913, 925; *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1452-1453; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376.) The absence of a beyond-a-reasonable-doubt finding of a gang relationship does not, however, render the evidence insufficient.⁴⁵

⁴⁵ Cook spends a good deal of time explicating the natural and probable consequences doctrine as originally construed and setting forth policy considerations he claims dictate a narrow application of the theory. Tellingly, he omits the fact the California Supreme Court has rejected most, if not all, of his criticisms of the doctrine. (See, e.g., *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 299-300 [simple assault can serve as target offense for murder conviction]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 184-185 [rejecting claim application of doctrine in capital case violates due process by permitting jury to convict defendant without deciding if he had the otherwise requisite intent and by authorizing death sentence based on vicarious negligence theory of liability]; *People v. Richardson* (2008) 43 Cal.4th 959, 1021-1022 [rejecting claims natural and probable consequence doctrine unconstitutionally imposes criminal liability based on negligence standard and unconstitutionally presumes malice on part of aider and

The evidence was uncontradicted defendants were at least former members of the Eastside Crips, and jurors reasonably could infer they had been friends for a long time. Jurors also reasonably could infer Smith — even if not an active gang member or acting for the benefit of a gang — would not want his drugs stolen, and would want to send a message to the thief, and to any other would-be thieves, that such action would not be tolerated. Jurors reasonably could infer Cook — even if not involved with Smith in the drug operation — was aware of allegations Jones was stealing Smith’s product, and would back up his longtime friend in rectifying a situation that could be vital to that friend’s livelihood. Thus, jurors reasonably could infer defendants would aid each other in a violent confrontation; tempers were running high; and escalating force was foreseeable and likely. In addition, a reasonable inference could be drawn that Cook knew Smith had a gun in his pocket. There was evidence drugs and firearms commonly were found together, Smith was not secretive about the fact he had a firearm, and Cook was present in a small motel room when Smith retrieved something from the place he was known to keep his weapon. There was also testimony Cook was standing right next to Smith when Smith pulled the gun and fired.

The California Supreme Court has stated that “[m]urder ... is *not* the ‘natural and probable consequence’ of ‘trivial’ activities. To trigger application of the ‘natural and probable consequences’ doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed.” (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 269.) That standard was met here. Considering all the evidence and inferences reasonably drawn therefrom, sufficient evidence supports Cook’s voluntary manslaughter conviction. This is so even though jurors did not find the gang charge and allegations proven beyond a reasonable doubt.

abettor].) We are not free to ignore these holdings, or dispense with or dilute a doctrine our state high court has endorsed. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

C. Smith's Conspiracy Conviction

1. Background

Count 2 of the information read as follows: "ON OR ABOUT AND BETWEEN JANUARY 1, 2011 TO APRIL 20, 2011, JAMES EDWARD SMITH, AND ADAM COOK, DID WILLFULLY AND UNLAWFULLY CONSPIRE TOGETHER OR WITH ANOTHER PERSON OR PERSONS WHOSE IDENTITY IS UNKNOWN, TO COMMIT THE CRIME(S) H&S 11352, TRANSPORT/SELL NARCOTIC CONTROLLED SUBSTANCE, FELONY(S), IN VIOLATION OF PENAL CODE SECTION 182(A) (1), A FELONY. THAT PURSUANT TO AND FOR THE PURPOSE OF CARRYING OUT THE OBJECTS OR PURPOSES OF THE AFORESAID CONSPIRACY, THE SAID CONSPIRATORS COMMITTED THE FOLLOWING OVERT ACT OR ACTS: ***OVERT ACT NO. 1: ON APRIL 20, 2011, JAMES SMITH WAS PRESENT AT THE ROYAL[E] PALMS MOTEL ON UNION AVENUE."

In pertinent part, jurors were instructed:

"A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of sale of controlled substance, in violation of Health & Safety Code Section 11352, and with the further specific intent to commit that crime followed by an overt act committed in this state by one of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, in violation of Penal Code Section 182 Subdivision (a) (1).

"In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent there must be of [*sic*] the commission of at least one of the acts alleged in the Information to be an overt act and that the act found to have been committed was an overt act....

"The term 'overt act' means any step taken or act committed by one of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.

“To be an overt act the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or an unlawful act. [¶] ... [¶]

“Before you may return a guilty verdict as to any defendant of the crime of the conspiracy you must unanimously agree and find beyond a reasonable doubt that, one, there was a conspiracy to commit the crime of sale of controlled substance and, two, a defendant willfully, intentionally, and knowingly joined with any other or others in the alleged conspiracy. You must also unanimously agree and find beyond a reasonable doubt that an overt act was committed by one of the conspirators. [¶] ... [¶]

“In this case the defendants are charged with a conspiracy to commit the following public crimes: sales of a controlled substance, to wit: cocaine, in violation of Health & Safety Code Section 11352.

“It is alleged that the following acts were committed in this state by one or more of the defendants and were overt acts and committed for the purpose of furthering the object of the conspiracy: On April 20, 2011, James Smith was present at the Royale Palms motel on Union Avenue.

“The defendants are also charged with the commission of the following crimes: murder, in violation of Penal Code Section 187 Subdivision (a); illegal possession of a firearm, in violation of Penal Code Section 12021 Subdivision (a) (1); illegal possession of ammunition, in violation of Penal Code Section 12316 Subdivision (a) (1); active participation in a criminal street gang, in violation of Penal Code Section 186.22 Subdivision (a).”

During deliberations, jurors sent out a note asking whether the verdict was contingent on all of the “counts” or just the violation of Health and Safety Code section 11352. With the assent of counsel, the court responded that defendants were charged with conspiracy to commit the crime of sale of a controlled substance in violation of Health and Safety Code section 11352, and that the other listed crimes were not to be considered as part of the conspiracy charge. The jury subsequently found Smith guilty as charged in count 2, and found true the overt act as alleged in that count.

2. Analysis

Smith now contends his conspiracy conviction must be reversed because the only overt act alleged in the information and found by the jury was not an act at all.⁴⁶

In California, “[a] conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act “by one or more of the parties to such agreement” in furtherance of the conspiracy.’ [Citation.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1131; see §§ 182, 184.) The overt act must further the object of the conspiracy and at least start to carry the conspiracy into effect (*People v. Olson* (1965) 232 Cal.App.2d 480, 490), but it need not amount to a criminal attempt (*People v. George* (1968) 257 Cal.App.2d 805, 808) or itself be a criminal act (*People v. Saugstad* (1962) 203 Cal.App.2d 536, 549), and it may merely be part of the preliminary arrangement for commission of the ultimate offense (*ibid.*).

