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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN PEREZ, JR.,

Defendant and Appellant.

F068416

(Super. Ct. No. VCF257788)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. H. N. Papadakis* and Gary L. Paden, Judges.†

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Brook A. Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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*Retired judge of the Fresno Superior Court assigned by the Chief Justice pursuant to section 6, article VI of the California Constitution.

†Judge Papadakis ruled on the People's motion to consolidate; Judge Paden presided over defendant's trial and sentencing.

INTRODUCTION

Defendant Juan Perez, Jr., was convicted at the conclusion of a jury trial of two counts of murder, one count of attempted murder, conspiracies to commit murder and promote a criminal street gang, assault with a firearm, and carjacking. The jury found true special circumstance allegations as well as allegations defendant used a firearm in the commission of the murders and committed the murders to promote a criminal street gang. Defendant was sentenced to two sentences of life without the possibility of parole, one sentence of life with the possibility of parole, two sentences of 25 years to life for personally using a gun, and a consecutive determinate sentence of 12 years.

Defendant contends there was insufficient evidence to support his convictions for attempted murder and carjacking. Defendant asserts the trial court erred in consolidating the murder case with the unrelated allegation of attempted murder. Defendant argues there was prosecutorial misconduct because the People examined an unsworn witness, and the trial court denied defendant's motion for a mistrial on that ground. Defendant contends the trial court erred in failing to instruct the jury on accomplice testimony and incorrectly instructing the jury on other-crimes evidence. Defendant argues all of these errors constitute cumulative error. The parties agree there are errors in the clerk's minute order and abstract of judgment requiring correction.

PROCEDURAL HISTORY

Second Amended Information

Defendant was charged in one case with double murder and in another case with attempted murder and carjacking. On May 17, 2013, the trial court granted the People's motion to consolidate both cases. On June 19, 2013, the People filed a second amended information alleging crimes occurring on January 14, 2011 (counts 1 through 5) and crimes occurring on May 8, 2011 (counts 6 and 7). The second amended information alleged defendant entered into a conspiracy to commit murder (Pen. Code, §§ 182, subd.

(a)(1)), 187, subd. (a), count 1).¹ Five overt acts were alleged in count 1: (1) defendant and his coconspirators traveled to Angel Gutierrez's residence in Earlimart; (2) defendant and a coconspirator obtained guns from Angel Gutierrez; (3) defendant possessed a gun; (4) defendant and his coconspirators traveled to State and Washington Streets in Earlimart; and (5) defendant and a coconspirator fired guns.

The second amended information further alleged defendant had committed the offense of a criminal street gang conspiracy to assist felonious criminal conduct by members of the gang (§ 182.5, count 2), and had murdered Victor Almaguer (§ 187, subd. (a), count 3) and Ignacio Gonzalez (§ 187, subd. (a), count 4). Counts 3 and 4 further alleged special circumstance allegations for being an active participant in a criminal street gang, murdering to further the activities of the criminal street gang (§ 190.2, subd. (a)(22)), and multiple murder (§ 190, subd. (a)(3)).

Counts 3 and 4 further alleged the murders were committed to promote a criminal street gang (§§ 186, subd. (b)(1)(C), 186.22, subd. (b)(4)), and eligibility for a life sentence for acting on behalf of a criminal street gang (§ 186.22, subd. (b)(5)). Counts 3 and 4 alleged defendant personally used a gun causing great bodily injury and death within the meaning of section 12022.53, subdivisions (d) and (e)(1).

The second amended information alleged defendant committed assault with a firearm on Freddy Hernandez on the date of the murders (§ 245, subd. (a)(2), count 5), attempted to murder Pablo Garcia (§§ 664, 187, subd. (a), count 6), and committed carjacking on Pablo Garcia (§ 215, subd. (a), count 7). Counts 6 and 7 alleged defendant was armed with a handgun within the meaning of section 12022, subdivision (a)(1)). The jury convicted defendant of all counts and found all of the special allegations true.

Sentence

The trial court sentenced defendant on count 7 to the upper term of nine years plus a consecutive term of one year for using a gun. Defendant was sentenced to consecutive

¹Unless otherwise designated, statutory references are to the Penal Code.

terms of one year on count 5, life with the possibility of parole on count 6, and one year on count 6 for using a gun. On counts 3 and 4, the court sentenced defendant to consecutive terms of life without the possibility of parole plus additional consecutive sentences of 25 years to life on these counts for personally using a firearm leading to great bodily injury or death. The court sentenced defendant to terms of 25 years to life on counts 1 and 2, but stayed his sentence on those counts pursuant to section 654. The court granted custody credits of 724 days for time in custody, conduct credits of 107 days, and total custody credits of 831 days.

FACTS

Double Homicide

In July 2008, Ignacio Gonzalez provided information to investigators concerning the murder of a mechanic. The information Gonzalez provided ultimately resolved the homicide investigation. Gonzalez had been a member of the Northerners gang in Earlimart, California, but dropped out of the gang. After leaving the gang, Gonzalez got into fights with gang members, including Antonio Valdez, whose gang moniker is “Pnut,” and one known as Jonathan.

Shortly before January 14, 2011,² Gonzalez was attacked by two men in the front yard of his family’s home. One attacker had a knife, the other was carrying a bat. Gonzalez jumped through a window into his home. Gonzalez said one of the attackers was “the Lopez young brother.” Gonzalez said Lopez was after him because he had “ratted” by telling authorities about the murder of the mechanic. Another time prior to January 14, a member of Gonzalez’s former gang, Julio Macias, also known as “Lil Red,” was driving in Gonzalez’s neighborhood and saw Gonzalez in front of his home. Julio Prieto saw Macias look at Gonzalez and say, ““Dead man walking.”” Macias said something about Gonzalez snitching on one of their gang members.

²Unless otherwise indicated, further references to dates are to the year 2011.

On January 14, Gonzalez was with his family in front of the family home barbecuing with his friend Victor Almaguer. Almaguer worked with Gonzalez, but he was not and had never been a member of a gang. Elena Becerra, Gonzalez's mother, left the home at 6:00 p.m. to go to a flea market with other family members and she returned about 8:00 p.m. Gonzalez and Almaguer were still in the front yard.

Shortly after the family returned home, a group of young people dressed in black hooded sweaters—who had been seen huddling together nearby—approached Gonzalez and Almaguer, fired multiple shots at both men, and killed them. The medical examiner explained Almaguer had a gunshot wound to the leg and a fatal wound to his head. Gonzalez had gunshot wounds to his head and chest. The medical examiner testified either wound would have been fatal.

Becerra heard multiple gunshots and ran out of the house. She saw the men running toward a van. Defendant was one of the men she saw. He looked straight at Becerra. Becerra recognized defendant because he used to pick up Gonzalez to play basketball. Defendant walked around the van and got into another car. Both vehicles drove away in different directions.

Freddy Hernandez, Jr., was using a payphone at a market across the street from the Gonzalez home and was hit in the left knee and right leg by stray bullets. Marina Gutierrez was waiting at a stop sign to pass through the intersection of Front Street and Washington at the time of the shooting. Gutierrez told investigators she heard a “rash” of gunshots. Gutierrez knew what Northerners did to people who cooperated with the police. At trial, Gutierrez testified she was listening to loud music, heard nothing, and then something hit and shattered her windshield. Gutierrez's daughter, a friend, and the friend's twin brothers were in the car with her.

Investigators found 31 nine-millimeter shell casings at the scene. The casings were ejected from two different semiautomatic guns; 17 from one gun and 14 from the other.

At 6:30 p.m. on the day of the murders, a two-door, yellow or golden Chevrolet Cobalt was stolen from a residence on Lupine Street in Delano, about eight miles from Earlimart. The stolen Cobalt was found on Road 168 and Avenue 24 at 10:36 that evening. Firefighters found it engulfed in flames. The car was completely burned.

Julio Prieto, Macias's friend, spoke to Macias on the phone about an hour after the murders. Prieto said it sounded like Macias was at a party. Prieto asked Macias whether he committed the murders. Macias laughed but did not say yes. Prieto felt like Macias's response was affirming even though he did not directly say yes. When Prieto asked why Almaguer was killed, Macias replied, "It was that bitch deserved what he got." Prieto contacted Macias a couple of days later in a face-to-face conversation. Prieto asked Macias why Almaguer was killed. Macias said, "It wasn't me," and when Prieto responded with "yeah right," Macias replied, "I had an alibi."

