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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.

JOSEPH ANTHONY OCEGUERA et al.

Defendants and Appellants.

G045222

(Super. Ct. No. 07CF2192)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Anthony Ocegüera.

David M. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant Marcos Javier Cardenas.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged Marcos Javier Cardenas, Joseph Anthony Ocegüera, and Santos J. Gomez with murder (count 1) in the June 17, 2007 shooting death of Rogelio Briseno Borjas. The prosecution alleged two special circumstances related to the murder: (1) murder committed during the commission of a felony (robbery or attempted robbery) (Pen. Code, § 190.2, subd. (a)(17)(A));<sup>1</sup> and (2) murder committed by active participants in the Santa Nita criminal street gang (§ 190.2, subd. (a)(22)), and further alleged all three defendants were principals to the discharge of a firearm causing death (§ 12022.53, subs. (d), (e)(1)), and murdered Borjas for the benefit of the Santa Nita criminal street gang (§ 186.22, subd. (b)(1)). Count 2 of the information alleged the defendants were active participants in the Santa Nita criminal street gang on the same day as the murder (§ 186.22, subd. (a); count 2)).<sup>2</sup>

The trial court granted the prosecution's pretrial motion to sever Gomez's case from that of his codefendants. Gomez received use immunity on the condition he plead guilty to a lesser charge, testify at trial, and accept a minimum 10-year prison term.

In April 2010, a jury convicted Cardenas of first degree murder and found true the allegation he committed the crime while an active participant in the Santa Nita criminal street gang and with the intent to further the gang's activities. The jury found not true the special circumstance of murder committed during a robbery, but convicted him of active participation in a criminal street gang. The trial court sentenced Cardenas to an indeterminate term of life without the possibility of parole, plus a consecutive term of 25 years to life for the personal discharge of a firearm.

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The information also charged Ocegüera with the April 29, 2007 attempted murder in the shooting of Terisita Cisneros (count 3), and street terrorism related to the attempted murder (count 4). The jury deadlocked on count 3 but found Ocegüera guilty of count 4. At sentencing, the trial court granted the People's motion to dismiss counts 3 and 4. Relevant evidence about this crime is interwoven into the statement of facts.

The jury convicted Ocegüera of second degree murder and found true the firearm and street gang enhancement allegations with respect to the murder. The jury also found him guilty of active participation in a criminal street gang. The trial court sentenced Ocegüera to 15 years to life for second degree murder, plus 25 years to life for gun use. The court ordered him to serve a minimum of 15 years before parole eligibility, pursuant to section 186.22, subdivision (b)(5).

Cardenas and Ocegüera (collectively defendants) raise several challenges to the judgment. First, they assert the prosecutor committed *Doyle*<sup>3</sup> error, and the trial court failed to recognize the error or remedy the damage. The Attorney General concedes the error, but argues it was harmless beyond a reasonable doubt. Although this is a close case, we agree with the Attorney General and find no basis for a reversal of the judgment on grounds of *Doyle* error.

Defendants also challenge the sufficiency of the evidence to prove their active participation in the Santa Nita criminal street gang, and the finding they committed murder for the benefit of the gang. They also assert the trial court committed reversible error by failing to sua sponte modify CALCRIM No. 370, the standard instruction on motive, and violated section 654 by imposing separate punishment for street terrorism. Cardenas separately contests the sufficiency of the evidence to prove both special circumstance allegations, notwithstanding the jury's not true finding with respect to the special circumstance of murder carried out during the commission or attempted commission of a robbery.

Of these contentions, only one has merit. In June 2012, the California Supreme Court filed *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*), which held section 654 prohibits the imposition of separate punishment for street terrorism when the underlying felony forms the basis of the felonious conduct required by section 186.22,

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<sup>3</sup> *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

subdivision (a). (*Id.* at p. 198.) Here, *Mesa* compels modification of the judgments. As modified, the judgments are affirmed.