“One purpose of the overt act requirement is to provide a *locus penitentiae* — an opportunity to repent — so that any of the conspirators may reconsider and abandon the agreement before taking steps to further it, and thereby avoid punishment for the conspiracy. [Citations.] Another purpose is ‘to show that an indictable conspiracy

⁴⁶ Smith also claims the allegation of mere presence provided insufficient notice of a criminal act, as required under the due process clause. Other than a one-sentence statement of his claim and citation to two notice/due process cases that are not specific to the issue (*Lankford v. Idaho* (1991) 500 U.S. 110; *In re Oliver* (1948) 333 U.S. 257), he does not expand on the claim. Accordingly, we decline to address it. (See *People v. Hardy* (1992) 2 Cal.4th 86, 150.) We note, however, that Smith neither demurred nor brought a motion in arrest of judgment (§§ 1004, 1185; see § 1012; *People v. Holt* (1997) 15 Cal.4th 619, 672; but see *People v. Paul* (1978) 78 Cal.App.3d 32, 42), and nothing in the record supports the notion Smith was somehow deprived of a meaningful opportunity to defend against the conspiracy charge (see *People v. Seaton* (2001) 26 Cal.4th 598, 640-641 [criminal defendant has constitutional right to receive notice of charges adequate to give meaningful opportunity to defend against them; he or she must have reasonable opportunity to prepare and present defense and not be taken by surprise by evidence]).

exists' because 'evil thoughts alone cannot constitute a criminal offense.' [Citations.]" (*People v. Russo, supra*, 25 Cal.4th at p. 1131.) "As was said by the Supreme Court of the United States, 'The function of the overt act in a conspiracy prosecution is simply to manifest "that the conspiracy is at work," [citation], and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.' [Citation.]" (*People v. Saugstad, supra*, 203 Cal.App.2d at p. 550.)

The California Supreme Court has recognized no one definition of "overt act" may be adequate for all conspiracy cases. (*People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8.) The court found it "sufficient to say that 'an overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.' [Citations.]" (*Ibid.*) "Outward" has in turn been held to "refer[] to any tangible acts that manifest a criminal intention. If the conspirators partake, among themselves, in arrangements, discussions, and preparation in regard to and for the criminal act, then they have ventured beyond a mere criminal intention and forgone the opportunity afforded them by the overt act requirement: 'to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 245.)

Smith asserts that "[a]n 'act' connotes the doing of something, as opposed to a mere state of being," and "[a]n 'overt act' is an act done openly and publicly." The state of being present, he argues, is not an act.

Smith may be correct under certain circumstances. In *People v. Northum* (1940) 41 Cal.App.2d 284, on which he relies, the appellate court reversed convictions of conspiracy to commit the crime of disturbing the peace, which resulted when a large group of members of a particular religious organization went into the residential districts of Hanford and, singly or in groups of two, went door to door preaching their beliefs. (*Id.* at pp. 285-287, 290.) The court stated: "[I]t is difficult to see how a criminal conspiracy can be said to have existed when the carrying out of the agreed purpose has involved the

doing of no act which is, in itself, unlawful. If, as conceded, the acts of the individual appellants were not in themselves unlawful they can hardly be held to have been guilty of a conspiracy in planning and agreeing upon the performance of those acts.” (*Id.* at pp. 287-288.) The court added: “In the instant case, if the appellants were acting within their rights in their individual conduct and if the individual members of this organization were not disturbing the peace by pursuing their activities, there is no evidence which would support the conspiracy charge merely because, by arrangement, a larger number of persons were, on this occasion, engaged in these activities. There is no evidence of the use of profane, indecent or abusive remarks directed to other persons or of any acts or statements which, in themselves, would be likely to provoke violence or a disturbance of the peace. While a large number of the members of this organization engaged in these activities in this community on that day, we find no evidence that they congregated in one place or engaged in any demonstration which would naturally be expected to lead to a disturbance.” (*Id.* at p. 289.)

In the case before us, by contrast, the evidence was overwhelming that Smith ran his drug operation out of room 220 of the Royale Palms Motel. Although there was testimony he “stayed” or “lived” in that room, the evidence was clear that as of the date of the shooting, Smith had a residence at 529 Villa where he also lived, and to which he withdrew after the shooting. Under the circumstances, Smith’s presence in room 220 not only “assured the accomplishment of the object of the conspiracy” (*People v. Sullivan* (1952) 113 Cal.App.2d 510, 524), it appears to have been necessary for that purpose.

There is no doubt the overt act allegation could have been better pleaded so as to avoid this whole issue. Nonetheless, “[a]n overt act need amount to no more than an act showing that the conspiracy has gone beyond the state of a mere meeting of the minds upon the attainment of an unlawful object and that action between conspirators as such has begun. [Citation.]” (*People v. Sullivan, supra*, 113 Cal.App.2d at p. 524.) This can be established by means of circumstantial evidence. (*People v. Herrera* (2000) 83

Cal.App.4th 46, 64.) Given that Smith did not only reside at the motel, but ran his drug operation from the room there, jurors reasonably could have concluded his presence there constituted an overt act as such an act was defined for them by the jury instructions.

III

FAILURE TO INSTRUCT ON INVOLUNTARY MANSLAUGHTER

With respect to count 1, the trial court instructed the jury on first degree premeditated murder, second degree express- and implied-malice murder, and voluntary manslaughter based on sudden quarrel or heat of passion. As to Cook, as we have already described, instructions on aiding and abetting and the natural and probable consequences doctrine, with a target crime of misdemeanor assault, were also given. Jurors were told the aider and abettor's guilt could be greater or less than that of the actual perpetrator, depending on the aider and abettor's mental state. Although the instructional conference was not reported, the court memorialized for the record that it believed it had a sua sponte duty to include instructions on the lesser included offense of voluntary manslaughter, but found no evidence to support an instruction on involuntary manslaughter. No one voiced disagreement with the court's analysis.

Cook contends the trial court committed reversible error by failing to instruct the jury, sua sponte, on involuntary manslaughter as a lesser included offense. Alternatively, he says defense counsel's failure to request such an instruction constituted ineffective assistance of counsel. We conclude the jury was correctly instructed.

The rules applicable to a trial court's duty to instruct on necessarily included offenses apply to cases tried on the natural and probable consequences theory. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578.) “It is well settled that the trial court is obligated to instruct on necessarily included offenses — even without a request — when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.’ [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 219.) This rule ““prevents either

party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither ‘harsher [n]or more lenient than the evidence merits.’” [Citation.] Because instructing on lesser included offenses serves to increase the accuracy of verdicts, the requirement to do so applies “even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given.” [Citation.] [Citation.]” (*People v. Banks* (2014) 59 Cal.4th 1113, 1159-1160, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)⁴⁷

On the other hand, “the trial court need not instruct on a lesser included offense whenever *any* evidence, no matter how weak, is presented to support an instruction, but only when the evidence is substantial enough to merit consideration by the jury. [Citation.]” (*People v. Barton, supra*, 12 Cal.4th at p. 195, fn. 4; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 587 [failure to instruct on involuntary manslaughter not error].) “‘Substantial evidence’ in this context is “‘evidence from which a jury composed of reasonable [persons] could ... conclude[.]’” that the lesser offense, but not the greater, was committed. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “[A] speculative inference that depends on the jury ignoring substantial contrary evidence is not enough to require the court to instruct on a lesser included offense. [Citations.]” (*People v. Harris* (2008) 43 Cal.4th 1269, 1298, fn. 10; accord, *People v. Gray, supra*, 37 Cal.4th at p. 219.)

