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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISMAEL NUNEZ,

Defendant and Appellant.

In re ISMAEL NUNEZ

on Habeas Corpus.

G044452

(Super. Ct. No. 07CF2123)

O P I N I O N

G045903

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed as modified.

Original proceedings; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition denied.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Annie Featherman Fraser, Deputy Attorney General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Ismael Nunez of all three counts with which he was charged: murder (Pen. Code, § 187, subd. (a));¹ attempted murder (§§ 187, subd. (a), 664, subd. (a)); and street terrorism (§ 186.22, subd. (a).) As to the murder conviction (count 1), the jury found true the street gang special circumstance (§ 190.2, subd. (a)(22)). The jury also found several charged firearm and street gang enhancements to be true. The court sentenced defendant to 50 years to life in prison, plus two consecutive life without the possibility of parole terms.

In his appeal, Nunez raises eight distinct issues. Nunez also filed a petition for writ of habeas corpus, in which he contends his trial attorney provided ineffective assistance of counsel with regard to several aspects of the case. We affirm the judgment (with one slight modification with regard to the restitution order) and deny Nunez's petition.

FACTS

Nunez, Porfirio Garcia, and Moises Cabrera were charged with the murder of victim Jose Guzman and the attempted murder of victim Paulino Nava. Nunez and Garcia were tried together in the instant case; we affirmed Garcia's conviction in a prior opinion. (See *People v. Garcia* (Jan. 27, 2012, G044562) [nonpub. opn.]) In an earlier

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

opinion, we also affirmed the conviction of Cabrera, who was tried separately. (See *People v. Cabrera* (Aug. 15, 2011, G043768) [nonpub. opn.]) Juan Avelar was an uncharged accomplice; the district attorney opted not to charge Avelar because he was already serving life without parole based on another murder conviction.

A 911 emergency call for assistance to a location on South Broadway, Santa Ana, California was received on March 3, 2006, at 11:43 p.m. Victim Jose Guzman died from a gunshot wound to the head. Victim Paulino Nava suffered two gunshot wounds to his arm. Ten empty 9-millimeter Luger cartridge cases were found at the scene of the crime. The police could not determine, based on forensic evidence, how many guns were utilized in the attack. Nor could the police immediately identify the perpetrators after investigating the crime scene and interviewing available witnesses. A break in the case occurred in May 2007, when Claudia Ruelas (an individual in state prison on an unrelated conviction) volunteered information. After interviewing Ruelas and re-interviewing two witnesses who were present at the crime scene, the police arrested the various defendants.

Testimony of Claudia Ruelas

Claudia Ruelas was in custody facing murder charges in the instant case and serving prison time for methamphetamine possession and possession of stolen property. She testified pursuant to a grant of immunity, which guaranteed dismissal of the charges against her in exchange for her truthful testimony. Ruelas recognized Garcia and Nunez, whom she had met through her ex-boyfriend Cabrera. Cabrera and the “guys I knew that would hang out with” him claimed to be members of the gang known as “Delhi.”

On March 3, 2006, Ruelas and Cabrera spent the day together. Just before midnight, they went out to get something to eat. Ruelas drove her blue Acura Legend automobile. After leaving the restaurant, the couple drove to Nunez’s house. Ruelas had

been to Nunez's house twice before; she had never met any of Nunez's family members. Nunez, Garcia, and Avelar were at Nunez's house. While Ruelas sat in the car, the four males stood outside talking to one another. Soon thereafter, all five individuals departed. Nunez drove his car with Avelar and Garcia inside; Ruelas drove Cabrera in her car. Ruelas followed Nunez's car.

After driving past "some guys outside" a house on Broadway, the two vehicles circled around and stopped at the intersection of Broadway and Saint Andrew in Santa Ana, California. Garcia, Avelar, and Cabrera got out of the cars. Nunez did not get out of his car or say anything during the entire incident. Cabrera, addressing another group of males gathered nearby, asked "the guys where they're from. They hit 'em up." Ruelas saw three people on the east side of Broadway; she did not know any of them. The other group responded they were from West Myrtle (another Santa Ana gang), and defendant's group replied "Delhi." Cabrera began firing a gun. One of the individuals being shot at successfully ran away. Cabrera shot at a car in which one of the other individuals was sitting. The shots "didn't stop. It just kept going." Cabrera, Avelar, and Garcia got back in their cars and the two cars drove away.

Ruelas identified each of the four alleged perpetrators (Nunez, Cabrera, Garcia, and Avelar) in six-pack identification lineups presented to her at her initial police interview in prison. Ruelas had never seen Nunez's hair like it was in court. His head was normally shaved bald.

During her cross-examination by counsel for Nunez, Ruelas agreed she had "expressed some doubts about whether [she was] right about who was present on [March 3, 2006] at the shooting." She expressed these doubts to her attorney and to the district attorney. In a conversation with an individual named Lester Neal, Ruelas expressed a doubt about Nunez's presence. On redirect, Ruelas clarified that Lester Neal and another individual were telling her that Nunez was not present at the crime. Nunez was there. Ruelas did not see anyone using a cell phone at the scene of the crime.

One of the police officers who conducted Ruelas's initial police interview authenticated a videotape and transcript of the interview. The majority of this interview was admitted into evidence as prior consistent statements supporting Ruelas's trial testimony.

Testimony of Israel Beltran

Israel Beltran and his older brother Aurelio used to live on South Broadway in Santa Ana, the scene of the crime at issue. Israel has never joined or been affiliated with a gang. Aurelio and (murder victim) Guzman were, at some point, members of or affiliated with West Myrtle gang. Israel knew from living in his neighborhood that the Delhi gang claimed the area as its territory. Israel smoked marijuana before the shooting occurred.

Israel "saw everything happen." "[T]here were streetlights out there. I was able to see real clearly, but, I mean, I can't make out real clear details being that they were" approximately 33 feet away. On cross-examination, Israel conceded he saw the back and profile of the attackers, not the front of their faces.