## FACTS

During the afternoon of June 17, 2007, Borjas, his wife Yvonne Luevano, and their 10-year-old son were celebrating Father's Day by watching a movie at home. When they heard a knock at their front door, Borjas got up and answered the door. He talked to a man about 10 to 15 minutes before Luevano heard him say, "No, I am not interested." She asked, "Babe, whose's that?" When Borjas turned to respond, the male visitor pushed open the front door and rushed inside.

Luevano watched as the unknown and armed intruder fired a shot into the ceiling. She quickly grabbed her son and ran out of her house. Once she made sure her son was safely outside, Luevano went back inside. From behind a wall, she watched her husband wrestle with the intruder. Their dog bit the man in the leg, and Borjas managed to knock the assailant's gun to the ground. However, Borjas tripped over a rug and fell to the floor. She then saw the hand, arm, and gun of a second intruder come around the front door and fire several shots. The first assailant retrieved his gun and shot Borjas several times before both assailants fled the scene. Borjas died as a result of multiple gunshot wounds.

Gomez was arrested within days of the murder. After being advised of his *Miranda*<sup>4</sup> rights, Gomez said he had been an involuntary wheelman in the crime, and he identified Cardenas and Ocegüera as the shooters. Two weeks later, police officers showed Luevano a photographic lineup, and she identified Cardenas as the first intruder and the person who shot her husband.

Around the same time as Luevano's identification, Santa Ana Police Detective Melecio Sarabia interviewed Aracelly Quirino. In a recorded statement, she

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<sup>4</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

told police Cardenas, or “D,” which is short for Demon, had been at her home on the morning of the murder. Cardenas said he needed a ride so he could “take care of some business.” They walked out into the street and flagged down Gomez. Gomez agreed to give Cardenas a ride, but said he needed to do something first. He returned about a half hour later, and Quirino and Cardenas got into his car. The three of them drove to another Santa Ana residence, picked up Ocegüera, and returned to Quirino’s home. As she got out of the car, Cardenas told her, ““We’re going to drop you off. Need to take care of something. Don’t trip.”” Then Gomez, Cardenas, and Ocegüera drove away.

On June 28, 2007, police stopped a Ford Focus. Cardenas, who had been a passenger in the car, attempted to flee from the police. Police officers found a .45 caliber Glock semiautomatic handgun in his possession. He was taken into custody and advised of his *Miranda* rights. He exercised his right to remain silent and declined to give a statement.

### *Trial*

As noted, Gomez testified under a grant of immunity that on June 17, Cardenas and Quirino stopped him while he was driving some family members to a birthday party. When Cardenas asked him for a ride, Gomez initially declined, but Cardenas insisted, threatened him, and said he would not take no for an answer. Gomez knew Cardenas was a Santa Nita gang member so he agreed to return after he drove his family to the party.

When Gomez came back, he, Quirino, and Cardenas drove to another house where they picked up Ocegüera before returning Quirino to her home. Gomez said he did not know where he was going, and Cardenas “just told [him] to drive.” While they were driving, Cardenas and Ocegüera said they were going to pick up a “pink slip” because someone was selling drugs and not paying taxes. Gomez also heard them say this person had a lot of money and gold in their home.

Eventually, Cardenas pointed to Borjas' house. He told Gomez to park a few houses away and keep the motor running. At this point, Gomez noticed Cardenas and Ocegüera were armed. He watched them walk to Borjas' home and ring the doorbell. Borjas opened the front door, and he talked to Cardenas for several minutes. After about 10 minutes, Gomez saw Cardenas draw his gun and push his way into Borjas' home. He heard a gunshot and saw something fly off the roof. Then Ocegüera extended his arm into the house and fired several shots. Gomez heard several more gunshots before Cardenas and Ocegüera ran back to his car.