“Murder is ‘the unlawful killing of a human being ... with malice aforethought.’ [Citation.] ‘[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.’ [Citation.] It is implied when the

⁴⁷ Defendants’ accession to the trial court’s failure to instruct on involuntary manslaughter was not invited error, as counsel did not express a deliberate tactical purpose for merely submitting the matter. (*People v. Wilson* (2008) 43 Cal.4th 1, 16.)

defendant engages in conduct dangerous to human life, “‘knows that his conduct endangers the life of another and ... acts with a conscious disregard for life.’” [Citations.]

“Both voluntary and involuntary manslaughter are lesser included offenses of murder. [Citation.]^[48] When a homicide, committed with malice, is accomplished in the heat of passion or under the good faith but unreasonable belief that deadly force is required to defend oneself from imminent harm, the malice element is ‘negated’ or, as some have described, ‘mitigated’; and the resulting crime is voluntary manslaughter, a lesser included offense of murder. [Citations.]

“Involuntary manslaughter, in contrast, [is the] unlawful killing of a human being without malice. (§ 192.) It is statutorily defined as a killing occurring during the commission of ‘an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, [accomplished] in an unlawful manner, or without due caution and circumspection.’ (§ 192, subd. (b).) Although the statutory language appears to exclude killings committed in the course of a felony, the Supreme Court has interpreted section 192 broadly to encompass an unintentional killing in the course of a noninherently dangerous felony committed without due caution or circumspection. [Citations.]” (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30-31; see, e.g., *People v. Lewis* (2001) 25 Cal.4th 610, 645.)

We review independently whether instructions on involuntary manslaughter were required in the present case. (*People v. Banks, supra*, 59 Cal.4th at p. 1160.)

“Involuntary manslaughter is ... inherently an unintentional killing. [Citations.]” (*People v. Broussard* (1977) 76 Cal.App.3d 193, 197.) Whether Smith intended to kill Jones or not, his act of shooting Jones in the back clearly was intentional. No evidence suggests otherwise.

⁴⁸ It has been held that while both forms of manslaughter are lesser included offenses of murder, involuntary manslaughter is not a necessarily included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 783-785.) Whether this remains true after the California Supreme Court’s decisions in *People v. Blakeley* (2000) 23 Cal.4th 82, 88-91 and *People v. Lasko* (2000) 23 Cal.4th 101, 108-110, holding that voluntary manslaughter requires *either* an intent to kill (as the law required when *Orr* was decided) *or* conscious disregard for life, need not concern us here.

“Through statutory definition and judicial development, there are three types of acts that can underlie commission of involuntary manslaughter: a misdemeanor, a lawful act, or a noninherently dangerous felony. [Citation.]” (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006.) “[F]or all three types of predicate acts the required mens rea is criminal negligence.” (*Ibid.*) Criminal negligence is “unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences. [Citation.]” (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.) By contrast, “conscious disregard for life” equates to implied malice, a more culpable mental state than criminal negligence. (See *People v. Brito* (1991) 232 Cal.App.3d 316, 321 & fn. 4.) “If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence.... [W]here the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice. [Citation.]” (*People v. Evers, supra*, 10 Cal.App.4th at p. 596.)

Because the evidence conclusively established an intentional shooting with a mens rea greater than criminal negligence, Smith was not entitled to instructions on involuntary manslaughter. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145; see *People v. Cook* (2006) 39 Cal.4th 566, 596-597; *People v. Smith* (2005) 37 Cal.4th 733, 741.) Rather, he could not be convicted of any crime less than voluntary manslaughter. (See *People v. Bryant* (2013) 56 Cal.4th 959, 968.)⁴⁹

An aider and abettor’s guilt “is based on a combination of the direct perpetrator’s acts and the aider and abettor’s own acts and own mental state.” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Where direct aiding and abetting is concerned, an aider and abettor can be more or less culpable than the direct perpetrator, if the aider and abettor has a greater or less culpable state of mind. (*Id.* at pp. 1116-1117, 1122; *People v.*

⁴⁹ Questions asked by the jury during deliberations, suggesting they struggled with the question whether Smith was the shooter, “cannot detract from the verdicts the jury ultimately rendered” (*People v. Horning* (2004) 34 Cal.4th 871, 906.)

Samaniego (2009) 172 Cal.App.4th 1148, 1164.) However, as Division 2 of the Second District Court of Appeal — the court that wrote the *Samaniego* opinion — explained in *People v. Canizalez* (2011) 197 Cal.App.4th 832, in discussing jury instructions on aiding and abetting that told jurors an aider and abettor was “equally guilty” as the direct perpetrator:

“Aider and abettor culpability under the natural and probable consequences doctrine for a nontarget, or unintended, offense committed in the course of committing a target offense has a different theoretical underpinning than aiding and abetting a target crime. Aider and abettor culpability for the target offense is based upon the intent of the aider and abettor to assist the direct perpetrator commit the target offense. By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be ‘equally guilty’ with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime.” (*Id.* at p. 852; see *People v. McCoy*, *supra*, 25 Cal.4th at p. 1117 [if person aids and abets only intended assault, but murder results, person may be guilty of that murder, even if unintended, if it is natural and probable consequence of intended assault].)

Since Smith could not have been convicted of only involuntary manslaughter and, as we have determined, *ante*, voluntary manslaughter was reasonably foreseeable and so a natural and probable consequence of the target assault/battery, Cook was not entitled to instructions on involuntary manslaughter.⁵⁰ Because Cook was not entitled to

⁵⁰ *People v. Woods*, *supra*, 8 Cal.App.4th 1570 suggests the aider and abettor is entitled to lesser included offense instructions “[i]f the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense *committed by the perpetrator* was such a consequence Otherwise, ... the jury would be given an unwarranted, all-or-nothing choice concerning

instructions on involuntary manslaughter, it necessarily follows defense counsel was not ineffective for failing to request them. Additionally, such instructions would have been contrary to counsel's reasonable tactical strategy, viz. that Cook was not involved. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

IV

NEW TRIAL MOTION

Cook contends the trial court erred by denying his motion for a new trial. The motion was based on discovery of new evidence, specifically a video from a market located a short distance from the scene of the crime that showed Cook outside the store shortly after the shooting, that allegedly was not disclosed by the prosecution in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Smith joins in the issue, arguing that to the extent the video removed Cook from the crime scene, it cast doubt on Stevenson's testimony and undermined Smith's conviction. We conclude the new trial motion was properly denied.