Prior to the murders, while driving around with Prieto, Macias would refer to Gonzalez. Everything led to Macias saying that "they were gonna smoke his ass." Macias told Prieto the reason Almaguer got what he deserved was because earlier on the day of the murders, Macias had driven past the Gonzalez residence and warned Almaguer: "I wouldn't be here today if I was you." Almaguer told Macias that Gonzalez was his friend. Macias told Prieto, "It was funny I even warned him and he still—still stayed."

The Northerners were the predominant gang in Earlimart. Gang members wear red and associate with the cardinal number 14 or the equivalent roman numeral XIV. Their rivals are the Southerners, who wear blue and associate with the cardinal number 13 or the equivalent roman numeral XIII.

A search warrant was served on defendant's home on November 21. While attempting to enter the residence, investigators saw defendant trying to jump over a fence and flee. After being seen, defendant went back into the residence.

Angel Gutierrez's Statements

Angel Gutierrez was arrested on gun charges on November 16. He testified in this case in exchange for a plea deal. Gutierrez gave statements to the police the day he was arrested and one month before trial. Gutierrez explained that defendant's two gang monikers were "ATL" and "Junior." Gutierrez had been a member of the gang from age 13 and had known defendant from high school. Gutierrez dropped out of the gang the day he talked to the police.

Gutierrez's job for the gang was to hold guns for fellow members. Another gang member, Anthony Alcaraz, whose gang moniker was "Antwon," brought Gutierrez the guns. Gutierrez and Gonzalez were good friends until Gonzalez dropped out of the gang a few years earlier. The two remained friends "on the down low" after Gonzalez dropped out. The gang did not like this relationship because members are not to associate with dropouts. Snitching is considered improper conduct by a gang member. Gutierrez was told that for his own safety he should not associate with Gonzalez. Gutierrez's fellow gang members told him Gonzalez was "not good for the hood."

Gutierrez explained it was common knowledge there was a "green light" on Gonzalez. Alcaraz and defendant had told Gutierrez there was a green light on Gonzalez and warned him not to be involved with Gonzalez. A week before the murders, Alcaraz came to Gutierrez's house and dropped off a nine-millimeter handgun referred to as the "Rusty Old 9." Gutierrez placed the gun in the truck bed of his uncle's truck. He had seen the gun twice before.

Defendant and Alcaraz picked up the gun from Gutierrez the day of the shooting. Other gang members were in a four-door beige car with defendant and Alcaraz, but Gutierrez could not see who they were. In Gutierrez's second statement to investigators, he said defendant and Alcaraz picked up the gun from him two or three days before the shooting.

Gutierrez testified that at 6:00 or 7:00 p.m. the day of the murders, Macias, a gang member named “Solo,” and two others Gutierrez did not know, came to his house. The group smoked marijuana together, talked about gang dropouts, specifically mentioning Gonzalez, and said they might beat him up if they saw him. Gutierrez said the others mentioned going to a party later that evening. According to Gutierrez, the visitors stayed for several hours until they heard gunshots. Gonzalez’s home was about a mile away. Gutierrez told Macias that “the homies” had come by and picked up a gun. Macias got on the phone and told someone to turn on the scanner. The visitors got nervous and decided to leave.

Gutierrez denied changing his statements and testimony after he began riding on the same bus to court with Macias, Alcaraz, and defendant. A couple of months after the murders, Gutierrez talked about the murders to defendant and Alcaraz. Defendant told everyone, especially Alcaraz, not to talk about it and refused to talk about it himself. Defendant also said that if they did not talk about it, they could beat the charges.

Uriel Uribe’s Statements

On October 12, Tulare County Sheriff’s Detective Florence Cotton learned a Northerner gang dropout, Uriel Uribe, was in custody. Cotton questioned him. Uribe explained he dropped out of the gang because he had been told to commit homicides in jail.

Uribe initially said he did not know who had committed the double homicide in Earlimart. Uribe learned gang members went to “Angel’s residence” to pick up firearms on the day of the murders. Uribe was aware Gonzalez was a dropout from the gang. On the evening of the murders, Uribe was at Benjamin Semintal’s home in Richgrove. Uribe and Semintal drove to Earlimart and picked up Lil Red (Macias) at his grandmother’s home.

Macias told Uribe he had just been dropped off by Pnut (Valdez). Macias said earlier in the day, he, Valdez and others had driven by Gonzalez’s house and saw

Gonzalez and Almaguer in the front yard. Gonzalez had “flipped off” Macias and his party. Uribe, Semintal, and Macias drove past Gonzalez’s house. Macias called Valdez and told him the subjects were in the front yard. Uribe, Semintal, and Macias continued on to Gutierrez’s house. When they arrived, Gutierrez told Macias that defendant, Valdez, and a third person had just picked up two firearms and left. Between 10 and 13 minutes later, they heard gunshots and drove to the crime scene where they stayed for five minutes before leaving.

As Uribe was driving around Earlimart, Macias received a call from Valdez, who was screaming he had just shot Gonzalez in the face and defendant had shot Almaguer. Macias received another call telling them to go to Humberto Garcia’s apartment in Delano and to pick up some alcohol on the way.

At Garcia’s apartment, Uribe heard defendant say Valdez shot Gonzalez in the face. Valdez was laughing. Defendant also said he and Valdez approached Gonzalez’s residence from the rear, jumped over the fence, shot the victims, and left the scene in a stolen vehicle. Defendant said they burned the vehicle at Avenue 24. Defendant described the gun he used as “very strong.” Defendant said “the [dropouts] thought they were cool chilling outside their house.” Defendant said they burned their clothes with the vehicle they had stolen. Uribe said Macias’s mother was listening to a scanner and told Macias a female was willing to testify the vehicle used was a black SUV.

Benjamin Semintal’s Statements

Benjamin Semintal was questioned on November 21 by Tulare County Sheriff’s Department Sergeant Jose Torres. At the beginning of questioning, Semintal denied knowing anything about the murders. When shown photographs, Semintal admitted knowing Macias and Valdez. Between 45 minutes and an hour into questioning, Semintal admitted he was with Uribe in Richgrove the night of the murders. Macias was already at Gutierrez’s home when they arrived in Earlimart between 7:00 and 8:00 p.m. They were all sitting in the front yard when, after about 20 minutes, they heard six to

seven gunshots. They all got into a car, drove past the murder scene, and drove to a party at Humberto Garcia's apartment. Semintal said Macias called his mother and said something to her about a scanner.

Semintal said defendant, Alcaraz, Valdez, Garcia, Macias, and Uribe were at the party. Defendant was talking about the shooting. Defendant said he was in the area during the shooting and saw the victims getting "hit." Semintal heard Macias tell defendant that Gonzalez was no good and had "flipped [him] off."

Cell Phone and Scanner Evidence

Analysis of the cell phones belonging to the various participants and witnesses who were members of the Northerners gang showed most of the participants had each other's contact information on their phones. Cell phone records showed defendant, Gutierrez, Valdez, Alcaraz, Macias, and Garcia had called and texted each other prior to and on the evening of the murders. Several phones contained gang-related content and videos.

Macias's phone contained the "Code of Conduct" or "Mission Statement" of the Norteño gang. Rule No. 14 was, "Kill as many scrappas as you can and always be proud of representation da Norte colla." Rule No. 13 was, "A coward, a traitor, a deserter will all get da valla," ("valla in Spanish is bullet"). Macias's house was searched on November 21, and a police scanner was found along with gang-related rap music and a letter written to Macias referring to him by his gang name, Lil Red.

Gang Expert Testimony

Tulare County Sheriff's Sergeant Crystal Derington testified as a gang expert. Derington explained the worst thing a gang member can do is to be a snitch, which is viewed as being a traitor and dropout. Gang members cannot associate with dropouts, especially when they are snitches. Derington said respect is a cornerstone of the gang lifestyle. Gang members demand it from each other and within the community. When

shown disrespect, gang members must act on it because otherwise it is considered a sign of weakness. “Flipping off” a gang member is a sign of disrespect.

The more violent a crime is, the higher the perceived level of respect and prestige within the gang. The more willing a gang member is to commit crimes, the more trusted that member becomes within the gang. Women do not participate directly in gang crimes other than to be facilitators. They may act as drivers, for instance, but do not have knowledge of what is happening within the gang.