As he sped away, Gomez noticed blood on Cardenas' shirt, pants, and shoes. Cardenas told Gomez a dog bit him, but Cardenas had not been shot. Cardenas took off his shirt and asked Gomez for another one. Gomez gave him a shirt, and then he drove Cardenas and Ocegüera back to their neighborhood. Afterward, he drove home and cleaned out the inside of his car to remove blood stains. Gomez testified he did not contact the police because he was "scared something [would] happen to [him] or [his] family . . . ."

Gomez denied being a Santa Nita gang member, but he admitted he had been the driver on another occasion when a Santa Nita gang member got shot. He claimed that in both instances he was simply in the wrong place at the wrong time. He also claimed Cardenas had used a gun to stop his car on one occasion before the shooting. That time, Cardenas asked him where he was from. Gomez told Cardenas he lived in the neighborhood but was not a gang member and Cardenas walked away.

#### *Physical Evidence*

A forensic pathologist concluded Borjas had been shot eight times and three of the eight shots were independently lethal. The nature of the wounds suggested the gun had been pointed down at Borjas body and had been fired from a distance of approximately two feet.

Investigators collected several .40 caliber cartridge casings and a .45 caliber bullet fragment from the scene. A firearms expert testified all the .40 caliber casings were fired from the same gun. The expert also matched .40 caliber casings found at the scene of Borjas' murder to those found at the scene of the April 2007 shooting of Terisita Cisneros. The .45 caliber bullet fragment had rifling consistent with having been fired from a Glock semiautomatic handgun, but it was too small for comparison testing.

DNA testing of samples taken from a baseball cap found at the scene was compared to the defendants' DNA. Cardenas could not be excluded as a contributor to the DNA mixture found on the cap, a result that would apply to about one in 600 people.

#### *Gang Expert Testimony*

Santa Ana Police Detective Jeff Launi testified as the prosecution's gang expert. He explained the culture and behavior of Hispanic street gangs in general and the Santa Nita street gang in particular. Relevant to this case, he explained the tendencies of Hispanic street gangs to claim a neighborhood as their "turf," to identify with certain signs, symbols, colors, and dress, and to commit certain types of crimes. Gang members often use the signs and symbols of the gang as graffiti. They also have tattoos representing their gang or gang life.

According to Launi, the desire for respect fuels criminal activity, including violent crime, and compels gang members to "backup" each other in the commission of these crimes. As Launi explained, "Respect is generally obtained by an individual or a gang representing itself. That could be done in many ways. Typically, what we see is if a gang is victimized, they retaliate. If a gang has a rival gang, they will commit crimes against that gang. If an individual is known to commit crimes, and particularly serious or violent crimes, that elevates the individual's respect or reputation within his gang." Launi described the various ways an individual can become a gang member, but he also stated active gang members will associate with people not formally recognized as members of the gang. He also explained the importance of guns in gang culture,

essentially describing them as a gang member's "tools of the trade." And, while many gang members have their own guns, Launi stated gang members will often share guns.

With respect to the Santa Nita criminal street gang, Launi testified the gang came to the attention of law enforcement in the early to mid-1960's after various car clubs developed rivalries and associations and took pride in their particular neighborhoods. He claimed there were approximately 230 active participants in the gang between April and June 2007. The gang has several well-recognized signs or symbols, and claims the Santa Anita neighborhood in westside Santa Ana as their turf. The primary activities of the Santa Nita gang are the commission of car thefts, weapons violations, and assaults. In 2006, the City of Santa Ana sought and obtained an injunction to prohibit Santa Nita gang members from engaging in certain proscribed activities in a specifically defined geographical area.

Launi recounted Cardenas' numerous contacts with police. In June 2001, Cardenas and another Santa Nita gang member were questioned about a vandalism report. Cardenas claimed membership in Santa Nita at the time. The same day, Santa Ana police officers gave Cardenas a Street Terrorism and Prevention (STEP) notice, which notifies those served they have been identified with a particular criminal street gang. The notice also advises the person served of the crimes the gang commits, and the potential punishment for gang-related crimes. Santa Ana police gave Cardenas another STEP notice in 2002. This time the notice listed his gang moniker, or nickname, as Demon. Again, Cardenas admitted he associated with the Santa Nita gang.