On the evening of March 3, 2006, Israel, Aurelio, Paulino Nava, and Jose Guzman were hanging out near the Beltran residence. Israel was in his driveway "working on [his] go-cart at the moment when they drove up in the cars, two cars" Israel saw the two vehicles very clearly. Israel saw the two automobiles stop "real, real fast, and . . . when they got out of the cars, they started . . . hitting up my brother, his friend [Guzman], and my cousin [Paulino]" The first car was tan, brown, or kind of dark; Israel was not certain what color it was. The second car was a "bluish Acura." "For sure, I saw like four people get out of the cars." Three people emerged from the lead car, and one additional person appeared from the second car. There was one gunman from each car. Israel could not see anyone inside the cars.

Within five seconds, the individuals from the cars pulled out two semiautomatic guns and began firing. Israel heard at least 10 shots. Aurelio was running northbound on the east side of Broadway. Neither Nava nor Guzman ran. Israel saw Nava get shot in his arm and torso; he saw Guzman get shot in the head. Guzman was in his car trying to leave when he was shot. The attackers “hopped in their cars and they took off.”

The four perpetrators had “mostly shaved” heads. Israel did not recognize Nunez in court. He was “not sure” if Nunez was one of the individuals who attacked his friends; no one who participated in the shooting had hair that was the length of Nunez’s hair at the time of trial. Israel identified Garcia as one of the two shooters.

Israel was interviewed by police on several occasions. Israel confirmed he still recognized an individual whose photograph he selected in a six-pack lineup sheet. Although the photograph selected by Israel was Nunez (as made clear by police testimony), Israel still could not identify Nunez in court as the individual in the photograph.

On cross-examination, Israel conceded his first response to the relevant six-pack lineup was that he could not tell whether he recognized any of the individuals. Only when prompted by a follow up question (whether anyone stands out) did Israel identify the photograph (that later testimony established is Nunez). Israel also conceded he said the photograph depicted someone who “‘looks like the type of these people that hang out with Delhi.’” Israel said during the identification that he had not really ever seen the individual; he testified at trial that he meant he had never interacted with him.

Testimony of Aurelio Beltran

Aurelio smoked methamphetamine on the night of the shooting. Aurelio “saw both cars open their doors, and I heard them . . . call out ‘Delhi.’ And I’m not stupid. I know what was coming. So that’s when I turn around and . . . started running.”

According to the testimony of a police officer, the day after the shooting, Aurelio identified a photograph of Garcia as someone who looked familiar from the shooting. Aurelio recalls identifying a photograph at that time. Garcia looked really familiar; Aurelio recalls seeing Garcia from the neighborhood. Aurelio lied when he initially told police he could not describe any of the perpetrators; he lied because he did not want to cooperate with the police.

Testimony of Detective Matthew McLeod

Called as an expert witness on Santa Ana street gangs (in particular, Delhi), Matthew McLeod opined: (1) the Delhi street gang currently (at the time of trial) had approximately 200-250 members; (2) the Delhi street gang's primary activities are assaults, murders, and weapons possession; (3) West Myrtle is a rival gang of Delhi; (4) Nunez, Garcia, Avelar, and Cabrera were active participants in Delhi; (5) Guzman was a member of West Myrtle and Aurelio Beltran was associated with West Myrtle; and (6) a hypothetical murder similar to that committed in this case would be committed for the benefit of Delhi. One of the predicate crimes used to prove Delhi was a criminal street gang was a murder committed by Avelar on December 25, 2005. In providing his reasons for opining that Nunez was a Delhi gang member, McLeod recited a litany of occasions on which Nunez was identified socializing and committing crimes with Delhi gang members.

McLeod offered the following general testimony about Santa Ana gangs and gang culture. The “[t]raditional Hispanic street gang is one that is turf oriented, usually . . . has a loose hierarchical basis such as there are those who will command more respect or of a higher level and then you have . . . mid level, as they would consider them soldiers, and then you have more foot soldiers.” “[T]urf is a geographical area which is adopted by a gang and that is an area that is seen that must be defended from all . . .

rivals, but it's also an area where the gangs or the individual members feel free to commit criminal acts, graffiti, what have you."

"[I]n the gang subculture respect is the utmost. It's the be all and end all of the gang member's life. And respect is equated to fear. The more respect that one garners for him or herself, as well as the gang, the higher that status of that individual and the gang. [¶] Also, if one falls in the eyes of another in terms of respect or allows another to disrespect them, that lowers their status. And in the criminal street gang subculture, if you have a lower status, then you are able to be preyed upon by other individuals as well as other gangs." "[G]ang members will either raise or lower their level of respect by committing crimes of violence. The more violent the act . . . then the more respect that is garnered for that gang member."

McLeod also offered some background information about Nunez. First, Nunez's appearance changed from the time of the crime to the trial. At trial, Nunez had a full head of hair, which contrasted with his appearance in a booking photograph taken in April 2006. Nunez's residence was approximately a half-mile away from the crime scene.

Defense Cell Phone Evidence

Nunez presented an alibi defense that he was talking on his cell phone at or around the time of the shooting and therefore he could not have been involved in the shooting.

Nunez's girlfriend, Rocio Vasquez,² testified that she purchased a cell phone in her name for Nunez with the phone number (714) 317-XXXX. Nunez used this

² On cross-examination, Vasquez testified that she has been in a relationship with Nunez for eight years and wished to marry him. She also confirmed Nunez had his head shaved in March 2006.

cell phone until April 2006. At Nunez's request, Vasquez cancelled service for the phone number following an argument between the two with regard to Nunez using the phone to communicate with other females. Soon thereafter, Nunez was arrested and the Santa Ana Police Department took possession of the phone. Vasquez recovered the phone a few weeks before trial from the Santa Ana Police Department. Vasquez was accompanied by defense investigator Jim Toguchi, to whom she immediately handed the phone.