The Northerners gang is an umbrella group that includes the prison gang the Nuestra Familia, and the Infamous Youngsters (IY), which started in 2007. The primary activities of the Northerners gang include homicides, shootings, robberies, burglaries, drive-by shootings, assaults, drug dealing, prostitution, extortion, carjacking, and witness intimidation. Gang members often use stolen vehicles to commit crimes.

In 2008, defendant was involved in a fight with a school resource officer at his high school. He was with another IY gang member. In 2009, he was contacted three times by law enforcement while with other IY gang members. The first time, defendant was wearing a red and white T-shirt and denied gang affiliation. The second time, he called someone a “scrap.” The third time, he admitted gang membership. In 2010, he was contacted four times by law enforcement. The first time, he was wearing a red baseball cap with the letter “N” on it and he denied it was gang attire. The second time, he was found in possession of gang indicia that included membership with the IY gang, and spoke about looking for dropouts. The third time, defendant was wearing the IY T-shirt. The fourth contact, in 2010, defendant was in the company of a fellow gang member.

Derington had 15 contacts with defendant in the past. Law enforcement had some 60 contacts with defendant. When gang members meet one of the 10 validation criteria for gang membership as set forth by the Department of Justice, law enforcement officers conduct field interviews. Officers fill out cards noting the gang attire worn by the

member, what the member says, what the member admits, who the member is with, and the nature of the contact. Derington said three points of validation are necessary to establish someone's membership in a gang. She believed defendant had at least seven validating points and was a member of the IY clique of the Northerners gang. Multiple photographs were introduced into evidence showing defendant "throwing" an IY gang sign—the number 14—pointing to a shotgun, wearing red clothing, and wearing a IY T-shirt.

Based on contacts, photographs, tattoos, and other evidence, Derington believed Angel Gutierrez, Humberto Garcia, Anthony Alcaraz, Julio Macias, Antonio Valdez, and Benjamin Semintal were all members of the Northerners gang. Derington testified Uriel Uribe was active in the Northerners gang in 2011, but deemed a snitch and dropout after he cooperated in the investigation of the double murder. Gonzalez had also been a gang member, but was deemed a snitch after he assisted in the investigation of the murder of a mechanic.

Based on a hypothetical question mirroring the People's evidence, Derington was of the opinion the murders of Gonzalez and Almaguer were committed for the benefit of the Northerners gang, and they promoted, furthered, and assisted the gang. The crime instilled fear because it was carried out in a blatant way in front of so many witnesses and showed a total disregard for human life. It was further designed to create fear within the community and in anyone who would potentially cooperate with law enforcement in the future. The double homicide would also directly benefit the gang member or members who carried it out.

Attempted Murder and Carjacking

Pablo Garcia lived on East Cardinal Avenue in Earlimart in May 2011. Ernie Medrano lived next door to Garcia. Gangsters who wore red clothing frequented Medrano's house. Garcia was never in a gang.

At 8:30 p.m. on May 8, Pablo Garcia left his house to pick up his sister in his pickup truck. As he drove from his home, Jacinto Magallenas, also known as Nano, stopped Garcia in front of Medrano's house and asked for a ride for himself and his two friends—one of whom was later identified as defendant—to Jose Raul Mojarro's house. Magallenas sat next to Garcia; defendant and the other male sat in the bed of the pickup truck. As Garcia drove, Magallenas was directing him.

Magallenas told Pablo Garcia to stop at Earlimart Avenue because he wanted to get out. Magallenas exited the truck and walked a few steps, opened the door on Garcia's side of the truck, and shot him in the neck. Defendant jumped out of the bed of the pickup at the same time Magallenas shot Garcia. The third male jumped out of the truck but Garcia did not see him. A few weeks after the shooting, Garcia told Tulare County Sheriff's Sergeant Frank Zaragoza that Magallenas shot him and defendant had been sitting in the back of the pickup truck. Garcia identified Magallenas and defendant from photographic lineups.

Lupe Lopez, Jr., who was viewing events from approximately 100 yards away, told a sheriff's deputy he saw a man in a white shirt pull Pablo Garcia from the truck, lay him on the ground in the middle of the street, get into the driver's seat, and drive away.³ The deputy explained the witness remembered seeing the man in the white shirt exiting the passenger side of the truck. He said nothing about the bed of the pickup truck. The same witness told Sergeant Zaragoza he saw a black truck occupied by two people in the cab and one in the bed of the truck. It was too dark to see faces, but the truck stopped in the middle of the block. The person sitting in the bed of the truck jumped out, approached the driver's side door, pulled the driver from the truck, and left the scene in the truck.

³Lupe Lopez, Jr., testified he only saw the victim in the road after the shooting, and the victim was the man in the white shirt. His statements to sheriff's deputies were admitted as prior inconsistent statements.

A blue denim hat was found next to Pablo Garcia's body. The shooting left Garcia a wheelchair-bound quadriplegic. Garcia's truck was found the next day on a dirt road in a vineyard not too far from the scene of the shooting and carjacking. The keys were in the ignition, the passenger door was open, and there was blood on the driver's seat.

Derington, the gang expert, testified Sureños, or Southerners, associate with the color blue and are rivals to Norteños, or Northerners. Gang members in Earlimart are predominantly from the Norteño gang and are expected to kill as many Sureño gang members as possible. A person who lived near a Northerner gang member and who wore a blue hat could be perceived by Northerners as a rival gang member. Also, Pablo Garcia could be perceived as a rival gang member because he was a close neighbor to Ernie Medrano, a member of the Norteño gang, but he did not associate with Medrano.

Based on the hypothetical mirroring of the People's evidence, Derington was of the opinion the attempted murder and carjacking of Pablo Garcia was committed for the purposes of the Northerner gang. She specifically believed the blue hat Garcia was wearing created the perception he was a rival gang member and "one of the cardinal rules within the gang is ... to take out any and all rivals sighted at that time."

Defense Evidence

Defendant's brother, Orlando Perez, testified defendant was at their mother's house for a Mother's Day barbeque on May 8. Perez said he arrived at the barbeque at 4:30 or 5:00 p.m., and left at 7:30 or 8:00 p.m. and defendant was still at the barbeque when Perez left. When Perez drove away and turned a corner, he saw a worker from a nearby apartment complex named Lupe running toward a body lying in the street.

Defendant's mother, Maria Campos, testified defendant, who was living with her, was at her house on May 8, Mother's Day, all day. Campos explained defendant left the party at 4:00 p.m. to talk to his boss, but came back one-half hour later and did not leave again. Campos said after defendant's brother left the barbeque, he called her a short time

later and said something happened in the neighborhood. Campos then opened her back door and heard sirens.

Other family members testified defendant was at the Mother's Day barbeque and did not leave until after the shooting. Defendant's boss testified defendant worked for him at the Earlimart Apartments. The boss called defendant to the apartments to pay him midday on May 8.

A nine-year-old boy testified he was playing outside when a black truck stopped in the street. He saw a bald, chubby or chunky man wearing a black T-shirt, black shorts, and black shoes jump out of the bed of the truck on the passenger side. This man opened the passenger door and got into the truck. The boy then heard gunshots and the truck drove away. The boy recognized defendant from a photo lineup because defendant had been working with a relative earlier that day. But according to the boy, defendant was not present during the shooting, defendant was not bald, and defendant was not the person who jumped from the bed of the pickup truck.

Rebuttal Evidence

Sheriff's Deputy Miguel Franco testified he questioned the nine-year-old boy at the scene of the Pablo Garcia shooting. The boy told Franco he saw a black truck stopped in front of the apartment complex. A male wearing a black shirt with a fade haircut got out of the bed of the truck. The male proceeded to pull the victim out of the passenger side of the truck to the ground. As the victim tried to get up, the man in the black shirt pulled out a handgun. The boy was scared, turned around, and ran home. As the boy was running, he heard five or six shots.

Maria Campos was recalled. The prosecutor confronted her with a phone call made between her and defendant when defendant was in jail. The jury was provided with a transcript of the conversation, which was admitted into evidence, and an audiotape was played in court at trial. The call suggested Campos was trying to tell defendant to say he was working for his bosses. Campos told defendant "we were right here cutting cake,"

suggesting an alibi for the Pablo Garcia shooting. Campos denied she worked out a deal with Lupe Lopez, Sr., to testify defendant was working with him.

Other-crimes Evidence

Efrain Sarabia had been a high-ranking Northerner gang member who used to spend time with defendant, Valdez, and other IY gang members, including Gonzalez, before he dropped out of the gang. In the gang, Sarabia and Gonzalez were good friends. Gonzalez dropped out of the gang before Sarabia, but they remained friends.