In September 2002, Cardenas fled from police officers in a stolen car. In December of that year, he and another Santa Nita gang member were arrested in another stolen car. Cardenas and the other Santa Nita gang member were on probation at the time, one condition of which was to stay away from Santa Nita gang territory and other Santa Nita gang members.

In January 2006, Cardenas fled from officers in another stolen car. The car had been stolen from a location inside the Santa Nita gang's claimed territory. In June 2006, Cardenas was served with the Santa Nita gang injunction order.

In June 2007, Cardenas was implicated in a shooting in the Santa Nita's gang claimed territory. In the same month, he was arrested for another homicide. At the time of his arrest, Cardenas possessed a gun and was with another Santa Nita gang member.

Launi also testified about Ocegüera's police contacts. In June 2005, police officers contacted him and his brother and fellow gang member, John Garcia, to investigate alleged narcotics violations. In March 2006, Ocegüera was linked to a gang-related armed robbery. In December 2007, rival gang members fired several gun shots at Ocegüera's home, and Ocegüera was implicated in the 2007 attempted murder of Cisneros.

In Launi's expert opinion Ocegüera, Cardenas, and Gomez were active participants of the Santa Nita gang in 2007 based on their numerous prior contacts with law enforcement and involvement in the instant offense. Based on the facts of the case, he testified their motive for going to Borjas' house was to collect Santa Nita gang "taxes," which he said is money or goods individuals pay for the privilege of doing business on the gang's turf. Although he admitted Borjas' alleged drug dealing occurred in a rival gang's territory, he also testified an individual gang member would venture into a rival's area on "orders from other [gang members] that are requiring that to be done."

Launi further opined the crime benefitted the Santa Nita gang as a means of providing money and valuables to further the gang's activities, and by increasing the respect afforded the gang and the individual members involved. He testified the commission of such a horrific crime also benefitted the gang by instilling fear in the non-gang population in their neighborhood and elsewhere.

### *Defense Case*

Cardenas testified on his own behalf. He claimed a friend gave him \$1,000 worth of methamphetamine to sell a week before the shooting. Gomez introduced him to Borjas and he gave the methamphetamine to Borjas to sell. Borjas said he did not have cash to pay Cardenas right then but that he would give Cardenas the pink slip to his car as collateral until he could sell the methamphetamine. A week later, when Cardenas had neither the money, the pink slip, nor Borjas' telephone number, he decided to go to Borjas' home. He and Quirino flagged down Gomez, and the three of them went to a friend's house to search for his cell phone. They did not find Cardenas' cell phone, but Ocegüera was there and asked if he could go to Borjas' house.

Cardenas said he and Gomez, not Ocegüera, approached Borjas' home. He talked to Borjas for a few minutes at the front door, but Borjas told him he had changed his mind about selling the methamphetamine. He also told Cardenas he had already given the drugs to Gomez. Cardenas said when he turned around to relay this message to Gomez, Borjas drew a gun. Cardenas threw himself at Borjas out of fear, and the gun fired accidentally. Borjas dropped the gun and a struggle for the weapon ensued. While he and Borjas were fighting for Borjas' gun, Gomez fired several shots into the house and then shot Borjas. Cardenas picked up Borjas' gun and fled with Gomez back to Gomez's car and Ocegüera. He said the .45 caliber Glock the police found in his possession when he was arrested belonged to Borjas. He admitted the baseball cap found at the scene belonged to him.

### *Rebuttal Evidence*

The parties stipulated Cardenas sent a note to a fellow inmate during their mutual incarceration, stating, "Go ahead and do that for me. You will get paid. Don't trip. Stop Santos from telling on me. You'll be well-taken care of. Be careful, dawg."