A. Background

Prior to trial, defendants requested disclosure of physical evidence, including videotapes and recordings, seized or obtained in connection with the investigation of this case. After conviction, Cook moved for a new trial based on newly discovered evidence and on the ground the prosecution failed to disclose evidence favorable to the defense in violation of *Brady*. He represented that he had claimed all along that he was not present at the Royale Palms Motel when the shooting occurred, and that the newly discovered

aider and abettor liability.” (*Id.* at p. 1593, italics added.) Assuming this is a correct statement of the law under certain circumstances, here the evidence would *not* support a finding Smith committed involuntary manslaughter. Moreover, jurors were not given an all-or-nothing choice as to Cook's liability. Either the homicide was reasonably foreseeable, in which case it could have been no less than voluntary manslaughter, or the jury would have acquitted Cook.

evidence — video surveillance from a market located approximately a quarter mile north of the motel — supported this claim. A copy of the video was not provided to the defense until the day of the verdict, and, for technological reasons, the video was not viewable until even later. Smith joined in the motion, arguing the video showed Cook directly in front of the store at the same time the first responding officer testified he received the shooting call from dispatch. The People opposed the motion, arguing in part seizure of the video was documented in a police report that was provided to defense counsel, and so the evidence was available to any reasonably diligent trial attorney; the evidence did not render a more favorable result on retrial reasonably probable; and the evidence was neither favorable nor material under *Brady*.

An evidentiary hearing was held on the motion. The video evidence consisted of three disks from the market at 349 Union Avenue, and a fourth disk that contained the program necessary to allow viewing of the disks.

Hale testified that he was the lead detective in this case. On April 27, 2011, he met Crime Scene Technician Rodriguez at the Quick Shop Mini-Mart at 349 Union Avenue, to retrieve video from the store. Hale did so because, according to witness statements, some of the people involved in the case had left the area on foot, and a lot of the people involved regularly traveled by foot up and down the Union Avenue corridor. Thus, Hale wanted to see what could be found on video. In addition, Hale had interviewed Cook on April 22, 2011. Cook indicated he had been in the area of the store.

Hale was present when Rodriguez downloaded the surveillance footage. Hale viewed the live video feed and compared the time on the monitor to his watch. The video was accurate with regard to time. Hale instructed Rodriguez to download the footage from April 20, 2011, from 2100 hours to 2330 hours. This gave Hale an hour or so before and after the initial call to police, which he felt was enough time to capture anything relevant. Hale never viewed the video, however; he did not believe it was necessary, based on statements from people he interviewed, including Cook's girlfriend

who lived around the corner from the store. Cook had told Hale he had gone to 529 Villa and watched television. Based on his statements and the statements of everybody else he interviewed, including Smith and Cook's girlfriend, Hale did not believe anything Cook told him concerning time, and did not want to invest the amount of time it would have taken to watch the video.

On the day he testified with respect to the new trial motion, Hale paced off the distance from the covered awning located on the northwest portion of the Royale Palms to the market at 4th Street and Union Avenue. The distance was 260 yards. Hale walked north from the awning along the sidewalk to the front of the bar just north of the motel, then crossed Union to the west sidewalk, and continued walking northbound to the market property, where he veered northwest toward the front door. He then walked to about the corner of the store. Hale did not keep track of the time it took to pace off the distance, nor did he measure the distance from the shooting's location to the motel awning. The quickest path from the shooting's location would have been via the stairwell in the northeast corner of the motel, next to where the shooting occurred. Someone could go down that stairwell, then come out into the parking lot on the north side of the motel. As for the market, the entrance faced east. There was one exit on the north side of the parking lot, and two on the east side of the property that exited onto Union Avenue. One of these was north of the gas pump island by the store, and the other was south of the gas pumps.

Rodriguez testified at the hearing that on April 27, 2011, he was a lab technician in the Bakersfield Police Department Crime Scene Unit. That day, he responded to the market, at Hale's request, to retrieve video surveillance from 2100 to 2345 hours on April 20, 2011. Rodriguez downloaded the surveillance footage onto either a universal serial bus (USB) thumb drive or an external hard drive. He then returned to his workstation at the police station, copied the data onto a compact disk (CD) or digital video disk (DVD), and booked it into Property. Once the CD or DVD was made, the

thumb drive or hard drive would eventually have been erased so that future video surveillance could be downloaded onto it.

Rodriguez looked at the video only briefly while downloading it in the store. He checked to make sure he got the time frame he wanted and that it was playing, but he did not go through and actually view the video for any kind of evidence. He did not check intermittently to make sure it was still downloading, or do anything to confirm he actually had data from 2100 to 2345 hours.

The disks before the court as exhibits were the disks onto which he placed the surveillance footage. The three disks had three separate periods of time. Disk 1-A was labeled "2100 to 2130." Rodriguez did not play the entire disk to make sure it covered that period of time, but played it briefly to make sure it was actually playing video. He then removed it and packaged it.

Rodriguez labeled disk 1-A as concluding at 2130 hours. Disk 1-B was labeled as covering 2135 to 2155 hours. Without looking at the video, Rodriguez could not tell if there was a five-minute gap with no data. He labeled disk 1-C as containing 2215 to 2240 hours. He did not know how long the disk actually ran. When Rodriguez downloaded the data, he downloaded it from 2100 to 2345 hours. Yet the disks showed there was nothing between 2200 and 2215 hours. Rodriguez had no explanation for how that time period came to not be downloaded. He "suppose[d]" it was possible there could have been other disks that should have been a part of the download.

Markings Rodriguez placed on the manila property room envelope into which he placed the disks showed he sealed the envelope on July 11, 2011. He did not keep a record as to the date he actually took the hard drive or thumb drive and downloaded the data onto the disks. Between April 27, 2011, and July 11, 2011, the hard drive or thumb drive typically would have stayed within the crime scene unit. Only crime scene unit personnel, and no other police personnel, would have had access to it.

Rodriguez had checked the hard drive. The data from the download in this case no longer existed. He did not know when it was erased. He had no records to show how many disks he originally placed in the manila envelope. Although the evidence label contained a space to note the number of pieces, it was blank. The item was listed on police reports for this case as “Quick Mart surveillance video.”

The manila envelope also bore the initials of Diana Kadel, an employee of the district attorney’s office, and the date October 11, 2011. This indicated someone had opened the envelope between July 11, 2011, when Rodriguez sealed it, and October 11, 2011, when Kadel sealed it. Rodriguez explained that once the police department handed the envelope to Kadel, they did not know who did something with it. The three disks bore in purple ink the initials “DK” — likely Kadel — and, in the same ink color “1 of 3,” “2 of 3,” and “3 of 3.” Rodriguez did not know whether Kadel made copies of the disks when they were checked out to the district attorney’s office. Once the district attorney’s office checked out the evidence, how long they kept it was up to them. The disks bore, in a different shade of purple, “AJ” and the date October 18, 2012. Rodriguez did not know who AJ was.