Once Sarabia's son was born, he told fellow gang members he would drop out of the gang if he were arrested. Later, Sarabia was arrested and was told by fellow gang members to stab another inmate. Instead, Sarabia approached a jail deputy and said he was dropping out of the gang. When Sarabia was released from custody, he told the gang he was dropping out. At first the members seemed okay with his decision, but later turned on him. Sarabia got into fights with the gang members. During one fight, Sarabia was with his younger brother and fought with gang members, including defendant. One gang member pulled out a gun. When Sarabia's girlfriend appeared, he told her to call the cops and the gang members ran away.

At 9:30 p.m. on March 18, 2010, Sarabia, his brother-in-law John Galvan, and 14-year-old J.G. were sitting in Galvan's Chevrolet Tahoe SUV in front of Sarabia's house watching videos on Sarabia's iPhone. A large white SUV driven by defendant kept passing by Sarabia. Jonathan Mojarro, Valdez, and "Piper" were also in the other SUV. Valdez and defendant started firing shots at Sarabia. J.G. was shot in the knee, jumped on Sarabia, and Sarabia pushed him off. Sarabia was shot in the neck. Sarabia described the guns as firing rapidly and described the weapon defendant used as similar to a nine-millimeter Uzi. Valdez was firing a .22-caliber gun or a shotgun.

J.G. ran out of the vehicle screaming. When defendant and Valdez stopped shooting, Sarabia pulled out his own gun and fired back at them but had no strength because he had been shot multiple times. Sarabia was evacuated by helicopter in

Earlimart and flown to Fresno to be treated for his injuries. A Beretta .45-caliber handgun and .45-caliber shell casings were retrieved from the Tahoe by sheriff's deputies.

J.G. testified he remembered getting shot. He did not know Galvan, did not remember identifying defendant as one of the shooters, and did not remember the vehicle the shooters used. The shooters' SUV, a white GMC Yukon, was located the following morning at 6:33 a.m. on a rural dirt road near Earlimart. The engine was still running. The Yukon had been stolen around 8:00 p.m. the night of the shootings.

Numerous bullet holes and nine-millimeter and .45-caliber projectiles were found in Galvan's Tahoe. Numerous nine-millimeter and .45-caliber shell casings were found in the Yukon. There were bullet strikes on the driver's side of the Yukon.

Defendant's mother testified defendant was at home on the day of the Sarabia shooting.

DISCUSSION

1. Evidence of Attempted Murder and Carjacking

Defendant contends there was insufficient evidence he was guilty of the attempted murder and carjacking of Pablo Garcia on May 8. Defendant argues the prosecution mainly established he was present at the shooting. We disagree.

When a defendant challenges the sufficiency of the evidence, appellate courts must review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. This standard of appellate review is the same in cases in which the People primarily rely on circumstantial evidence. Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury, not the reviewing court, that weighs the evidence, resolves conflicting inferences, and determines whether the People have met the burden of establishing guilt beyond a

reasonable doubt. If the trier of fact's findings are reasonably justified under the circumstances, the opinion of the reviewing court that the circumstances may also be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Casares* (2016) 62 Cal.4th 808, 823-824.) After reviewing the evidence in the light most favorable to the prosecution, we determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient for a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) An appellate court must accept logical inferences the jury might have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Before setting aside the judgment of the trial court for insufficiency of the evidence, it must clearly appear there was no hypothesis whatever upon which there was substantial evidence to support the verdict. (*People v. Connors* (2008) 168 Cal.App.4th 443, 453; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

The jury was given instructions on aiding and abetting a crime (CALCRIM No. 401), conspiracy to commit murder (CALCRIM No. 563), evidence of an uncharged conspiracy (CALCRIM No. 416), and liability for the coconspirator's acts (CALCRIM No. 417). The prosecutor argued the jury could reasonably infer Magallenas and defendant worked together as part of a coordinated plan. The prosecutor further argued Magallenas and defendant acted together like a well-oiled machine to commit crimes constituting two of their gang's primary activities, murder and carjacking. The prosecutor argued the two gang members were doing their job for the gang.

Defendant was not merely present with Magallenas during the Pablo Garcia shooting and carjacking. Magallenas flagged down Garcia and asked for a ride for himself and his friends, including defendant, who sat in the bed of the pickup truck. According to Garcia, Magallenas gave directions as to where to go and told Garcia when

to stop. As Magallenas exited the truck, Garcia remembered defendant jumping out of the bed of the truck. Magallenas initially walked away from the truck but then back toward it before opening the driver's side door and shooting Garcia. Defendant was seen pulling Garcia out of the truck, placing him on the road, and driving away with the truck. This conduct appeared to be coordinated.

The gang expert, Sergeant Derington, testified Sureños associate with the color blue and are rivals to Norteños. Gang members in Earlimart are predominantly from the Norteño gang and are expected to kill as many Sureño gang members as possible. A person who lived near a Northerner gang member and who wore a blue hat could be perceived by Northerners as a rival gang member. Also, Pablo Garcia could be perceived as a rival gang member because he lived close to Medrano, a member of the Norteño gang, but did not associate with Medrano.

Based on the hypothetical mirroring of the People's evidence, Derington opined the attempted murder and carjacking of Pablo Garcia was committed for the purposes of the Northerner gang. She specifically believed the blue hat Garcia was wearing created the perception he was a rival gang member, and "one of the cardinal rules within the gang is ... to take out any and all rivals sighted at that time." Derington also testified homicide and carjacking were among the crimes committed for the benefit of the gang.

Because there were two males in the bed of the pickup truck, defendant argues there was no evidence demonstrating he was the person who removed Pablo Garcia out of the cab and drove away with his pickup truck. The People explain why this argument is unpersuasive. Garcia testified defendant jumped out of the pickup truck's bed onto his side, the driver's side, of the cab. Also, Lupe Lopez, Jr., told Sergeant Zaragoza the person sitting in the back of the truck jumped out, approached the driver's side door, and pulled the driver out before driving away. This evidence was sufficient to support the jury's finding defendant was the person who pulled Garcia out of the pickup truck, after Magallenas shot him, and drove away with Garcia's truck.

We acknowledge there is other contradictory evidence in the record. Lupe Lopez, Jr., told another deputy the man who had pulled Pablo Garcia out of the truck and drove away had exited from the passenger side of the truck cab and was wearing a white shirt. Another witness described the male who pulled Garcia out of the truck as wearing a black shirt. As noted above, our task on appeal is to view the evidence in the light most favorable to the jury's verdict. Garcia's testimony and identification of defendant is such evidence.

The evidence adduced at trial, including the reasonable inferences to be drawn from that evidence, supported the prosecution's theory Magallenas and defendant acted in a well-coordinated conspiracy to attempt to kill Pablo Garcia and carjack his vehicle. The jury could find defendant criminally liable for attempted murder and carjacking based on an uncharged conspiracy, aiding and abetting, or both theories. There is circumstantial evidence the motive for the attempted murder and carjacking was to retaliate against a perceived rival gang member and to intimidate the community to enhance the prestige of defendant and his Northerner gang. Viewing the evidence as a whole, we conclude there is substantial evidence in the record to sustain defendant's convictions for attempted murder and carjacking.

2. People's Motion to Consolidate

A. Introduction

Defendant initially concedes joinder was permissible because murder and attempted murder are crimes of the same class. Defendant contends, however, the People sought to join two weak cases, sought the introduction of a completely irrelevant uncharged crime, and attempted to consolidate two cases without cross-admissible evidence. Defendant argues he was denied due process by the consolidation of the murder and attempted murder cases. We find the trial court did not abuse its discretion in joining the two cases.

B. Motion to Consolidate

The prosecutor moved prior to trial to consolidate the Gonzalez and Almaguer murders with the Pablo Garcia attempted murder and carjacking case. The prosecutor argued both cases involved the same class of crime; the motive in both crimes was gang related, making evidence in both cases cross-admissible; evidence in the shooting of Garcia could be used to prove elements of charged gang offenses, enhancements, and special circumstance allegations in the double murder case; several of the same witnesses would testify in both cases; evidence of the shooting of Garcia was admissible under Evidence Code section 1101, subdivision (b) in the double murder case to show motive, intent, and identity; and trying both cases separately would involve an undue consumption of time.