## DISCUSSION

### *I. Doyle Error*

In *Doyle, supra*, 426 U.S. at page 610, the United States Supreme Court prohibited the prosecution from using a testifying criminal defendant's post-*Miranda* silence to impeach an exculpatory explanation offered at trial. (*Id.* at p. 619.) To do so is a violation of due process and the government's implicit assurance contained in *Miranda* warnings that silence will not be used against the defendant at trial. (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 291.) Defendants<sup>5</sup> claim the prosecutor improperly cross-examined Cardenas about his post-*Miranda* silence and commented on his silence during closing argument, and the trial court permitted the prosecutor to do both. The Attorney General concedes the error, but argues it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Champion* (2005) 134 Cal.App.4th 1440, 1453.) We agree with the Attorney General's concession and assessment of its impact on the judgment.

“Under [the *Chapman*] test, the appropriate inquiry is ‘not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.’ [Citation.]” (*People v. Quartermain* (1997) 16 Cal.4th 600, 621; quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics original.) When considering the effect of *Doyle* error, an appellate court considers three factors: “(1) the extent of the comments made, (2) whether an inference of guilt from silence was stressed to the jury, and (3) the extent of other evidence suggesting the defendant's guilt. [Citations.]” (*U.S. v. Baker*

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<sup>5</sup> Ocegüera did not testify at trial, but he argues the error implicates his constitutional rights because he “was relying on Cardenas' defense case . . . .” Neither he, nor the Attorney General, provide us with citation to authority for the proposition a non-testifying, codefendant may suffer deprivation of his constitutional right to due process and a fair trial in this manner. However, we need not address the issue because we conclude any error was harmless beyond a reasonable doubt.

(9th Cir. 1993) 999 F.2d 412, 416; accord, *U.S. v. Pino-Noriega* (9th Cir.1999) 189 F.3d 1089, 1097-1098.)

The Attorney General argues the prosecutor's improper questioning comprises only two and a half pages of the 74 pages of cross-examination in the reporter's transcript, her use of Cardenas' silence during closing argument amounts to only one page out of 55 pages of reporter's transcript, and Cardenas' defense was "patently unbelievable" in the face of overwhelming evidence of his guilt. But despite the relatively limited attention the prosecutor drew to Cardenas' post-*Miranda* silence during cross-examination, even the written record reveals aggressive questioning on the topic. On seven occasions, the prosecutor asked, in essence, why Cardenas remained silent after his arrest and for the two and one half years it took to bring him to trial.<sup>6</sup> The final question on the topic is illustrative: "Q. The bottom line here is: You didn't tell the police, who could have investigated your drug dealer story, about Mr. Borjas ever. The first time you're telling this story is here for this jury, right?"

Similarly, the prosecutor's closing argument placed more emphasis on Cardenas' silence than the Attorney General is willing to admit. Early in her closing statement, the prosecutor challenged the notion that a drug dealer would give a stranger \$1,000 worth of methamphetamine and emphasized the conflicting evidence pointing to Cardenas' guilt. But after summarizing these valid points, the prosecutor continued, "Why didn't he tell anybody else who could have worked on this story for the last two years and could have come in and said, you know, he's right about that drug dealer thing.

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<sup>6</sup> Here is a representative colloquy between the prosecutor and Cardenas: "Q. Is there a reason you didn't tell the police about the drugs and this drug dealer so that the police maybe could have verified your story? [¶] . . . [¶] A. No, I didn't say nothing. [¶] Q. But didn't you want the police to get at the truth of this? [¶] A. Yes. But I didn't want [Gomez] to come after me. [¶] Q. So you decided to simply tell us two-and-a-half years later about this, rather than at a time when the police might have been able to investigate it; is that right? [¶] . . . [¶] A. I didn't want to say anything. But my lawyer told me I had to come up here and say what really happened."