A portion of the video was played in court. The format was multiscreen view, with as many as eight views being projected at any one time. Some of the views included running clocks. When Rodriguez went to the market to retrieve the video, he verified that what was being shown on the display inside the store was comparable to what was going on outside. He also looked for a time stamp. Had it been inaccurate, he would have noted it in his report. Typically, he would check the accuracy with his wrist watch or, if someone with him had a cell phone, that phone. The time stamp on the video could have been as much as three minutes off and he would have considered it to be “real time.” He did not recall how close to real time this video was.

Stanley Mosley, a self-employed private investigator who previously was a detective with the Bakersfield Police Department for 17 years, took measurements from

the motel to the market using a 150-yard tape measure. He started at the southwest portion of the motel, went north on the sidewalk on Union Avenue to the driveway of a gas station a little bit south of 4th Street, then across Union to the front door of the market. The distance was 375 yards.

Mosley noted the location of the market's surveillance cameras. Two that were attached to the building itself faced Union Avenue. One of the cameras under the awning over the gas pumps faced south by southeast toward Union, while the other faced north by northwest toward the store. Mosley also noted the location of the gas covers (the covers of the underground tanks where fuel is delivered); they were just north of the gas pumps, with the market to their west.

Mosley reviewed disk 1-C of the surveillance video, which he found to be of very poor quality. Even so, he was able to discern which direction people and cars were traveling. A portion of the video was played in court. The video showed one view from outside the store; the rest were inside views. A person, whom the parties stipulated was Cook, walked into the exterior view and into the store. He subsequently exited the store. The person first appeared when the camera time stamp read April 20, 2011, 22:25:46. When the person first walked past the camera and entered the front of the store, the view was from one of the surveillance cameras on the store building.

Although the prosecutor did not call any witnesses at the hearing, he offered as evidence the declarations appended to his response to the motion. One was a sworn declaration from the supervisor of the Bakersfield Police Department's Communications Center, which was responsible for dispatching calls for service pursuant to 911 calls received by the police department. According to the declaration, 911 call logs for this case showed the first call for service was received at 2219 hours on April 20, 2011, and Officer Grogan was dispatched to the location of the shooting at 2225 hours that same date. The other declaration — also sworn — was from the owner of the market. The owner, who was familiar with the physical layout of the store and location of its

surveillance cameras, reviewed a still photograph taken from a surveillance camera. The person was in the middle of the lot, by the gas tank covers. He was facing north, toward 4th Street.

Argument on the new trial motion was extensive. In pertinent part, counsel for Cook represented, as an officer of the court, that he had reviewed the entirety of the three video disks, and that there were gaps of 10 to 15 minutes in several places so that there was no video for those time periods. Because of those gaps, and the fact the hard drive or thumb drive had been erased so that the time periods could not be recreated, Cook was precluded from showing the possibility he was at the store during that period of time, thereby directly contradicting Stevenson's and Tokunaga's testimonies. Counsel also argued that while there were three disks in the evidence envelope now, there was no way to know how many disks Rodriguez downloaded, or how many were in the evidence envelope when Kadel, an investigative aid for the district attorney's office, retrieved the envelope. Counsel asserted that had jurors been able to view the video, they could have made their own evaluation of Cook's demeanor and whether it appeared he had been involved in a fight or shooting.

Smith's attorney adopted the comments of Cook's counsel. He argued the manslaughter verdict constituted juror compromise, Stevenson was the only eyewitness, and his credibility was very questionable. Counsel argued the video evidence put Cook at a different location, and did not show him to be injured or walking in haste. In addition, counsel represented Cook told the officers the truth that he was at the convenience store. Counsel suggested it was suspicious that there was video of Cook at the convenience store, but video of the moment the murder occurred and just before it was suddenly missing, or possibly accidentally or purposely erased.

The prosecutor responded that the existing video covered the time period of 2215 to 2245 hours, which was the period encompassing the shooting. Based on a review of that video, Cook was not inside the store or in the parking lot at the time the shots were

fired. He first showed up a minute or two after officers started arriving at the motel, walking northbound through the parking lot. The prosecutor argued the video evidence actually corroborated Stevenson's and Tokunaga's testimonies.

The court declined to find lack of due diligence by defense counsel. Following input from counsel and based on various authorities, the court took judicial notice that the average pedestrian could walk at a pace of two to three miles per hour, and that a person traveling approximately 375 yards could walk the distance, which was .21 miles, within an approximate range of four to six minutes.

Considering all the relevant factors, the court did not find the newly discovered evidence created a reasonable probability of a different result on retrial. It found the evidence was not exculpatory under all the circumstances, did not contradict the strongest evidence introduced against defendants, and corroborated Stevenson's and Tokunaga's testimonies. Having found the evidence not exculpatory, the court further found there was no *Brady* violation. Accordingly, it denied the motion for new trial as to both defendants.

B. Analysis

1. New Trial Based on Newly Discovered Evidence

“““The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.”” [Citations.]” (*People v. Turner* (1994) 8 Cal.4th 137, 212, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; see *People v. McDaniel* (1976) 16 Cal.3d 156, 177.) Thus, there is a strong presumption the trial court properly exercised its discretion (*People v. Davis* (1995) 10 Cal.4th 463, 524), and these rules apply where, as here, the basis for such a motion is newly discovered evidence (*People v. Greenwood* (1957) 47 Cal.2d 819, 821). In determining whether there has been a proper exercise of discretion, “each case must be examined on its own facts [citation], recognizing that the trial court is in the best position

to determine the genuineness and effectiveness of the showing in support of the motion [citation].” (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481; accord, *People v. Turner, supra*, 8 Cal.4th at p. 212; *People v. Hill* (1969) 70 Cal.2d 678, 698.)

Pursuant to subdivision 8 of section 1181, a court may grant a new trial “[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.” The requisite showing is well settled: “To entitle a party to a new trial on the ground of newly discovered evidence, it must appear, — “1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.”” (*People v. Martinez* (1984) 36 Cal.3d 816, 821.)⁵¹

A motion for a new trial made on this ground is looked upon with disfavor. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 485.) Nevertheless, it “should be granted