In his opposition, defendant argued the two cases were not cross-admissible because no gang enhancements or crimes were alleged in the attempted murder information and a gang expert would not be permitted to give an opinion in that case; both cases were weak and joining them could result in a different outcome than if they were tried separately; the two cases did not have many common witnesses; there were insufficient similarities to show common scheme, plan, intent, or motive; and consolidation would violate Evidence Code section 352 because it would confuse the issues and substantially prejudice defendant.

The prosecutor replied gang evidence in the attempted murder case was admissible even if no gang allegations or crimes were alleged in that case. The prosecutor further argued cross-admissibility was only one factor to consider when ruling on a consolidation motion.

The law and motion court made the following findings at the conclusion of the hearing on May 17, 2013. The court noted the gang evidence appeared to be very strong in both cases, and the motive in both cases appeared to be gang related. The court rejected defendant's argument there were no gang allegations in the attempted murder case because even without specific allegations, gang evidence could still be relevant to

the attempted murder case. The court observed both cases had a number of similarities: both involved gang motivation, the use of firearms, and the taking of vehicles. The court noted the identity of the shooter in the attempted murder case did not impose a great consequence on defendant, and the court also stated there was no significance in the People's failure to file other charges in the attempted murder case. The court found there was evidence in each case relevant to the other based on Evidence Code section 1101, making the evidence in each case cross-admissible. The court granted the People's consolidation motion.

C. Legal Principles

Section 954 governs joinder and severance. It provides, in relevant part, “[a]n accusatory pleading may charge ... two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated ...; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately” When the statutory requirements for joinder are satisfied, a defendant has the burden to clearly establish a potential of prejudice sufficient to warrant separate trials. (*People v. McKinnon* (2011) 52 Cal.4th 610, 630.)

Murder and attempted murder are both assaultive crimes against the person and are, therefore, offenses of the same class expressly made joinable by section 954. Where, as here, the statutory requirements of joinder are met, a defendant can predicate error only upon a clear showing of prejudice. (*People v. Miller* (1990) 50 Cal.3d 954, 987; see *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 [consolidation or joinder of charged offenses ordinarily promotes efficiency, the course of action preferred by the law].)

The California Supreme Court has held that while cross-admissibility ordinarily dispels any inference of prejudice, the court has never held the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice. (*People v. McKinnon, supra*, 52 Cal.4th at p. 630.) The absence of cross-admissibility alone is insufficient to establish prejudice where (1) the cases are properly joinable under section 954 and (2) no other factor relevant to the assessment of prejudice shows an abuse of discretion. (*McKinnon*, at pp. 630-631.)

If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing the joinder resulted in gross unfairness—a denial of due process. Even if the court abused its discretion in joining or refusing to sever, reversal is unwarranted unless a defendant would have received a more favorable result in a separate trial to a reasonable probability. (*People v. Avila* (2006) 38 Cal.4th 491, 575.) The refusal to sever an action, or in this case the joinder of two actions, may constitute an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a weak case has been joined with a strong case or with another weak case; (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173 (*Sandoval*).)

D. Cross-admissibility of Evidence

Defendant reargues the entire factual profile of the prosecution's case, discounting most of the evidence adduced at trial. Defendant finds no cross-admissible evidence in the murder and attempted murder cases. Defendant points to the evidence from his family members establishing his alibi for the attempted murder of Pablo Garcia and vigorously asserts both cases were weak. Defendant also finds no similarity in the other-crimes evidence in the attempted murder of Sarabia. Before reaching these points, we note defendant has done the reverse of what a reviewing court is charged to do: he has

viewed the evidence in the light most favorable to his contentions and not in the light most favorable to the prosecution's case and verdict.

We conclude the evidence in the double murder case was cross-admissible with evidence in the attempted murder of Pablo Garcia. It was alleged the murders of Almaguer and Gonzalez were committed while defendant was an active participant in a criminal street gang and were carried out to further the activities of the gang (§ 190.2, subd. (a)(22)); they were committed for the benefit of a criminal street gang, the gang enhancement allegation (§ 186.22, subd. (b)(1)(C)); and they were committed with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(4)). Defendant was further charged with being a principal in the murders who intentionally discharged a firearm (§ 12022.53, subds. (d), (e)(1)) and defendant was charged with being involved in a criminal street gang conspiracy (§ 182.5).

The attempted murder and carjacking of Pablo Garcia was admissible in the double murder case to show defendant was an active member in the Northerner gang, that murder and carjacking were among the gang's primary activities, and that both crimes were carried out to further the activities of the gang, as well as to promote, further, or assist the gang's criminal conduct. Defendant's activities in both cases formed part of the basis for the opinion of the gang expert, Sergeant Derington, concerning defendant's motive for the double murder and the attempted murder.

In granting the People's motion to consolidate both cases, the trial court found evidence in both cases was cross-admissible pursuant to Evidence Code section 1101, subdivision (b) as evidence of motive, common plan and scheme, and intent. In both cases, the common motive for the crime was either to kill someone who dropped out of the gang and showed it disrespect—Ignacio Gonzalez—or to kill someone who was believed to be the member of the rival Sureño gang by wearing its representative color in the form of a blue hat—Pablo Garcia. The People accurately evaluate the prosecution

evidence adduced at trial as establishing defendant acted with these overarching goals of the gang with the clear purpose of eliminating gang dropouts, snitches, and rival gang members. The first factor identified in *Sandoval* as showing a potential abuse of discretion, absence of cross-admissible evidence, is not present.

E. Similarity of the Cases

Defendant argues the facts of the double murder and attempted murder are totally dissimilar. Defendant further argues the dissimilarities are exacerbated by the even more dissimilar uncharged crime of the attempted murder of Efrain Sarabia. There are several key similarities between all three cases. A Chevrolet Cobalt was stolen in the double murder case and Elena Becerra saw defendant get into it after the shootings. In the attempted murder of Pablo Garcia, his truck was stolen after he was shot and left for dead in the street. Both cases occurred to retaliate against a former gang member who had cooperated with the police or someone perceived to be a rival gang member.

The attempted murder of Sarabia was very similar to the double homicide. After leaving the gang, Sarabia had fights with gang members in much the same manner as what happened with Gonzalez. Defendant and a fellow gang member sprayed gunfire at Sarabia, injuring the 14-year-old bystander and nearly killing Sarabia. Almaguer and Gonzalez were sprayed with gunfire and a bystander was also shot. Defendant used a stolen Yukon SUV for the Sarabia crime and a stolen Chevrolet Cobalt for the double murder.

Defendant's attempt to characterize the cases as being factually dissimilar is unpersuasive. We note there are several factual similarities in the charged offenses, including gang motivation, for committing all of the crimes. We reject defendant's contention this evidence, including the uncharged attempted murder of Sarabia, was introduced to inflame the passions of the jury. The second *Sandoval* factor is not applicable to this case.

F. Strength of the People's Case

Defendant contends the prosecution's case was weak in both cases. Ignacio Gonzalez's mother, Elena Becerra, heard multiple gunshots and ran out of the house. She saw men running toward a van. Defendant was one of the men running away. He looked straight at Becerra. Becerra recognized defendant because he used to pick up Gonzalez to play basketball. Defendant walked around the van and got into another car. Both vehicles drove away in different directions.

Northerner gang member Macias talked to his friend Prieto prior to the shootings and said they were going to "smoke" Gonzalez's ass and referred to Gonzalez as a dead man walking. Later, Macias all but admitted his gang killed Gonzalez. Angel Gutierrez provided guns to defendant and Alcaraz the day of the shooting and was aware there was a "green light" in the gang to kill Gonzalez. Uriel Uribe learned shortly after the shootings that defendant had shot and killed Almaguer, and gang member Valdez simultaneously shot and killed Gonzalez.

At Humberto Garcia's apartment, Uribe heard defendant say Valdez shot Gonzalez in the face. Valdez was laughing. Defendant also said he and Valdez approached Gonzalez's residence from the rear, jumped over the fence, shot the victims, and left the scene in a stolen vehicle. Defendant said they burned their clothes together with the stolen vehicle at Avenue 24. Defendant described the gun he used as "very strong." Defendant said "the [dropouts] thought they were cool chilling outside their house."

The strength of the People's second case against defendant was also strong, but had less corroborating evidence. Pablo Garcia picked up defendant, Magallenas, and an unidentified third person. In a coordinated action, Magallenas had Garcia stop his truck, then he exited the cab of the truck and walked around to the driver's door. At the same time, defendant jumped out of the bed of the truck on the driver's side. Magallenas opened the driver's door and shot Garcia in the neck. Lupe Lopez, Jr., told Sergeant Zaragoza he saw a black truck occupied by two people in the cab and one in the bed of

the truck. It was too dark to see faces, but the truck stopped in the middle of the block. The person sitting in the bed of the truck jumped out, approached the driver's side door, pulled the driver from the truck, and left the scene in the truck.