We looked into that. Uh-huh. Mr. Borjas was a big drug dealer. Yeah, uh-huh. We need to talk to you about that. Or, yes, we know all about that. [¶] No. He tells you for the first time here because there's nothing we can do about it here. And you are stuck making the credibility call. But I submit to you, it's not a very hard credibility call. [¶] Do you believe somebody who for the very first time comes in and says, oh, I need to tell these 12 people the best story I can tell them because it's very serious here? [¶] Or, do you believe the people who talked to the police right away, who gave statements two and a half years ago, whose statements were used here in court to refresh their recollection, if they forgot, or brought in by police officers if they didn't want to remember, as in [Quirino's] case. That's credibility, ladies and gentlemen. You have to think about that. [¶] Why would he just come up with this magic story of how he was just such a victim with these crocodile tears of how scared he was and -- you know, that's a credibility call, ladies and gentlemen, for y'all. But you've got to have the story of his hang together in order to find him not guilty of murder, because he is the instigator of this entire murderous event. [¶] . . . [¶] Here, I expect you're going to hear from the defense, okay, it was me. But I have a really good reason. And from Cardenas it's going to be, I was only going to pick up what I was owed. Well, again, that's a credibility call for y'all. If you want to believe his statement from the stand. But I submit to you, you've got to look at more than that. You've got to look at witnesses, when they gave their statement, when they gave their statements to police. The police had a chance to investigate their statements, work on their statements. He just throws this statement up at you in trial for the very first time."

In our view, the prosecutor's repeated *Doyle* violations amount to more than an incidental attack on Cardenas' right to remain silent. Furthermore, the questioning continued after defense counsel's objection and a sidebar discussion on the topic. But the real issue is whether evidence adduced at trial renders Cardenas' defense "transparently frivolous." (*United States v. Gentry* (8th Cir. 2009) 555 F.3d 659, 664.)

On the one hand, the People’s case relied on the testimony of an accomplice, and Gomez certainly had a motive to lie in an effort to minimize his own guilt. On the other hand, Borjas’ widow positively identified Cardenas as the shooter, and Gomez’s account of the incident generally agrees with her testimony.

While the physical evidence was not conclusive, it too tends to support an inference of guilt. The .45 caliber Glock Cardenas possessed at the time of his arrest suggests guilt, and he fled from police when an arrest became imminent. The jury was instructed flight may be used to show consciousness of guilt.

Finally, while awaiting trial, Cardenas attempted to solicit a fellow inmate to silence Gomez by promising he would be well-taken care of if he was able to keep Gomez from “telling” on him. Considering the record as a whole, the admittedly prejudicial error of questioning Cardenas about his silence and arguing his silence undermined his credibility was harmless beyond a reasonable doubt.

## *2. Sufficiency of the Evidence*

Both defendants challenge various parts of the judgment on grounds of insufficient evidence. Cardenas attacks both special circumstance allegations by claiming there is no evidence he intended to rob Borjas as required by the prosecution’s felony-murder theory and the prosecutor hopelessly confused the crime of extortion with robbery. Defendants argue the prosecution failed to prove they murdered Borjas while active participants in the Santa Nita criminal street gang, or that they committed the murder for the benefit of the Santa Nita gang. We address each contention in turn, but begin with a summary of the standard of review.

“When an appellant challenges the sufficiency of the evidence to support a conviction, the appellate court reviews the entire record to see “whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.” [Citation.] We view the facts in the light most favorable to the judgment, drawing all

reasonable inferences in its support. [Citations.] We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citations.]” (*People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13, overruled on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) We do not reweigh the evidence, including testimony that is subject to understandable suspicion, because ““it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]” [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 361.)

*a. Robbery or Extortion?*

In an interesting twist, Cardenas raises a challenge to the jury’s *not true* finding on the felony-murder special circumstance. He expends a great deal of energy in recounting the prosecutor’s multiple references to extortion, and argues the prosecution mischarged robbery when the crime committed, or attempted, was actually extortion. He asserts, “Given that there was insufficient evidence to sustain a robbery finding, and given that the offense actually proven was extortion, the first degree murder conviction, as well as the special circumstance finding flowing from that conviction, must be reversed. . . .”