Toguchi testified that he accompanied Vasquez to the police department and took possession of the cell phone. Toguchi maintained possession and brought the phone to court; the phone never left Toguchi's possession and was kept in a locked drawer. Toguchi took photographs of the phone and its display features. One photograph depicted a naked female photograph that appeared on the phone when Toguchi powered it up. Another photograph depicted Rocio Vasquez, and one entry in the address book was Rocio Vasquez. The phone number for "Dad" linked to the land line at Nunez's residence. Numbers for Nunez's workplace and employment agency were listed in the phone book listings included as a cell phone feature. The outgoing and incoming calls history included calls to and from "Rocio."³

Several of Nunez's friends testified. Javier Gonzalez testified that his phone number in April 2006 was (714) 654-XXXX and that he would talk to Nunez on the phone sometimes. Gonzalez never overheard any yelling or shooting when he talked to Nunez on the phone. Nancy Lopez testified that she talked to Nunez on the phone in early 2006; her number was (714) 873-XXXX. She does not recall a 48 minute phone call at 11:41 p.m. on March 3, 2006. She does recall having many lengthy phone conversations with Nunez during that time period. Lopez never heard yelling or gun shots during her conversations with Nunez.

³ We describe the cross-examination of Toguchi in our discussion below of Nunez's claim of prosecutorial misconduct.

Nunez's brother, Salvador, testified that he also received phone calls from Nunez in early 2006, although he does not remember any particular calls at his (714) 454-XXXX cell phone number. He does not recall ever hearing yelling or gun shots

Sprint phone records entered into testimony indicate: (1) two short (one minute and two minute, respectively) calls were made to (714) 454-XXXX (Salvador's number, according to his testimony) at 11:30 p.m. and 11:36 p.m. on the night of March 3, 2006; (2) a one minute call was made to (714) 654-XXXX (Gonzalez's number, according to his testimony) at 11:20 p.m. on the night of March 3, 2006; and (3) a 48 minute call to (714) 873-XXXX (Lopez's number, according to her testimony) was made at 11:41 p.m. on the night of March 3, 2006. Two calls to other, unidentified numbers occurred at 11:39 p.m. and 11:40 p.m. The Sprint records do not identify the names of the call recipients, only the phone numbers.

Defense Character Testimony of Steven Buck

Nunez called Steven Buck, his supervisor at S.P.S. Technologies, a manufacturing firm. Buck worked at S.P.S. Technologies for 29 years on the second shift, from 2:00 p.m. to 10:30 p.m. Nunez, a temp agency employee, "worked in finishing," a department "where they tumbled parts and sandblasted." This was a difficult job "[b]ecause everything bunches up there, and to keep the flow going through the building, he's got to be on top of his game. He was a one man band going there." Buck was not asked when Nunez worked at S.P.S. Technologies and how long he worked there. But Nunez's girlfriend, Rocio Vasquez, testified that Nunez was working from 2:00 p.m. to 10:30 p.m. in March 2006.

Defense Medical Testimony

An expert witness testified that crystal methamphetamine "interferes with perception, interferes with retention and does interfere with memory." Marijuana also

has an adverse effect upon memory, perception, retention, and retrieval of information. The more these drugs are used, the more impairment to memory. The expert talked only in generalizations; he did not review any materials pertaining to the actual case before the jury. The expert also conceded that methamphetamine may actually enhance memory to the extent the individual under the influence is focused on the details of a single occurrence.

DISCUSSION

We address each of Nunez's appellate and habeas issues in logical order, supplementing our discussion with additional facts as necessary to address each issue.

Jury Instructions Pertaining to Corroboration of Accomplice Testimony

Because Ruelas was an accomplice, her testimony alone was insufficient to convict defendant. (§ 1111 ["A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof"].) Nunez asserts the court prejudicially erred in instructing the jury on this issue.

The court instructed the jury with standard CALCRIM instructions. CALCRIM No. 335, as given, stated in relevant part: "If the crimes of murder, attempted murder or street terrorism were committed, then Claudia Ruelas was an accomplice to those crimes. [¶] You *may not convict the defendant* of those crimes nor find the allegations or special circumstances to be true *based on the statements or testimony of an accomplice alone*. You may use the statements or testimony of an accomplice to convict the defendant or to find the allegations or special circumstance to be true only if: [¶] 1. The accomplice's *statement or testimony is supported by other evidence* that you believe;

[¶] 2. That supporting evidence is *independent of the accomplice’s statement or testimony*; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes. . . .” (Italics added.)

CALCRIM No. 318, as given, stated: “You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1. To evaluate whether the witness’s testimony in court is believable; [¶] AND [¶] 2. As evidence that the information in those earlier statements is true.”

According to Nunez, CALCRIM No. 335 is erroneous because by repeatedly referring to “‘statement or testimony,’” it wrongly suggests an accomplice’s out-of-court statement can be used to corroborate her in-court testimony. Moreover, according to Nunez, together these two instructions (CALCRIM Nos. 318 and 335) “would have misled a reasonable juror to believe that Ruelas’s out-of-court statements could provide sufficient credibility and corroboration of her [in-court trial] testimony.”

Even assuming Nunez did not forfeit this claim (there was no request at the trial court for a modification of these form instructions), his argument is foreclosed by *People v. Tuggles* (2009) 179 Cal.App.4th 339 (*Tuggles*). “No reasonable jury would have understood CALCRIM Nos. 318 and 335 to allow [an accomplice] to corroborate his own testimony. CALCRIM No. 318 informed the jury that it could consider discrepancies between out-of-court statements and in-court testimony to decide that a witness’s statements on the stand were not trustworthy. CALCRIM No. 335 served a similar function in cautioning the jury against blithe acceptance of testimony by an accomplice. CALCRIM No. 335 instructed the jury to require supporting testimony that was independent of the accomplice’s statement or testimony. The instruction’s use of the word ‘independent’ to describe the sort of evidence that could serve as corroboration eviscerates [the] claim that the instruction allowed [an accomplice] to corroborate his own testimony.” (*Id.* at. p. 365.)