There was contradictory testimony on some points, such as whether the person Lupe Lopez, Jr., saw taking Pablo Garcia out of the truck and driving away with it exited from the cab of the truck or from the truck bed. Lopez's account to Sergeant Zaragoza was most consistent with Garcia's testimony.

Neither case was perfect, but we reject defendant's contention both cases were weak. Both cases were relatively strong and involved the same class of offense. The third factor identified in *Sandoval* as showing a potential abuse in the trial court's discretion in consolidating both cases, matching a strong case with a weak case or matching two weak cases, is not present.⁴

G. Conclusion

Defendant initially conceded joinder was permissible because murder and attempted murder are crimes of the same class. Defendant bore the burden of showing the trial court's consolidation of the two cases denied him of his right to due process and a fair trial. Not present in this case are the three factors identified in *Sandoval* as showing a court abused its discretion in granting a motion to consolidate or denying a motion to sever two or more cases. There was cross-admissible evidence, both cases were relatively strong, and the evidence of each case was not presented to unduly inflame the passions of the jury. We therefore find no error in the trial court's order consolidating both cases.

⁴The fourth *Sandoval* factor indicating an abuse of discretion in ruling on a severance or consolidation motion is when any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*Sandoval, supra*, 4 Cal.4th at pp. 172-173.) Defendant was never charged with the death penalty.

3. Alleged Prosecutorial Misconduct

A. Introduction

Defendant argues there was no compliance with Evidence Code section 710, which requires a witness to take an oath or affirmation prior to giving testimony. Defendant further argues the failure of the witness Carlos Infante to take an oath also violated the confrontation clause of the Sixth Amendment. Defendant contends the prosecutor committed misconduct by questioning Infante after he refused to take the oath to tell the truth in violation of the trial court's order. Defendant further contends the prosecutor was allowed to get information before the jury concerning defendant's alleged confession to Infante that he was guilty of the double murder. Defendant states he was denied due process and the trial court erred in denying his motion for a mistrial on this ground.

The People reply defendant failed to raise any objections based on Evidence Code 710 and the confrontation clause, and this issue was therefore forfeited. As we explain, defendant did not object to the failure to swear Infante on Evidence Code and confrontation clause grounds related to a witness taking an oath. Defense counsel, however, did object to the prosecutor's questioning of Infante as bringing in evidence of a confession through the "back door," another aspect of the confrontation clause, and did make a motion for mistrial based on prosecutorial misconduct, preserving these issues for appellate court review. We do not find error on these grounds.

B. Attempted Questioning of Carlos Infante

Although the prosecutor called Carlos Infante as a witness, Infante refused to be sworn in or to answer any questions. After refusing to be sworn as a witness, the prosecutor asked Infante the following: "On March 26, 2013, did you tell Investigator Denny that you knew [defendant] since he was a little boy and that [defendant] told you that [he] along with Red and a third guy killed the victims—" Defense counsel immediately objected before the prosecutor could finish his question. The prosecutor

continued with his question: “—with a 9-millimeter gun at State and Washington because they were rats or in a gang?”

Defense counsel immediately lodged a second objection. The trial court replied, “Objection sustained. That question is stricken.” The court then advised the jury, “When I strike something, you’re to assume it didn’t happen.” The court noted the prosecutor’s question was compound. The court cut off the prosecutor and asked Infante, “On March 26, 2013, did you talk to Investigator Denny?” Infante replied, “I don’t want to say anything. I am not going to say anything.”

The attorneys proceeded to have a discussion with the court outside the jury’s presence. Defense counsel stated the prosecutor’s question of what Infante told an investigator allowed the jury to hear information through the back door. Defense counsel argued the court had told the prosecutor not to question the witness under these circumstances, and he made a motion for a mistrial based on prosecutorial misconduct. The prosecutor argued he was permitted to ask a leading question, there was nothing wrong with his question, and the only way to determine whether Infante would testify was to ask him the question. The prosecutor told the court that not allowing him to question Infante was prejudicial to the People’s case.

The trial court responded: “Stop, stop. You’re not going to ask the question. [¶] I asked a question whether or not he talked to the officer, and he refused to answer that. So it’s obvious he’s refusing to answer any questions, and we are done with this witness.” The court denied defense counsel’s motion for a mistrial, and the jury was brought back into court.

The court ordered Infante to answer relevant questions. Infante again said he had nothing to say and refused to answer any question put to him. The court advised Infante it would hold him in contempt if he continued to refuse to answer questions. Infante refused to answer questions and the court found him in contempt.

Later, defense counsel sought to clarify the record concerning what the trial court told the prosecutor prior to calling Infante to the witness stand. Defense counsel said it was his recollection he had expressed concerns to the court about the nature of the question to be asked by the prosecutor. Defense counsel had asked the court if it agreed with him on that point. Counsel was unsure if the court actually told the prosecutor not to ask questions. The prosecutor stated he believed he could ask Infante a leading question based on reports Infante was not going to cooperate with questioning.

The court explained its understanding was the prosecutor could ask one leading question, anticipating Infante would not answer it. The court stated, “That is why in the middle of the prosecution’s question I interrupted and moved to strike the question.” Defense counsel said he wanted to discuss this point to put his mistrial motion in context. The court replied there was nothing significant, given the fact only a partial question was presented by the People, the witness did not answer the question, and the court immediately struck it with an admonition to the jury to disregard it.

C. Failure to Swear Witness

Defendant argues the trial court erred in permitting the prosecutor to ask Infante any questions after Infante refused to be sworn, asserting a violation of Evidence Code section 710 and the confrontation clause of the Sixth Amendment of the United States Constitution. The People reply defense counsel did not object to Infante’s testimony on this basis and the issue is forfeited.

The central concern of the confrontation clause is to safeguard the reliability of evidence against a criminal defendant by subjecting it to rigorous testing, ensuring the witness gives his or her statements under oath—impressing on the witness the seriousness of the matter, forcing the witness to submit to cross-examination, and permitting the jury deciding the defendant’s fate to observe the demeanor of the witness, thus aiding the jury in assessing the witness’s credibility. (*Maryland v. Craig* (1990) 497 U.S. 836, 845-846.) Evidence Code section 710 requires “[e]very witness before testifying shall take an oath

or make an affirmation or declaration in the form provided by law, except that a child under the age of 10 or a dependent person with a substantial cognitive impairment, in the court's discretion, may be required only to promise to tell the truth.”

Generally, the failure to object to an evidentiary error at trial results in forfeiture of the issue on appeal. (*People v. Dykes* (2009) 46 Cal.4th 731, 756; *People v. Partida* (2005) 37 Cal.4th 428, 433-435; *People v. Lewis* (2001) 26 Cal.4th 334, 357.) Failure to raise a constitutional objection to evidence can also establish waiver of the issue on appeal. (*People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4.) Defense counsel did not specifically object to Infante's presence in court on the basis he had not been sworn as a witness pursuant to Evidence Code section 710. We find his assertions of a violation of Evidence Code section 710 and the confrontation clause component of this argument are both subject to forfeiture.

Even if we were to carve an exception to the forfeiture and waiver doctrines for the failure of a witness to take an oath, defendant cannot prevail on this point. Infante refused to take the oath and, more importantly, he refused to answer any question posed by the prosecutor or the court. Infante provided no evidence of anything during his brief stay on the witness stand. Under these circumstances, there was no error in asking Infante a single question without him being sworn. We therefore find no error in the failure to obtain an oath from Infante or a related violation of the confrontation clause based on Infante's failure to take the oath.

D. Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct in asking a question suggesting he confessed to Infante he committed the double murder, thus placing extrajudicial information before the jury in violation of the trial court's ruling. This presents another facet of a violation of the confrontation clause defense counsel did not object to. Defendant argues the court had agreed the prosecutor could not ask questions permitting information to come in through the back door, but the prosecutor disregarded

the trial court and still asked the question. Defendant describes the prosecutor's conduct as being in contravention of the court's order and, thus, prosecutorial misconduct.

Defendant argues the prosecutor improperly interrogated a witness.