As noted, the jury agreed with Cardenas and concluded the prosecution failed to prove he committed or attempted to commit robbery, which was a necessary element of the theory he committed first degree, felony-murder. Consequently, there is nothing to reverse, regardless of the prosecutor’s unfortunate references to extortion, or her statement during closing argument that “extortion is just a fancy word for robbery.” But even assuming the prosecutor somehow violated Cardenas’ right to due process and a fair trial, the jury’s verdict renders any error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

*b. Active Participation in a Criminal Street Gang, Special Circumstance, and Gang Enhancement.*

The jury convicted both defendants of active participation in a criminal street gang. It found true the gang-related special circumstance under section 190.2, subdivision (a)(22), and gang enhancement under section 186.22, subdivision (b)(1). The same standard of review applies in each situation. (*People v. Mickey* (1991) 54 Cal.3d 612, 678 [special circumstance]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322 [gang enhancement]).

1. Active Participation in a Criminal Street Gang

A person who “actively participates” in a criminal street gang is one whose involvement is more than nominal or passive. (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) There is ample evidence Cardenas was more than a nominal or passive member of Santa Nita. First, he committed murder for gang purposes with another gang member. Second, Launi recounted his numerous contacts with law enforcement over the years and his continued, close association with other Santa Nita gang members. He has a gang moniker and gang tattoos to substantiate his admission and allegiance to the gang. And, at the time of the arrest, he possessed a gun that was likely used in the commission of the murder. This is sufficient to support the conviction for street terrorism.

Oceguera is in a similar situation. Although he did not have as many police contacts as did Cardenas, Launi testified Oceguera received a STEP notice in relation to a March 2006 armed robbery, and in June 2005, police contacted him and his brother and fellow gang member, Garcia, to investigate alleged narcotics violations. In 2007, police determined rival gang members fired several gun shots at his home, and he was implicated in the attempted murder of Cisneros, which was linked by ballistics evidence to the instant crime. Oceguera claims there is no evidence he was aware of Santa Nita’s criminal activity, but his prior police contacts and participation in the Borjas murder belie

this claim. Any rational jury could have concluded he was an active participant of the Santa Nita criminal street gang with full awareness of the gang's criminal activities.

## 2. *Gang Enhancement*

Section 186.22, subdivision (b)(1) adds specified penalties the commission of a felony “for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .” (See also *People v. Abillar* (2010) 51 Cal.4th 47, 64 (*Abillar*); *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) When applying the standard of review, we are mindful that “[i]t is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. [Citation.]” (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 18-19 (*Romero*).)

Cardenas claims the prosecution failed to establish a nexus between the charged crimes and gang activities. However, Launi testified gang members elevate their individual status, and thus benefit themselves and their gang, when they act with other gang members. As news of the crimes goes out, it increases the level of fear and intimidation in the community, and the gang's violent reputation. These facts can support an inference the alleged crime was committed for the benefit of the criminal street gang. (See *Abillar, supra*, 51 Cal.4th at p. 63.) Evidence a criminal defendant committed crimes in association with fellow gang members and knowledge their codefendants are members of their gang is sufficient to support the section 186.22, subdivision (b) enhancement. (See *People v. Leon* (2008) 161 Cal.App.4th 149, 163 [sufficient evidence to support section 186.22 enhancement where prosecution established defendant committed crimes in association with fellow gang member, knowing he was a gang member]; *Romero, supra*, 140 Cal.App.4th at p. 20 [evidence defendant “intended to commit a crime, . . . intended to help [codefendant] commit a

crime, and . . . knew [codefendant] was a member of his gang” created a reasonable inference appellant possessed specific intent required by section 186.22[.]) “Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.” (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [“very fact that defendant committed the charged crimes in association with fellow gang members” supports the enhancement].)