Tuggles also noted that CALCRIM No. 301, as provided in that case, “dispelled” any possible “mistaken impression.” (*Tuggles, supra*, 179 Cal.App.4th at p. 365.) Similarly, in the instant case, the court instructed the jury as follows with CALCRIM No. 301: “Except for the testimony of Claudia Ruelas, which requires supporting evidence, the testimony of only one witness can prove any fact. . . .” “CALCRIM Nos. 318 and 335 did not inform the jury that it could use [an accomplice’s] out-of-court statements to corroborate his later testimony at trial. With the additional consideration of CALCRIM No. 301, we find that no reasonable jury could have understood the instructions to allow an accomplice to corroborate himself.” (*Tuggles*, at p. 366.)

Sufficiency of Evidence Corroborating Ruelas’s Testimony

Nunez concomitantly avers there was insufficient evidence to corroborate his involvement in the murder of Guzman and attempted murder of Nava. “Corroborative evidence sufficient to satisfy section 1111 need not corroborate every fact to which the accomplice testified or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy a fact finder the accomplice is telling the truth. [Citation.] ‘Corroborative evidence may be slight and entitled to little consideration when standing alone.’” (*People v. Williams* (1997) 16 Cal.4th 153, 246.) “‘The trier of fact’s determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.’ [Citations.] Thus, to the extent defendant argues that evidence corroborating [accomplice] testimony must be substantial, he is mistaken.” (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

There is sufficient corroborating evidence of Ruelas’s compelling testimony. Obviously, the bullet-ridden bodies of the victims confirm an unlawful

shooting occurred. And there is corroborating evidence from the Beltran brothers that the crimes occurred much as Ruelas described (i.e., some cars stopped, either three or four individuals piled out of the car, someone “hit up” the victims, and either one or two individuals began shooting). Moreover, expert testimony confirmed Nunez (like Cabrera, Avelar, and Garcia) was a member of Delhi. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1178 [citing gang membership and associations as evidence corroborating defendant’s motive and opportunity to participate in gang-motivated murder].)

There is also evidence directly linking Nunez to the crime — Israel’s out-of-court identification of Nunez. This identification was not ideal. It might be entitled to little consideration were it the only evidence linking Nunez to the crime. But as corroboration for Ruelas’s testimony, Israel’s identification, together with the evidentiary material discussed in the preceding paragraph, is sufficient. (See *People v. Samaniego, supra*, 172 Cal.App.4th at p. 1178 [citing weak identification of witness who “was not sure” if defendant was one of the perpetrators as corroboration along with other evidence].)

The jury implicitly rejected Nunez’s alibi (i.e., he obviously was not near the crime scene as he was on the cell phone talking to Nancy Lopez and others). Perhaps the jury thought someone else was using the phone (which was not registered to Nunez’s name) on March 3, 2006. Perhaps the jury thought evidence had been manipulated or defense witnesses had been untruthful in their testimony (i.e., the numbers called by the phone at issue were not really their phone numbers). Perhaps the jury believed the cell phone alibi testimony, but concluded Nunez still had time to take part in the attack (the evidence supports an inference that the attack took less than one minute) in between phone calls (if the jury was willing to believe Nunez participated in a murder, surely they could conclude he was willing to drive while talking on his cell phone). We may not

revisit these factual and credibility findings, and we need not divine precisely why the jury rejected Nunez's alibi.

Ineffective Assistance of Counsel Regarding Israel's Identification of Nunez

Nunez's petition for writ of habeas corpus asserts trial counsel was ineffective: "First, counsel did not file a motion to suppress the alleged identification of [Nunez] by Israel Beltran in a photo lineup as impermissibly suggestive. Second, after Israel Beltran testified to that photo identification, counsel failed to play the audiotape of that so-called identification to impeach Israel Beltran's testimony."

Trial counsel Hector Chaparro submitted a declaration pertaining to these contentions. With regard to a motion to suppress the identification, Chaparro declared: "I cannot remember why I did not make a motion, but I may have thought the procedure was not suggestive enough to prevail. I remember that I argued to the jury that the questioning was suggestive and that the police officer made the assumption that Israel Beltran was making an identification of a person at the scene." With regard to playing the recording of this interview, Chaparro declared: "I do not remember why, or if I considered doing so. I might have thought that I got more out of cross-examining Israel Beltran with his statements during the interview than playing the recording. I agree . . . that it is odd that the recorded interview was not introduced through the police officer, as this effectively denied me the opportunity to cross-examine the officer and possibly get him to admit that the interview was leading or suggestive in terms of an identification."

"The standard for establishing ineffective assistance of counsel is well settled. A defendant must demonstrate that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant. [Citation.] A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.] "Reviewing courts defer

to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'"" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

Trial counsel's performance did not fall below an objective standard of reasonableness. Our review of the entire record in this case indicates Mr. Chaparro vigorously defended his client, both by attacking the prosecution's evidence (particularly the testimony of Ruelas and the Beltran brothers) and presenting defense witnesses on the subjects of Nunez's character and cell phone alibi.

With regard to a motion to exclude Israel's identification, "[t]he issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

"Of course, '[a]nyone asked to view a lineup would naturally assume the police had a suspect.' [Citation.] This circumstance does not render the lineup unduly suggestive." (*People v. Avila* (2009) 46 Cal.4th 680, 699.) Moreover, the passage of time may affect the reliability of an identification, but it does not affect the admissibility of the identification. (*Ibid.*)

The identification was not unduly suggestive. Israel was presented with the six-pack lineup card in which Nunez appeared. The six pack included six young Hispanic men with shaved heads and thin mustaches. The photo lineup did not unfairly cause Nunez's photograph to stand out from the other photos. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 367.)