Before analyzing the legal principles applicable to prosecutorial misconduct, we first note the following concerning how the trial court ruled. In the hearing after Infante was called to the stand, the court explained its understanding was the prosecutor could ask one leading question anticipating that Infante would not answer it. The court stated, "That is why in the middle of the prosecution's question I interrupted and moved to strike the question." Defense counsel said he wanted to discuss this point to put his mistrial motion in context. The court replied there was nothing significant, given the fact only a partial question was presented by the People, the witness did not answer the question, and the court immediately struck it with an admonition to the jury to disregard it.

The prosecutor and the trial court apparently understood the prosecutor would ask Infante one leading question to determine whether Infante indeed intended not to testify. The prosecutor's single attempted question did not, by itself, violate any prior ruling of the trial court. Infante was not invoking his privilege against self-incrimination and the prosecutor could call him to the witness stand to determine whether he would testify. (See *People v. Sisneros* (2009) 174 Cal.App.4th 142, 151, questioned on another ground in *People v. Sanchez* (June 30, 2016, S216681) __ Cal.4th __, __ [2016 Cal. LEXIS 4577, pp. 29-30]; *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1553-1554.) It appears the prosecutor was attempting to either establish whether Infante talked to Investigator Denny regarding an admission defendant made concerning the double murder, or that Infante would deny making any statement to Denny, permitting the prosecutor to introduce Infante's statement as a prior inconsistent statement pursuant to Evidence Code section 1235. (*People v. Perez* (2016) 243 Cal.App.4th 863, 891 (*Perez*)). Where, as here, the record shows the prosecutor had a good faith belief a witness could establish a factual basis for the questioning posed at trial, no prosecutorial misconduct has occurred.

(*People v. Mooc* (2001) 26 Cal.4th 1216, 1232-1234; *People v. Lucas* (1995) 12 Cal.4th 415, 466-467.)

The more pertinent issue is whether the prosecutor's question violated the confrontation clause by alluding to evidence not otherwise before the jury. The United States Supreme Court in *Douglas v. Alabama* (1965) 380 U.S. 415, 419-421 (*Douglas*) held a prosecutor violated the confrontation rights of a defendant when the prosecutor asked a witness a series of questions concerning the crime charged against the defendant after the witness invoked the right against self-incrimination. The witness was repeatedly asked whether he had made a statement, and he refused to answer the prosecutor's questions. (*Id.* at pp. 416-417.) The court in *Douglas* found the prosecutor's reading of the statement, while technically not testimony, may well have been the equivalent in the jury's mind that the witness made the statement and it was true. (*Id.* at pp. 419-420.)

California cases have relied on *Douglas* to find a defendant's right to confrontation is violated where, in examining a recalcitrant witness, the prosecutor poses leading questions providing the details of prior statements the witness made to law enforcement regarding a defendant's commission of a crime. A victim-witness's refusal to answer over 100 leading questions while the prosecutor read to the jury from police questionings denied the defendant the opportunity to cross-examine the victim on what was tantamount to adverse testimony in *People v. Murillo* (2014) 231 Cal.App.4th 448, 455-456 (*Murillo*). The admission of a prior statement made by a witness who stonewalled at trial and refused to answer any question on direct or cross-examination denies the defendant the right to confrontation, which contemplates a meaningful opportunity to cross-examine witnesses. (*People v. Rios* (1985) 163 Cal.App.3d 852, 863-864 (*Rios*).

In *People v. Shipe* (1975) 49 Cal.App.3d 343, 354-355 (*Shipe*), the prosecutor succeeded in creating the distinct impression the witnesses had talked to authorities, had described the events vividly depicted in the prosecutor's questions, and their statements

were true. In *Perez, supra*, 243 Cal.App.4th at pages 887-890, the case had been remanded for retrial. On retrial, the *Perez* court directed the trial court not to allow the prosecutor to pose numerous questions to a recalcitrant witness concerning the witness's statements to police because this violated *Douglas* and its progeny. The *Perez* court was not persuaded by the People's argument the statements were not themselves testimony, the very argument rejected in *Douglas*. (*Perez, supra*, at p. 887.)

Although the prosecutor's single question here could be considered improper pursuant to *Douglas* and its progeny, there is a material difference in the length of the colloquy between the prosecutor, which was interrupted by defense counsel's objections and the trial court ordering the question stricken, and the persistent questioning that occurred in *Douglas, Perez, Murillo, Rios, and Shipe*. Unlike the prosecutors in the referenced cases, the prosecutor here did not have the opportunity to paint a portrait of facts not in evidence through his questioning of Infante. In fact, the prosecutor never got to reformulate his question. The trial court intervened and asked Infante whether he had talked to Investigator Denny on March 26, 2013. Infante refused to answer this question, and Infante was asked no further questions concerning any statement made to Denny.

We further find any potential harm was immediately overcome by the trial court sustaining the objections by defense counsel and ordering the prosecutor's question stricken. Elaborating on its ruling, the trial court further admonished the jury, "When I strike something, you're to assume it didn't happen." The jury received further instructions both at the beginning of trial and in concluding instructions pursuant to CALCRIM Nos. 104 and 222 that nothing the attorneys said was evidence, their remarks are not evidence, their questions are not evidence, and only the witnesses' answers are evidence. Appellate courts presume the jury followed the trial court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

We conclude the prosecutor did not willfully violate any prior order of the trial court. To the extent the prosecutor's leading question to Infante contained information

not otherwise in evidence, the trial court ameliorated any negative impact by immediately intervening, sustaining defense counsel's objections, striking the question, and ordering the jury that by striking the question it was not to consider any part of the prosecutor's statements. Unlike *Douglas* and the California cases applying it, the prosecutor here did not attempt to get, nor succeed in getting, evidence in through the back door by way of a series of questions creating a portrait of evidence not before the jury. The trial court did not abuse its discretion in denying defendant's motion for a mistrial. (See *People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

4. Failure to Give Instructions on Accomplice Testimony

Defendant contends the trial court prejudicially erred by failing to instruct the jury on the rules governing accomplice testimony for witnesses Uriel Uribe and Benjamin Semintal. Defendant argues Uribe and Semintal were both Northerner gang members, and there was evidence from which the jury could have inferred they were accomplices with Macias in the double murder. The People argue there is no direct evidence from which reasonable inferences could be drawn that Uribe and Semintal acted as accomplices, and accomplice instructions were not warranted for these witnesses. We agree.

When a jury receives substantial evidence a witness who has implicated the defendant was an accomplice, a trial court must instruct the jury on the principles of accomplice testimony on its own motion. This includes instructing the jury an accomplice's testimony implicating the defendant must be viewed with caution and corroborated by other evidence. (*People v. Houston* (2012) 54 Cal.4th 1186, 1223; see CALCRIM Nos. 334, 335.) An accomplice is someone subject to prosecution for the charged crimes by reason of aiding and abetting or being a member of a conspiracy to commit the charged crimes. (*People v. Houston, supra*, at p. 1224.) An accomplice is recognized as a tainted source of evidence because he or she has a strong motive to fabricate testimony incriminating innocent persons or attributing to others active roles for

more serious offenses so the accomplice might gain leniency or even immunity for his or her own criminal actions. (*In re Mitchell P.* (1978) 22 Cal.3d 946, 955.)

An accomplice must have guilty knowledge and intent with regard to the commission of the crime. An aider and abettor must act with the knowledge of the criminal purpose of the perpetrator and with the intent or purpose either of committing, encouraging, or facilitating commission of the offense. (*People v. Houston, supra*, 54 Cal.4th at p. 1224.) Mere presence at the scene of a crime is insufficient to constitute aiding and abetting. The same is true for failure to take action to prevent a crime. However, these may be factors the jury can consider in assessing a defendant's criminal responsibility. Knowledge of another's criminal purpose is also insufficient for aiding and abetting. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

Defendant's argument Uribe and Semintal were accomplices is largely based on the prosecutor's argument to the jury that Macias orchestrated the double murder and manufactured an alibi because Gonzalez had "flipped off" Macias earlier the day of the shootings. Defendant surmises that because Uribe and Semintal were with Macias prior to the shootings, they were necessarily accomplices with Macias and defendant.

According to Gutierrez, defendant and Alcaraz picked up the guns from him at 4:00 p.m. the day of the murders.⁵ At trial, Gutierrez said the guns were retrieved by defendant and Alcaraz a few days before the murders. Neither Uribe nor Semintal were with defendant. Gutierrez said two men he did not know came with Macias the day of the shootings, talked about dropouts, and mentioned Gonzalez. The men talked about beating up Gonzalez. Assuming the two men with Macias were Uribe and Semintal, a discussion about dropouts and beating up Gonzalez in no way links Uribe and Semintal as accomplices to double murder.