⁵¹ The Attorney General notes the trial court declined to base its denial of the motion on defense counsel’s failure to act with reasonable diligence, but argues the defense could have discovered the video disks earlier because they were referenced in police reports and their significance should have been apparent because Cook claimed he was elsewhere at the time of the shooting. This may be true. Regardless, the requirement of diligence must not be used “to sustain an erroneous judgment imposing criminal penalties on the defendant as a way of punishing defense counsel’s lack of diligence.” (*People v. Martinez, supra*, 36 Cal.3d at p. 825, fn. omitted.) Rather, “[t]he focus of the trial court ... should be on the significance and impact of the newly discovered evidence, not upon the failings of counsel or whether counsel’s lack of diligence was so unjustifiable that it fell below constitutional standards.... If consideration of the newly discovered evidence is essential to a fair trial and a just verdict, the court should be able to grant a new trial without condemning trial counsel as constitutionally ineffective. (*Id.* at p. 826.) When the defense presents newly discovered evidence that would probably lead to a different result at retrial, “[r]eliance upon counsel’s lack of diligence to bar defendant from presenting that evidence to a trier of fact would work a manifest miscarriage of justice.” (*Ibid.*)

when the newly discovered evidence contradicts the strongest evidence introduced against the defendant.” (*People v. Delgado* (1993) 5 Cal.4th 312, 329.) Newly discovered evidence that merely impeaches or discredits a witness does not compel the granting of a new trial. (*People v. Moten* (1962) 207 Cal.App.2d 692, 698; accord, *People v. Trujillo* (1977) 67 Cal.App.3d 547, 556; *People v. Maldonado* (1963) 221 Cal.App.2d 128, 135.) However, a new trial ““should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be, or should be, different on a retrial.”” (*People v. Love* (1959) 51 Cal.2d 751, 757.) The test of whether a different result in retrial is reasonably probable “is not a subjective one whether a particular trier of fact would be persuaded by the new evidence to reach a different conclusion, but rather is an objective one based on all the evidence, old and new, whether any second trier of fact, court or jury, would probably reach a different result.” (*People v. Huskins* (1966) 245 Cal.App.2d 859, 862.) “[W]hen a defendant makes a motion for a new trial based on newly discovered evidence, he has met his burden of establishing that a different result is probable on retrial of the case if he has established that it is probable that at least one juror would have voted to find him not guilty had the new evidence been presented.” (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521.)

In the present case, the evidence at trial showed 911 was called almost immediately after the shooting. It was undisputed, from the declaration presented by the People in opposition to the new trial motion, that the first 911 call was received by the police at 2219 hours, i.e. 10:19 p.m. The first officer was dispatched at 2225 hours, i.e., 10:25 p.m. At 2225 hours, plus or minus three minutes, Cook was in front of a market approximately .21 miles away from the shooting scene.⁵² Given the fact the evidence at

⁵² The prosecutor stipulated Cook was the person shown in the video for purposes of the hearing on the new trial motion. We know of nothing that would have required him

trial showed everyone involved in or a witness to the shooting immediately fled the area of the motel, the short distance between the motel and the market, and the pace at which someone could easily walk, we find no probability at least one juror would have voted to find either defendant not guilty had the video been presented: In light of all the circumstances, it simply does not show Cook was at the market at the time of the shooting, even assuming the time stamp was off by three minutes. Although the video shows Cook walking, not running, he could easily have walked the distance within the time frame, and walking would be consistent with not wanting to attract attention. The video quality was not sufficient to show whether, for example, he appeared to have been in a fight. Speculation as to how portions of the video surveillance came to be missing or what those portions might show (for example, that Cook was at the market the entire relevant time period) does not assist defendants because it is just that — speculation. Speculation is an insufficient basis to establish a different result — even a deadlocked jury — is probable upon retrial. (See *People v. Clauson* (1969) 275 Cal.App.2d 699, 707-708.)

Cook appears to contend Stevenson’s testimony was false, and the video would have helped establish this. “[A] conviction obtained through use of false evidence, *known to be such by representatives of the State*, must fall under the Fourteenth Amendment. [Citations.] The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [Citations.]” (*Napue v. Illinois* (1959) 360 U.S. 264, 269, italics added; accord, e.g., *Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 652.) “When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is

to enter into the same stipulation at a new trial. Given the quality of the video — the pertinent portion of which we have viewed — and the defense investigator’s inability to identify the person depicted therein, we question whether the defense would be able to establish the person was Cook at a new trial. We will assume, for purposes of our analysis that they would be able to do so or the prosecutor would again stipulate.

required if there is any reasonable likelihood the false testimony could have affected the judgment of the jury.” (*People v. Dickey* (2005) 35 Cal.4th 884, 909, italics omitted.)

The video does not show the testimony of Stevenson — or any other prosecution witness — was false, much less that the prosecution knew or should have known of its falsity.⁵³ The video does not raise “grave doubts” about any witness’s veracity. (*People v. Huskins, supra*, 245 Cal.App.2d at pp. 862-863.) Significantly, all witnesses to the shooting — particularly Stevenson — were extensively cross-examined and their credibility impeached.

Cook says the flaw with the trial court’s reasoning that Cook could have walked to the market after the crime because it was approximately 375 yards away “is that the court did not take into account that [Cook]’s asserted location at the time of the trial, 529 Villa St., was equidistant in the opposite direction from the market. A review of the overhead map shows that the market was located around the corner from the store on Fourth Street.” (*Sic.*)

The foregoing is unclear; Cook may be arguing that while the trial court found the video corroborated Stevenson’s and Tokunaga’s testimonies, it equally corroborated Cook’s statement to police. According to Hale’s testimony at trial, Cook said he was last at the motel around 3:00 p.m. to 5:00 p.m. on the day of the shooting, and heard about it on the news while at home at 529 Villa the next morning. Tokunaga testified Cook showed up at the residence on Villa after the shooting, but she did not see how he got there. At the hearing on the new trial motion, Hale testified Cook said he had been in the area of the store. Hale also testified Cook said he had gone to 529 Villa and watched

⁵³ By statute (§ 1473), an inmate may petition for a writ of habeas corpus based on the introduction against him or her of “[f]alse evidence that is substantially material or probative on the issue of guilt or punishment” (*id.*, subd. (b)(1)), without showing knowledge on the part of the prosecution (*In re Richards* (2012) 55 Cal.4th 948, 960-961). Defendants are not, of course, presently prosecuting a habeas action. Our assessment of the video is the same in any event.

television. According to Hale, Cook’s girlfriend lived “around the corner” from the market, within a block of Union Avenue.

Overhead photographic maps introduced into evidence at trial showed 529 Villa and the market were both north of the motel, although the market was on the west side of Union, while the motel and Villa address were east of Union.⁵⁴ Because of the relatively short distance between the motel and the market (which is also shown by the maps) and the time frame involved, the video — which manifestly does not show Cook anywhere near the Villa address at the time of the shooting — does not sufficiently show he was at the market so as to render a different result probable for either defendant on retrial. Accordingly, the trial court acted well within its discretion in denying the motion for a new trial.

2. *Brady*

“[T]he suppression by the prosecution of evidence favorable to an accused ... 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” (*Brady, supra*, 373 U.S. at p. 87; accord, *In re Ferguson* (1971) 5 Cal.3d 525, 532), and regardless of whether such suppression was intentional, negligent, or inadvertent (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1225). The duty to disclose such evidence is wholly independent of the prosecutor’s obligation under section 1054 et seq.⁵⁵ (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244), the duty exists even where there has been no request by the

⁵⁴ In addition, the market was just south of 4th Street, while the Villa address was several blocks north of 4th Street.