The following dialogue ensued at the out-of-court identification. Israel: "I can't really tell. I mean, I can't . . . remember exactly their faces anymore . . . cause since that day" Police: "Is there any of these guys that stands out?" Israel: "Probably this guy in the corner." Police: "Number three?" Israel: "Yeah." Police: "What about him stands out?" Israel: "He just looks like the type of these people that hang out with Delhi." Police: "Have you seen him before?" Israel: "Not really, no." Police: "You started to nod your head yeah." Israel: "Nah, I didn't see him." Police: "And you . . . you caught yourself. You ever seen him in school? In the neighborhood?" Israel: "Probably I seen him in his neighborhood cause I . . . I drive by the houses cause my . . . my aunt lives around there." Police: "Do you know where this guy may have lived, on what street you may have seen him on?" Israel: "Probably around Standard and Evergreen. Well, I mean, not Standard uh . . . St. Andrew." Police: "St. Andrew and Evergreen. Does he look like one of the people that was out on the night of the shooting in one of the cars?" Israel: "Yeah." Police: "Can you say which car you think he may have been in?" Israel: "The people I saw weren't distinguishable, like well, uh the guys in the . . . in the car in the back."

The police did not provide any suggestions to Israel. In fact, the police carefully questioned Israel and provided fertile ground for defense counsel to explore in cross-examination of Israel (which defense counsel exploited). In this context, by identifying the photo of Nunez and by confirming Nunez looked like one of the people involved in the shootings, Israel made an admissible identification.

Nor was unreasonable representation provided with regard to the impeachment of Nunez. Had counsel chosen not to impeach Israel's identification at all, it would have constituted unreasonable representation under the circumstances of this case despite the general rule that the failure to impeach a witness is a tactical decision. (See *People v. Frierson* (1979) 25 Cal.3d 142, 158.) As described in the facts section above, however, defense counsel walked through the identification transcript with Israel and, through leading questions, pointed out the relative weakness of Israel's identification of Nunez as one of the perpetrators. Especially in light of the jury's request for a copy of the transcript during deliberations, it is easy to assert in retrospect that defense counsel should have sought admission of the transcript rather than simply relying on cross-examination. But given the deference owed to tactical decisions by counsel, as well as the fact that almost all of the same information was elicited in cross-examination, trial counsel's performance was not inadequate.

Prosecutorial Misconduct Regarding Burden of Proof

Next, Nunez argues certain comments by the prosecutor in his rebuttal closing argument amounted to misconduct and entitle defendant to a new trial.

Defense counsel argued in his closing argument: "The cell phone evidence that we have here, it doesn't show that [Nunez] was, like, in Timbuktu or New York City or anything like that, but it's very, very telling. Because we have the evidence of the Sprint bill . . . for the account of 714-317-[XXXX]. And what that showed is that, at the time of the shooting that's at issue in this case, that Mr. Nunez was on the telephone. He had a 48-minute conversation with Nancy Lopez. Not only that, but in the preceding 10, 15, 20 minutes he had made several short telephone calls to people that he knew. [¶] . . . [¶] I don't think anyone can argue that it would be reasonable to believe that someone who was in the midst of a hit-up on the streets of Santa Ana where there's yelling and shouting and gang names being thrown around, and then there's this violent

shooting with nine, ten or more shots being fired, that someone would be calmly on the telephone having a long conversation with a close friend”

In his rebuttal, the prosecutor responded to the cell phone alibi: “I’m going to preface what I’m about to say with the following: defense attorneys in a criminal case have absolutely no burden. They don’t have to do anything. I know the judge talked about that during the jury selection. They don’t have to present any evidence. It’s solely the responsibility of the district attorney, the prosecutor, to prove guilt beyond a reasonable doubt. They don’t have to do anything.” But if the defense puts on a case, “you’ve got to scrutinize their evidence the same way you’d scrutinize the evidence that I present.”

“What is the best way to illustrate the ridiculousness of [the cell phone alibi]? I thought about it in terms of a trial, And let’s say that the trial is or the issue is or the crime is Ismael Nunez talking to Nancy Lopez at 11:41 p.m. on [March 3, 2006]. That’s the charge. Now, how is somebody going to prove that? What evidence are you going to present to prove the charge [¶] Well, the first witness that I’m going to call is a phone bill. So Mr. Phone Bill takes the stand. Mr. Phone Bill raises his paw and says the following” The phone bill shows there was a “call starting at 11:41 p.m. from telephone number 317-[XXXX], and that phone call lasted 48 minutes, and it was to 873-[XXXX].” On cross-examination, it would be established that Nunez was not the registered subscriber of the phone, and that the records did not include information concerning the identity of the recipient of the phone calls or the location of the caller. The prosecutor then walked through perceived shortcomings in the testimony of Lopez, Vasquez, and others. The prosecutor then suggested he would call “Mr. Phone Forensic Pathologist,” who would provide the testimony provided by Toguchi.

The prosecutor then summed up: “How long would it take a jury to evaluate the credibility or the strength of my case now? I’ve just presented seven witnesses who have all told you that Mr. Nunez was on the phone with Miss Lopez at that

particular time. That would be a two minute not guilty verdict right there. There's just no credible evidence there, nothing. Nothing for you to hang your hat on . . . and walk him out the door on this murder charge. [¶] But [defense counsel] yesterday absolutely professed to the contrary. So please think about that. I know it's sort of maybe a silly illustration, but it's the best I've got."