⁵The trial court informed counsel the jury would be instructed Gutierrez was an accomplice as a matter of law. The jury received accomplice testimony instructions (CALCRIM No. 335) stating Gutierrez was an accomplice in counts 1 through 5.

The visitors stayed with Gutierrez until after they heard gunshots from the double murder. Macias mentioned a police scanner and the other men appeared nervous. Uribe told an investigator he had learned that earlier in the day gang members went to Gutierrez's home to pick up firearms. It is unclear whether Uribe was aware of this fact prior to the shootings. Gutierrez testified he told Macias, and presumably Uribe and Semintal, the "homies" had picked up firearms earlier that day. This information was imparted after the three men arrived at Gutierrez's home and just before the shootings.

Uribe picked up Semintal, drove to Earlimart, and learned Valdez had just dropped off Macias. Uribe and Semintal drove with Macias past Gonzalez's home and then to Gutierrez's house. Between 10 and 13 minutes later, they heard gunshots and drove past the crime scene. Semintal gave a similar account to investigators. At most, this information does nothing more than place Uribe and Semintal at the scene of the shootings before and after they occurred, and nearby when the double murder happened. As noted above, however, being at the scene of a crime does not make one an accomplice.

We disagree with defendant's assertion the jury would have likely considered them accomplices. The only connection to the double murder Uribe and Semintal had was their car ride with Macias before and after the shootings. Thus, tying Uribe and Semintal to the double murder as accomplices would be based on vague speculation, even if one accepts the theory Macias called for Gonzalez's murder.

The cautionary instruction is not necessary when the witness is a mere accessory after the fact of the crime or when the witness does not claim firsthand knowledge of how the crime was committed and only testifies to what he or she heard. (*People v. Mackey* (2015) 233 Cal.App.4th 32, 123.) Even where the accomplice testimony rule is violated, the failure to give the instruction is harmless if there is sufficient corroborating evidence in the record. The corroborating evidence may be slight. (*Id.* at p. 124.) Here, there was

abundant evidence corroborating the testimony and prior statements of Uribe and Semintal. This ground for appeal is rejected.

5. Instructions on Other-crimes Evidence

Defendant argues the trial court erred in its jury instructions on other-crimes evidence because the jury was not instructed it could not conclude from the other-crimes evidence that defendant had a bad character or was disposed to commit crime. Defendant further argues the court erred in instructing the jury the other-crimes evidence was relevant to all the charged offenses rather than limiting this evidence to the double murder allegations. The trial court did not err for either reason.

A. Trial Court's Instruction

The trial court instructed the jury with CALCRIM No. 375 on how to evaluate an uncharged offense as follows:

“The People presented evidence that the defendant committed the offense of Attempted Murder and Drive By Shooting that was not charged in this case.

“You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

“If the People have not met this burden, you must disregard this evidence entirely.

“If you decide that the defendant committed the offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

“The defendant acted with the intent to kill in this case; or

“The defendant had a motive to commit the offenses alleged in this case.

“In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offenses.

“Do not consider this evidence for any other purpose.

“If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Murder or that the personal use of a firearm causing great bodily injury or any other charges in this case [have] been proved. The People must still prove every charge and allegation beyond a reasonable doubt.”

B. Omission of Bracketed Portion

Defendant now complains the trial court did not include the following bracketed sentence: “[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]” (CALCRIM No. 375.) Defendant acknowledges the bench notes following the instruction include the following: “Give the bracketed sentence beginning with “Do not conclude from this evidence that” on request if the evidence is admitted only under Evidence Code section 1101(b).” (Bench Note to CALCRIM No. 375 (Feb. 2016 ed.) p. 147.) Defendant concedes there was no request for this instruction by defense counsel, but argues the court must still instruct the jury on general principles of law that are closely and openly connected with the facts before the court and the jury’s understanding of the case.

The trial court only has a sua sponte duty to give this instruction in the extraordinary case in which unprotested evidence of past offenses is the dominant part of the prosecution’s case and the uncharged crimes evidence is highly prejudicial and minimally relevant to any legitimate purpose. (*People v. Collie* (1981) 30 Cal.3d 43, 63-64.) Evidence of the uncharged crime was not the dominant part of the prosecution’s case, nor was the uncharged crime different in degree or kind from the charged offenses. In the context of this case, the uncharged crime was not unduly inflammatory or prejudicial. The trial court nevertheless instructed the jury with the most pertinent portions of CALCRIM No. 375.

The bracketed portion of the instruction not given is, in the context of the instant action, similar to a pinpoint instruction. Even if proper, pinpoint instructions are not

required to be given sua sponte. (*People v. Hughes* (2002) 27 Cal.4th 287, 361.) The court here did not have a sua sponte duty to give the bracketed portion of the instruction, especially without a request from defense counsel.

C. Referring to All Offenses in Instruction

Defendant further argues the trial court erred in modifying CALCRIM No. 375 by adding that the uncharged crime evidence could be used by the jury to evaluate defendant's intent or motive for all of the charged offenses, rather than confining it to the double murder prosecution. We disagree.

For the purposes of introducing evidence of uncharged acts under Evidence Code section 1101, subdivision (b), the least degree of similarity between the charged and uncharged crimes is required to establish intent. The uncharged crime or crimes need only be sufficiently similar to the charged offenses to support the inference the defendant probably harbored the same intent in each instance. (*People v. Kipp* (1998) 18 Cal.4th 349, 371, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) The probative value of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes so long as the offenses have a direct, logical nexus. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [motives for shooting and robbing victim tended to show defendant had the same motives earlier that evening when he stabbed a different victim, thus showing an intent to rob rather than an act of self-defense].)

Although the least degree of similarity is required for establishing intent, the uncharged attempted murder of Efrain Sarabia, a former gang member who dropped out of the gang, bore remarkable similarity to the double murder and the attempted murder/carjacking case. There was also a direct, logical nexus between the uncharged and charged offenses probative of defendant's motive, which was clearly to avenge Northerners by punishing dropout gang members and perceived members of the rival Southerner gang. The trial court's instructions properly focused the jury's attention on

what the other-crimes evidence was relevant to show—defendant’s intent and motive in committing the charged offenses. Promoting and fighting for the Northerner gang was part of defendant’s intent in committing all of the charged offenses and was not confined to the double murder case. We therefore reject defendant’s argument the trial court erred in having the jury consider defendant’s intent and motive with other-crimes evidence to all of the charged offenses rather than limiting it to the double murder case.

6. Cumulative Error

Defendant asserts the combination of all the issues he has raised constitutes cumulative error. The cumulative effect of errors must be sufficiently prejudicial to warrant reversal of guilty verdicts. Where there are few errors and each one is harmless when separately considered, there is no cumulative error warranting reversal of guilty verdicts. (*People v. Jurado* (2006) 38 Cal.4th 72, 127; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1056.) Here there were no errors shown on appeal, therefore there is no cumulative error.

7. Clerical Errors

Defendant contends, and the People concede, there are errors in the abstract of judgment. Although the trial court sentenced defendant on count 6, the attempted murder allegation, to a term of life *with* the possibility of parole, the abstract of judgment inaccurately indicates defendant’s sentence on count 6 is life *without* the possibility of parole. The abstract of judgment also inaccurately indicates the gun use enhancement on count 6 was 25 years to life based on section 12022.53, subdivisions (d) and (e)(1). The court, however, imposed a consecutive term of one year for the gun use enhancement on count 6 pursuant to section 12022, subdivision (a)(1). Also, the gun use enhancement alleged as to count 7 inadvertently states section “1022(a)(1)” as the applicable statute. It should indicate defendant violated section 12022, subdivision (a)(1). Clerical errors can be corrected at any time, including on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181,

185; *In re Candelario* (1970) 3 Cal.3d 702, 705.) We will remand for the trial court to correct the abstract of judgment.

DISPOSITION

The case is remanded to the trial court to prepare an amended abstract of judgment showing defendant's sentence on count 6 is life with the possibility of parole plus one year for the gun use enhancement alleged as to that count, and showing the statute for the gun use enhancement on count 7 is section 12022, subdivision (a)(1). The trial court shall forward the amended abstract of judgment to the appropriate authorities. The judgment is affirmed.

PEÑA, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.