⁵⁵ Section 1054.1 provides in part: “The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] ... [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] ... [¶] (e) Any exculpatory evidence.”

accused (*United States v. Agurs* (1976) 427 U.S. 97, 107), encompasses both impeachment and exculpatory evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676), and extends to evidence known only to law enforcement investigators and not to the prosecutor (*Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870; *Kyles v. Whitley* (1995) 514 U.S. 419, 438). “In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.’ [Citations.]” (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042, quoting *Kyles v. Whitley, supra*, at p. 437.) Disclosure must be made at a time when it would be of value to the accused. (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51.)

Although “the term ‘*Brady* violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence — that is, to any suppression of so-called ‘*Brady* material’ — ... there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” (*Strickler v. Greene* (1999) 527 U.S. 263, 281, fn. omitted.) Thus, to merit relief on due process grounds, “the evidence a prosecutor failed to disclose must have been both favorable to the defendant and material on either guilt or punishment. Evidence would have been *favorable* if it would have helped the defendant or hurt the prosecution, as by impeaching one of its witnesses. Evidence would have been *material* only if there is a reasonable probability that, had it been disclosed to the defense, the result would have been different. The requisite *reasonable probability* is a probability sufficient to undermine confidence in the outcome on the part of the reviewing court. It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]” (*People v. Dickey, supra*, 35 Cal.4th at pp. 907-908.) “A showing by the [defendant] of the favorableness and materiality of any evidence not disclosed by the prosecution necessarily establishes at one stroke what in other contexts

are separately considered under the rubrics of ‘error’ and ‘prejudice.’ For, here, there is no ‘error’ unless there is also ‘prejudice.’ [Citations.] [¶] It follows that harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24, with its standard of ‘harmless beyond a reasonable doubt,’ is not implicated.” (*In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 7.)

Since the surveillance video was listed in police reports that were disclosed to defendants, we question whether the evidence was suppressed or withheld for *Brady* purposes. (See *Smith v. Cain* (2012) 565 U.S. ___, ___ [132 S.Ct. 627, 630] [witness’s statements to police were contained in officer’s notes, which notes were not disclosed to the defendant].) In any event, as we have discussed, there is no reasonable probability the result would have been different had the video been disclosed to the defense. Accordingly, defendants’ claim under *Brady* fails.

V

CUMULATIVE ERROR

Defendants contend the cumulative effect of the asserted errors deprived them of due process and a fair trial, thus requiring reversal. There being “no error to accumulate” (*People v. Avila* (2014) 59 Cal.4th 496, 520), their claim fails.

VI

SENTENCING ISSUES

A. Strike Findings

Smith was found to have suffered a prior strike conviction based on a juvenile adjudication, despite his argument such use of a juvenile adjudication was unconstitutional because juveniles are not afforded jury trials. Prior to sentencing, he requested that the court dismiss that conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The People opposed the motion. After argument that centered around the remoteness of the offense and Smith’s age at the time, the court denied the request, finding Smith did not fall outside the spirit of the three

strikes scheme, in whole or in part, because there was no significant period of time in which he rehabilitated himself and was no longer committing criminal offenses.

Smith now claims the strike finding must be reversed because use of a juvenile adjudication as a strike violates his jury trial right, and the trial court abused its discretion by denying his *Romero* request. We disagree with both contentions.⁵⁶

1. Use of Juvenile Adjudication

If the various prerequisites are met, as they were here, the three strikes law mandates that a prior juvenile adjudication be deemed a strike. (§§ 667, subd. (d)(3), 1170.12, subd. (b)(3).) As a result, Smith’s base terms were doubled. (§§ 193, subd. (a), 667, subd. (e)(1), 1170.12, subd. (c)(1).)

Smith points to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 (*Apprendi*), wherein the United States Supreme Court stated, “[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged ..., submitted to a jury, and proven beyond a reasonable doubt.’ [Citation.]” As we have explained, “[W]hile certain constitutional protections enjoyed by adults accused of crimes also apply to juveniles (e.g., notice of charges, right to counsel, privilege

⁵⁶ Cook was also found to have suffered a prior strike conviction for an offense committed when he was a juvenile, but for which he apparently was tried as an adult. Prior to sentencing, he filed a *Romero* request. Relying primarily on the remoteness of the offense, his age at the time, and the fact he was an aider and abettor both then and in the current offense, he argued the conviction should be stricken. The court, finding there was no substantial period of time in which Cook was free of crime and living a productive life as a member of the community, denied the request.

Cook does not now expressly raise any claims with respect to his prior conviction. In light of the individualized considerations that go into a trial court’s ruling on a *Romero* request, we do not interpret Cook’s joinder in various issues raised by Smith as including the *Romero* denial. Assuming Cook was tried as an adult with respect to his juvenile strike offense, Smith’s constitutionality argument does not apply to Cook. If indeed Cook’s strike prior resulted from a juvenile adjudication, our analysis of the issue as to Smith would apply equally to Cook.

against self-incrimination, right to confrontation and cross-examination, double jeopardy, proof beyond a reasonable doubt), ... juveniles enjoy no state or federal due process or equal protection right to a jury trial in delinquency proceedings. [Citations.]” (*People v. Fowler* (1999) 72 Cal.App.4th 581, 585.) Accordingly, Smith reasons, his second-strike sentence violated the United States Constitution “because it was based on a factor, a prior juvenile court adjudication, which was not subject to jury trial.”

As Smith acknowledges, the California Supreme Court has held that, despite *Apprendi* and its progeny, the United States Constitution allows use of a prior juvenile adjudication as a strike, “even though there was no right to a jury trial in the juvenile proceeding[.]” (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1010; see *id.* at pp. 1012, 1019, 1022, 1025, 1028.) Even if we were convinced, as Smith argues, that California “is an outlier in this respect” and that there is “an emerging national consensus against the use of prior juvenile adjudications to increase the maximum sentencing range for felony conduct,” we would be bound to follow *Nguyen*. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

2. Romero

Trial courts have limited discretion under section 1385 to dismiss prior convictions in three strikes cases. (*Romero, supra*, 13 Cal.4th at p. 530; see *People v. Williams* (1998) 17 Cal.4th 148, 162.) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) “[W]hen a defendant’s criminal conduct has been proven to be immune from ordinary modes of punishment, one of the duties of the judiciary is to protect the public by utilizing recidivist sentencing statutes to incarcerate

such persons. [Citations.]” (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1250-1251.) Thus, when sentencing pursuant to the three strikes law, objectives include protection of public safety and punishment of recidivism. (*People v. Castello, supra*, at p. 1251.) “Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony, supra*, at p. 377.)