Even assuming this issue has not been forfeited in full or in part (counsel did not make a timely objection to the prosecutor's argument), we find no misconduct. (*People v. Panah* (2005) 35 Cal.4th 395, 462-463; see *People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203 ["When the issue [of prosecutorial misconduct] 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion'"].) In *Panah*, the defendant contended "the prosecutor improperly appealed to the prejudices and passions of the jury, and denigrated the presumption of innocence, when he argued that the prosecution's evidence had 'stripped away' defendant's presumption of innocence." (*Panah*, at p. 463.) The *Panah* court held "the prosecutor's references to the presumption of innocence were made in connection with his general point that, in his view, the evidence, to which he had just referred at length, proved defendant's guilt beyond a reasonable doubt, i.e., the evidence overcame the presumption." (*Ibid.*)

In this case, the prosecutor's statements came in the context of attacking Nunez's alibi evidence. In light of the prosecutor's prefatory comments, the prosecutor's statements could not reasonably be interpreted as a claim that Nunez had the burden of proving his alibi rather than the prosecutor having the burden to prove Nunez's guilt beyond a reasonable doubt. Considered in context, the statements pertaining to a "trial" of Nunez's cell phone alibi do not amount to prosecutorial misconduct. (See *People v. Cole, supra*, 33 Cal.4th at p. 1203 ["we must view the statements in the context of the argument as a whole"].) Unlike cases cited by Nunez, the prosecutor in this case did not

state or imply that Nunez was obligated to put forth any evidence. (See *People v. Hill* (1998) 17 Cal.4th 800, 831-832; *People v. Woods* (2006) 146 Cal.App.4th 106, 112-114.)

Prosecutorial Misconduct Regarding Cross-Examination of Defense Investigator

Nunez also contends the prosecutor committed misconduct during his cross-examination of defense investigator Toguchi. Through leading questions, the prosecutor established that Toguchi could have videotaped the entire procedure in which Vasquez obtained the cell phone from the police department and handed it over to Toguchi, who then charged the phone and photographed its contents. Toguchi did not necessarily follow standard police chain of custody procedures (i.e., storing the evidence in a sealed envelope with an attached card describing the chain of evidence); he stored the phone in a manila envelope in his locked desk. Toguchi could have powered up the phone for the first time in court. There was no way to tell when the information in the phone (e.g., phone number contacts) was entered. The prosecutor asked: “And . . . you wouldn’t be able to tell whether that name and phone number was put in on September [30, 2009], could you?” Toguchi replied, “Well, I presume it wouldn’t be because it was in Santa Ana P.D.” The prosecutor followed up, “Well, no. You already had it by September 30[,] 2009.” Toguchi responded, “What I mean is I didn’t do it, so I presume it wasn’t.”

Questioning Toguchi about a voice mail entry he inadvertently made when he was trying to access the voice mail records, the prosecutor asked: “So there was nothing inadvertent about your accessing the voice mail, was there?” Toguchi responded, “It was inadvertent inasmuch as I didn’t intend to create . . . an extra addition[al] call in that memory bank, that was inadvertent.” The prosecutor next asked: “Were you also involved with discovery, giving information to the district attorney’s office?” At this point, counsel objected on the grounds of privilege and relevance. After accusing the prosecutor of misconduct in open court, defense counsel observed at sidebar: “It’s

improper for the district attorney under the guise of these questions to imply something improper having been done by this witness.” The court sustained the objection to asking the defense investigator about discovery, but refused to provide an instruction to the jury to ignore any implications made by the prosecutor’s questioning.

Even assuming this claim was not partially or entirely forfeited, our review of the record discloses no misconduct. It would have been misconduct to insinuate that the defense team fabricated evidence without any evidence to support such a claim. (*People v. Earp* (1999) 20 Cal.4th 826, 862.) But the prosecutor, who was apparently frustrated by the discovery he had received with regard to the cell phone alibi defense, was entitled to explore Toguchi’s chain of custody procedures, his gathering of evidence, the limits of what Toguchi’s evidence showed, and Toguchi’s credibility. (Cf. *People v. Gray* (2005) 37 Cal.4th 168, 215-216 [vigorous cross-examination of defense expert not misconduct; “[a] prosecutor has wide latitude to challenge a defendant’s evidence”].) It was for the jury to decide whether Toguchi’s testimony had any relevance to the question of Nunez’s guilt.

Exclusion of Defense Character Evidence

Nunez next argues the court prejudicially erred by excluding certain defense character evidence. The exclusion of evidence occurred during the testimony of Steven Buck, Nunez’s supervisor at S.P.S. Technologies. When asked whether Nunez was a “good worker,” Buck answered “[a]bsolutely.” The prosecutor objected to the question on relevance grounds and moved to strike the response; the court sustained the objection and granted the motion. Defense counsel asked Buck whether Nunez was trusted with responsibilities. Buck again answered, “absolutely.” The prosecution objected on relevance grounds and the court responded by calling counsel to sidebar.

Defense counsel made an offer of proof as to areas he wished to explore: “Hard worker, dependable worker, being trustworthy. [Buck] had some conversations

with my client [in which Nunez] was very polite, never spoke of gangs, never spoke of any criminality. He would have him back. He was an excellent worker, worked more than his share and was . . . enthusiastic about his work.” Defense counsel claimed this information was admissible as character evidence and was relevant in that it “is circumstantial evidence that he is not the kind of a violent gang member that the district attorney’s trying to portray him [as].”

The court observed: “I’m only aware of good character evidence being admissible for truth and honesty . . . or for the character traits involved in committing a particular crime. I don’t know that being a good worker has anything to do with [being] peaceable [or] nonviolence[t].” Defense counsel conceded Buck did not have foundation for providing an opinion about Nunez’s character with regard to violence or nonviolence. The court sustained the objection to defense counsel’s proposed line of questioning and granted the motion to strike Buck’s last response about Nunez being trusted with responsibilities. The court noted, “I don’t see how [the proposed testimony] relates to whether or not someone forms the specific intent to participate in a criminal street gang or the specific intent to kill somebody.”

Ordinarily, “evidence of a person’s character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion.” (Evid. Code, § 1101, subd. (a).) But “[i]n a criminal action, evidence of the defendant’s character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.” (Evid. Code, § 1102.)

“[A] defendant in a criminal action may introduce evidence of his character or a trait of his character in the form of an opinion or evidence of reputation, but not in the form of specific conduct, in order to prove conduct in conformity with such character or trait of character. [Citation.] However, character evidence must relate to the particular

character trait involved in the charged offense.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 348-349 (*Honig*)). “Lay opinion testimony is admissible under [Evidence Code] section 1102 when it is based on the witness’s personal observation of the defendant’s course of behavior.” (*People v. Felix* (1999) 70 Cal.App.4th 426, 430; see *People v. McAlpin* (1991) 53 Cal.3d 1289, 1308-1310 [trial court should have allowed ex-girlfriends to provide opinions that defendant was not a sexual deviant based on their experiences with him and observations of him with their daughters].)