### *3. Gang-Related Special Circumstance*

The jury also found true the gang special circumstance, which provides that any defendant found guilty of first degree murder shall be punished by death or by life in state prison without the possibility of parole if the “defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of section 186.22, and the murder was carried out to further the activities of the criminal street gang.” (§ 190.2, subd. (a)(22).) Considering the evidence presented to prove Cardenas’ intent, his active participation in the Santa Nita criminal street gang, and the expert testimony explaining how the instant murder benefitted the gang, the evidence is more than sufficient to sustain the true findings on the special-circumstance allegation under section 190.2, subdivision (a)(22).

### *3. Instructional Error*

Oceguera claims giving CALCRIM No. 370<sup>7</sup> without specifying that motive is inapplicable to the crime of street terrorism or the gang enhancement created

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<sup>7</sup> CALCRIM No. 370 states, “The People are not required to prove that the defendants had a motive to commit the crime charged. In reaching your verdict you may, however, consider whether the defendants had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.”

contradictory instructions and violated his federal Constitutional rights by lessening the burden of proof. We disagree.

First, Ocegüera did not object to the instruction, nor did he request a modification specifically addressing its asserted deficiency. Because CALCRIM No. 370 is a correct statement of the law (*People v. Howard* (2008) 42 Cal.4th 1000, 1024 (*Howard*), the issue is waived. (*People v. Cleveland* (2004) 32 Cal.4th 704, 750.) Second, the California Supreme Court has held this instruction does not lessen the prosecution's burden, impermissibly shift the burden of proof to the defendant, or permit the jury to base guilt on motive alone. (*Howard, supra*, 42 Cal.4th at p. 1024.) And, finally *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1139-1140 (*Fuentes*), directly rejected the claim CALCRIM No. 370 creates a conflict in the jury instructions as they related to active participation in a criminal street gang, or the gang enhancement. Ocegüera's attempts to distinguish his case from *Fuentes* are unpersuasive.

#### 4. Sentencing Error

Defendants claim the court violated section 654 by sentencing them for active participation in a criminal street gang and the murder because both crimes involved the same felonious criminal conduct. This issue was pending review in the California Supreme Court when the parties filed their briefs. (*People v. Mesa* (2010) 186 Cal.App.4th 773, rev. granted Oct. 27, 2010, No. S185688; *People v. Duarte* (2010) 190 Cal.App.4th 82, rev. granted June 22, 2010, No. S189174.) More recently, the California Supreme Court resolved the issue in defendants' favor. (*Mesa, supra*, 54 Cal.4th at pp. 197-198.) As the Court stated, ““section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have “willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang,” [citation] and (2) the underlying felony that is used to satisfy this element of gang participation.” [Citation.]” (*Mesa, supra*, 54 Cal.4th at pp. 197-198, citing *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315.)

The Attorney General claims dual punishment is permissible here because defendants “not only had the intent to cause harm to Borjas, but . . . also had the broader intent to instill terror in the community and to demonstrate to the entire community the power of his gang.” While this may be true, section 186.22, subdivision (a) requires an active participant to willfully “promote[], further[], or assist[] in any felonious criminal conduct by members.” However, here, as in *Mesa, supra*, 54 Cal.4th at p. 200, the information alleged defendants committed the murder and related gang participation offense on the same day. There was no evidence either defendant engaged in unrelated felony conduct on that day. Consequently, section 654 operates to preclude punishment for both crimes.

#### DISPOSITION

The judgments are modified to reflect the application of a section 654 stay on count 2, active participation in a criminal street gang (§ 186, subd. (a)). The clerk of the superior court is directed to amend the abstracts of judgment to reflect this modification and forward a certified copy of the amended abstracts to the Department of Corrections, Division of Adult Operations. As modified, the judgments are affirmed.

O’LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

THOMPSON, J.