In deciding whether to dismiss or vacate a prior strike allegation or finding, or in reviewing such a ruling, “the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.) By establishing a sentencing norm, circumscribing the trial court’s power to depart from that norm, and requiring the court explicitly to justify its reasons for doing so, “the [three strikes] law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances.” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) These include situations in which the trial court was not aware of its discretion to dismiss or considered impermissible factors in declining to dismiss; or where the sentencing norms produce, as a matter of law, an arbitrary, capricious, or absurd result under the specific facts of a particular case. (*Ibid.*)

This is not the “extraordinary case” in which “the relevant factors ... manifestly support the striking of a prior conviction and no reasonable minds could differ,” such that the failure to strike constituted an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Smith was 45 years old at the time of sentencing. His record of criminal offenses dated back to 1983. His adult record consisted of five felony convictions and resulting prison terms, seven misdemeanor convictions, and numerous violations of probation and parole. Although many of his more recent offenses were drug related, his record was not free of violence even apart from the current convictions. As shown by the probation officer’s report, he had not remained out of custody and offense free for any appreciable period of time since he was 15 years old. Under the circumstances, he is precisely “the kind of revolving-door career criminal for whom the Three Strikes law was devised.” (*People v. Strong* (2001) 87 Cal.App.4th 328, 340, fn. omitted.)

The trial court did not abuse its discretion in reaching this conclusion. (See, e.g., *In re Large* (2007) 41 Cal.4th 538, 552; *People v. Pearson* (2008) 165 Cal.App.4th 740, 749; *People v. Strong, supra*, 87 Cal.App.4th at pp. 338-340 & cases cited.) That dismissing his juvenile strike may conceivably have constituted a proper exercise of discretion (see, e.g., *People v. Garcia* (1999) 20 Cal.4th 490, 502-503; *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250-1251) does not mean any other course of action constituted an abuse of discretion.

B. Amount of Restitution Fine

Defendants committed the present crimes on April 20, 2011. At the time, section 1202.4, subdivisions (b) and (c) required imposition of a restitution fine in every case in which a person was convicted of a crime, unless the court found “compelling and extraordinary reasons for not doing so,” and stated those reasons on the record. Subdivision (b) of the statute further provided: “(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall

not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony” Subdivision (b)(1) of section 1202.4 subsequently was amended to raise the minimum restitution fine to \$240, starting January 1, 2012, and \$280, starting January 1, 2013. (Stats. 2012, ch. 868, § 3.)

Defendants were sentenced on March 4, 2013. The probation officer’s reports, which were prepared in advance of the originally scheduled sentencing date of December 4, 2012, recommended that each defendant pay a restitution fine pursuant to section 1202.4, subdivision (b) in the amount of \$240, and a parole revocation restitution fine in the same amount pursuant to section 1202.45, with payment of said fine to be suspended pending revocation of parole.⁵⁷

Smith was sentenced first. At one point, the court asked the probation officer about restitution amounts listed in the probation officer’s report. This ensued:

“THE COURT: Did some of the fines change? I thought January 1 some of the fines changed also.

“THE PROBATION OFFICER: That’s correct, your Honor. The 1202.4(b) fine is now 280.

“THE COURT: Can you help me find where that is in the report?

“THE PROBATION OFFICER: It is on Page 15, between lines 11 and 13.

“THE COURT: So change 240 to 280.

⁵⁷ Section 1202.45 has stated, at all times pertinent to this case: “In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine ... shall be suspended unless the person’s parole is revoked.” Our discussion of the fines imposed pursuant to section 1202.4 applies equally to the fines imposed pursuant to section 1202.45.

“THE PROBATION OFFICER: Yes, your Honor. And because of that, on the next page, Page 16, between lines 1 and 4, in reference to the 1202.45 fine, it will also need to match. So it will be 280, as well.”

Smith’s attorney did not object to the changes, but merely submitted the matter when asked by the court. The court then handwrote the alterations in the probation officer’s report, and subsequently ordered Smith to pay a restitution fine in the amount of \$280 pursuant to section 1202.4, subdivision (b), and in the same amount, with the fine suspended, pursuant to section 1202.45.

Turning to Cook’s sentence, the court asked whether there were any proposed amendments to the probation officer’s report based on changes in the law. The probation officer stated the restitution and parole revocation restitution fines should be changed to \$280. Cook’s counsel did not object, but merely submitted the matter. The court wrote the alterations in the probation officer’s report, and subsequently ordered Cook to pay the new amounts.

Defendants now contend the fines must be reduced to \$200. They say the trial court clearly intended to impose the minimum amount permitted by statute, but violated ex post facto provisions by employing the amount in effect at the time of sentencing rather than the time the offenses were committed. The Attorney General concedes the error.⁵⁸

“The Constitution forbids the passage of *ex post facto* laws, a category that includes ‘[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.’ [Citation.]” (*Peugh v. United States* (2013) 569 U.S. ___, ___-___ [133 S.Ct. 2072, 2077-2078]; accord, *Collins v. Youngblood* (1990) 497 U.S. 37, 41-42.) “It is well established that the imposition of

⁵⁸ The Attorney General’s concession is made expressly with respect to Cook, who raised the issue in his opening brief. We assume the Attorney General simply overlooked the letter in which Smith specifically joined in the issue, and so we will treat the concession as affecting both defendants.

restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions. [Citations.]” (*People v. Souza* (2012) 54 Cal.4th 90, 143; accord, *People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

A trial court has broad discretion to determine the amount of a restitution fine within statutory parameters. (§ 1202.4, subd. (b)(1); *People v. Kramis* (2012) 209 Cal.App.4th 346, 350; *People v. Urbano* (2005) 128 Cal.App.4th 396, 406.) Although the trial court here had discretion to set defendants’ fines at \$280, it is clear from the record that the probation officer recommended, and the court intended to impose, the minimum amount permitted by law. Based on when the crimes were committed, that amount was \$200. We will modify the judgment to reduce the fines to that amount.⁵⁹

DISPOSITION

The fines imposed on each defendant pursuant to Penal Code sections 1202.4, subdivision (b) and 1202.45 are reduced to \$200 apiece. As so modified, the judgments are affirmed. The trial court is directed to cause to be prepared an amended abstract of judgment for each defendant showing said modification, and to forward certified copies of same to the appropriate authorities.

⁵⁹ Because the fines imposed were within the statutorily authorized range, they did not amount to an unauthorized sentence. Accordingly, defendants’ claim arguably was forfeited by their failure to object at sentencing. (See *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1188-1189.) The Attorney General does not assert forfeiture, however, and finding the issue has not been preserved for appeal would almost certainly give rise to petitions for writs of habeas corpus on the grounds of ineffective assistance of counsel. (See *id.* at p. 1190 [no conceivable tactical reason for counsel’s failure to object to trial court’s mistaken use of minimum statutory fine in effect at sentencing].) Rather than waste scarce judicial resources, we accept the Attorney General’s concession that the fines must be modified.

DETJEN, J.

WE CONCUR:

GOMES, Acting P. J.

SMITH, J.