The court excluded opinion testimony from Nunez’s supervisor that Nunez was a good worker: responsible, trustworthy, polite, and enthusiastic about work. The court also excluded proposed testimony that Nunez did not communicate any information suggesting he was involved in criminality or gangs (i.e., an absence of incriminating admissions by Nunez). To the extent this latter point was character evidence, perhaps it would have been presented as a lay opinion that, based on Buck’s observation of Nunez at work, Nunez was not a gang member.⁴ The court’s rationale with regard to both categories of testimony was that this evidence was irrelevant to the question of whether Nunez was violent.

Other than citing the discretionary nature of evidentiary rulings (*People v. Watson* (2008) 43 Cal.4th 652, 692), the respondent’s brief offers no cases supporting the court’s ruling. “It has been said that a trial court is vested with wide discretion in determining the relevance of proffered evidence. [Citation.] However, it has also been said that in determining the admissibility of evidence proffered by a defendant in a criminal case, a trial court should give the defendant the benefit of any reasonable doubt.

⁴ The offer of proof does not suggest that Buck’s testimony would have been reputation testimony. Instead, Buck would have testified regarding his personal interactions with Nunez (not what he had heard about Nunez from various sources). An absence of criminal admissions made by Nunez to a particular witness does not fall into traditional categories of admissible character evidence — opinion and reputation. Thus, some of the testimony at issue was not really character evidence per se.

[Citation.] But this does not mean that a trial court is required to allow the defendant to define the issues or to introduce evidence without regard to its relevance to the issues defined by law. A trial court has no discretion to admit irrelevant evidence.” (*Honig, supra*, 48 Cal.App.4th at pp. 342-343.)

In our view, the court erred by excluding Buck’s testimony as irrelevant. Nunez was charged with a violation of section 186.22, subdivision (a), commonly referred to as street terrorism. To secure a conviction, the prosecutor needed to prove beyond a reasonable doubt that Nunez actively participated in a criminal street gang. According to prosecution expert witness McLeod, criminal street gangs fetishize the concept of “respect,” which they define (inaccurately, from a prescriptivist’s point of view) to mean “fear.” In trying to prove Nunez was not an active participant in such an organization, defense counsel attempted to elicit testimony from Nunez’s supervisor at work. This supervisor was willing to testify Nunez was polite, hardworking, dependable, and trustworthy. These qualities are at least arguably incongruous with an assertion that Nunez was only concerned with garnering “respect” for himself and his gang, which is one implication of McLeod’s testimony. Moreover, Nunez did not (according to the offer of proof) draw any attention to his gang affiliation or gang misdeeds. This also contrasts with the notion that Nunez was actively participating in Delhi, as (per McLeod’s testimony) he would maximize the “respect” others had for him by drawing attention to his gang affiliation at any opportunity.⁵

⁵ The respondent’s brief asks us to consider “common sense” in that: (1) “there is nothing to support the notion that gang members [cannot be] good employees or hard workers”; and (2) “it is hardly surprising that [Nunez] would not talk about gangs while he was at work.” Indeed, McLeod testified that some gang members did not participate in criminal or violent actions. McLeod also testified that gang members can have jobs and families. We agree with these common sense observations. But in light of the gang lifestyle and culture described by McLeod regarding the violent members of gangs, it is hardly irrelevant that a man accused of being an active, violent gang participant models behaviors at work that contrast with McLeod’s testimony that “respect” is the “be all and end all of [every] gang member’s life.”

But this error was harmless; it is not reasonably probable Nunez would have received a more favorable result had the testimony been admitted. (*People v. McAlpin, supra*, 53 Cal.3d 1289, 1311-1313.) First, there was no indication in Buck's testimony or the offer of proof as to the chronology of Nunez's work performance. The jury was tasked with determining whether Nunez committed murder, attempted murder, and street terrorism on a particular night (March 3, 2006). That Nunez may have been a model employee at some unspecified point in time and for some unspecified length of time is hardly probative of his conduct on March 3, 2006. Second, even if it were determined through Vasquez's (Nunez's girlfriend) testimony that Nunez was working for Buck at or around the date in question, his solid work performance and lack of admissions at work on the subject of gangs and criminality would have a minimal effect on a rational examination of the direct and circumstantial evidence linking Nunez to the crimes in question. Buck's testimony was relevant, but it would not have been sufficient to affect the jury's deliberations in any significant way.

Denial of Motion to Retain New Counsel at Sentencing Hearing

After Nunez was convicted on October 19, 2009, Nunez's appointed trial counsel (Hector Chaparro) was replaced by appointed counsel Earnest Eady, on the basis that a conflict had developed between Nunez and Chaparro. After numerous continuances of the sentencing hearing, which was originally set for January 15, 2010, Eady orally moved for a new trial at the sentencing hearing on October 29, 2010.

Nunez claims the court erred by denying an oral motion he made at the October 29, 2010 sentencing hearing. Nunez stated on the record as follows: "My family has agreed to retain an attorney to put a motion before this court. Granted, it would be a hardship, but after witnessing the lack of motivation on the part of my current appointed counsel . . . it is a hardship they are willing to incur. [¶] I understand that this court has been sympathetic in granting me continuances up to this point However,

at this point I would like to ask this court to grant me an additional continuance so I may have a motion brought before this court by my own attorney whom I believe will be more enthusiastic in providing this court with significant findings in the form of a motion on my behalf.” As a basis for his proposed new trial motion, Nunez cited the failure of his trial counsel to bring certain unnamed witnesses to testify at trial and the failure to subpoena certain global positioning system records pertaining to his cell phone location at the time of the crime.

The court suggested Nunez’s claims based on new evidence could more properly be brought in a petition for writ of habeas corpus.⁶ The court stated with regard to a continuance: “The problem . . . is that we’re a year past . . . verdict in this case.” The court denied the motion to continue the sentencing hearing, and also denied the “*Marsden* [motion], if that’s what it is.”⁷

On appeal Nunez asserts he made a *Marsden* motion and the court did not provide an appropriate *Marsden* hearing. But Nunez’s motion actually amounted to an untimely request for a continuance of the sentencing hearing in order to retain private counsel. “A criminal defendant . . . has the due process right to appear and defend with retained counsel of his or her choice.” (*People v. Lara* (2001) 86 Cal.App.4th 139, 152.) Assuming he actually intended to retain private counsel,⁸ Nunez was not required to make a showing pursuant to *Marsden*, a case which applies to circumstances in which a criminal defendant wishes to replace one appointed counsel with another appointed counsel. (See *People v. Courts* (1985) 37 Cal.3d 784, 787-796 [no mention of *Marsden*

⁶ Interestingly, the petition for writ of habeas corpus filed with this court does not explore any of the contentions made by Nunez (e.g., new witnesses, GPS records).

⁷ *People v. Marsden* (1970) 2 Cal.3d 118.

⁸ Nunez’s current appellate/habeas counsel is appointed, not privately retained.

in case in which defendant originally represented by public defender sought to substitute in retained counsel one week before trial].)

The right to substitute in retained counsel is not absolute. “The trial court, in its discretion, may deny such a motion if discharge will result in ‘significant prejudice’ to the defendant [citation], or if it is not timely, i.e., if it will result in ‘disruption of the orderly processes of justice.’” (See *People v. Ortiz* (1990) 51 Cal.3d 975, 983.) The court may deny the request if it would require a continuance and the defendant has been “‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’” (*People v. Courts, supra*, 37 Cal.3d at pp. 790–791.) In deciding whether the trial court’s denial of a continuance was so arbitrary as to deny due process, this court “looks to the circumstances of each case, “‘particularly in the reasons presented to the trial judge at the time the request [was] denied.’”” (*Id.* at p. 791.)

Under the circumstances presented, the court did not abuse its discretion. (See *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850-851 [lack of timeliness and adverse effect on the orderly administration of justice support court’s denial of motion for continuance to obtain retained counsel].)

Cumulative Error

Nunez also contends the cumulative effect of the errors and misconduct cited above entitles him to a new trial. But the court committed only one error (refusing to allow Nunez to present certain character evidence) and, as already discussed, this error was not prejudicial.

Restitution Order

Finally, Nunez takes issue with a restitution order imposed by the court under section 1202.4, subdivision (f). The court ordered Nunez to pay \$6,270 in mortuary and funeral expenses incurred on behalf of victim Guzman. Nunez claims this

restitution order should have been explicitly deemed a joint and several liability of Nunez, Garcia, and Cabrera. It is uncontested that the court found \$6,270 to be the full amount compensable under section 1202.4, subdivision (f), at all three sentencing hearings. It is also uncontested that each of the three defendants was ordered to pay (in separate sentencing hearings) the full amount, \$6,270. The Attorney General asserts this issue was forfeited because Nunez failed to object to the restitution award at his sentencing hearing.

“It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.” (§ 1202.4, subd. (a)(1).) “[I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim . . . in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (§ 1202.4, subd. (f).)

“A restitution order is intended to compensate the victim for its actual loss and is not intended to provide the victim with a windfall.” (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172.) To that end, one way for trial courts to hold multiple defendants fully accountable and simultaneously avoid a double recovery by a victim is to impose explicitly a “joint and several” obligation on each defendant convicted of the crime at issue. (See *People v. Leon* (2004) 124 Cal.App.4th 620, 622 [“a court may impose liability on each defendant to pay the full amount of the economic loss, as long as the victim does not obtain a double recovery”]; *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1052 [explicit order deeming award joint and several]; *People v. Zito* (1992) 8 Cal.App.4th 736, 744-745 [same].)

The parties have not provided briefing on the question of what the practical effect of the court’s order will be in the absence of a modification. Assuming Nunez, Garcia, and Cabrera each somehow pay \$6,270 to the victims (while serving life without

parole prison terms), they would collectively overpay \$12,540. This amount can hardly be deemed a “windfall” to a murder victim’s family, but Nunez’s point is well taken. It is unclear whether there is a mechanism in the restitution payment system to prevent this overpayment from occurring by, for instance, crediting payments by any of the three defendants against the amount owed by the other defendants notwithstanding the lack of explicit “joint and several” language in the court’s sentencing orders.

We find persuasive a case that, in very similar circumstances, rejected a claim of forfeiture and modified the judgment: “Here, if defendants’ contentions are correct, the trial court did not merely abuse its discretion in setting the restitution amounts; it imposed restitution in amounts that could not lawfully be imposed in this case under any circumstances. Such contentions are not [forfeited] by failure to object.” (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.) Reaching the merits of the issue before us, *Blackburn* held: “The trial court had the authority to order direct victim restitution paid by both defendants jointly and severally. [Citations.] It seems glaringly obvious that is what it did here. In this light, there is no double recovery Of course, each defendant is entitled to a credit for any actual payments by the other. To make sure this is clear (though out of an excess of caution), we will modify the judgment so as to provide expressly that the direct victim restitution ordered is joint and several.” (*Blackburn*, at p. 1535; see also *People v. Neely* (2009) 176 Cal.App.4th 787, 800.)

As in *Blackburn*, the prudent course is to modify the judgment to make clear Nunez’s obligation to pay victim restitution is joint and several with Garcia and Cabrera.

DISPOSITION

The judgment is modified so as to provide expressly that Ismael Nunez is jointly and severally liable with Porfirio Garcia and Moises Cabrera for the \$6,270 in

direct victim restitution awarded by the court. As modified, the judgment is affirmed. The trial court is directed to amend Ismael Nunez's abstract of judgment to reflect this modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The petition for writ of habeas corpus is denied.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.