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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.

JORGE ARMANDO GARCIA and
JUAN PABLO GARCIA,

Defendants and Appellants.

G045371

(Super. Ct. No. 07CF3830)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Judge. Affirmed as modified.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Armando Garcia.

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

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

Brothers Jorge and Juan Garcia were convicted of special circumstances murder for killing a rival gang member.¹ They contend there is insufficient evidence to support the prosecution's theory the killing was gang related, the court erred in admitting a false statement Jorge made about Juan after the killing, and the court erred in allowing lay testimony regarding the accuracy of a witness's identification. We find these contentions unmeritorious, and other than to correct an undisputed sentencing error, affirm the judgment in all respects.

FACTS

On November 18, 2007, Jorge was living in an apartment complex at 521 South Lyon Street in Santa Ana. The complex is located in disputed gang territory, with both the Lyon Street gang and Los Crooks gang staking claim to the area. At around 5:00 p.m. on the 18th, Jose "Kid" Granillo and several other Lyon Street members were hanging out in the parking area of the complex. They were drinking beer and smoking drugs when Jorge pulled up in his Chevy Tahoe. Granillo puffed out his chest, glared at Jorge and claimed Lyon Street, and in response, Jorge announced his allegiance to Los Crooks. Granillo then made a derogatory reference to Los Crooks and challenged Jorge to fight. But Jorge didn't stick around. He told Granillo, "I'll be right back" and promptly left the area in his vehicle.

About 30 minutes later, Jorge returned to the same location in his vehicle. This time, he was not alone. When he pulled up to Granillo's group, a man wearing a hooded sweatshirt exited the front seat of his vehicle and approached Granillo. Granillo set down his beer and assumed a fighting stance. However, the man pulled out a gun and fatally shot Granillo in the chest with a single bullet. The shooter then rejoined Jorge in his vehicle, and they drove away.

¹ When referring to the Garcia brothers individually we will use their first names to avoid confusion; when referring to them jointly we will refer to them as appellants.

Miguel Chavez lived at the apartment complex where the shooting took place and was among the people who were hanging out with Granillo when he got shot. At trial, he claimed he could not remember anything about the shooting or identify anyone in the courtroom as being involved in it. But when the police questioned him in the wake of the shooting and showed him lineups containing appellants' photographs, he identified Jorge, aka "Spy," as the driver and Juan as the shooter. On the witness stand, Chavez insisted he was "just pick[ing] out random people" when he made those identifications. And although he signed documents attesting to his identifications, he claimed he didn't really know what he was signing. Nonetheless, Chavez denied the police had coerced him. He said he did not feel pressured by his interrogators and that he had a choice in terms of picking out suspects from the lineups.

Porforio Vasquez was also with Granillo at the time of shooting. He told the police he recognized the driver of the Chevy Tahoe as a Los Crooks member named "Spy." Vasquez said that, like himself, Spy lived in the apartment complex where Granillo was gunned down. He also said Spy had confronted him a few months before the shooting occurred. On that occasion, Spy asked Vasquez about some Lyon Street graffiti he had found in his parking space. He also asked Vasquez what gang he belonged to, and when Vasquez said Lyon Street, Spy made a disparaging remark about that gang.

During his police interview, Vasquez was shown photographic lineups containing appellants' pictures. Vasquez said he wasn't very good at identifying people from photos, but he could show the police where Spy lived in his building. Thereupon, the police drove Vasquez to the apartment complex, and he pointed them to Jorge's apartment, which was not far from his own unit.

Based on the strength of Vasquez's and Chavez's statements, the police arrested Jorge at the apartment complex two days after the shooting. They then searched his apartment and his vehicle — the Chevy Tahoe — and found writings and other

indicia connecting him to Los Crooks. In the parking spot assigned to Jorge, they noticed the words “R.I.P. Kid” and “Lyon Street” written in large black letters.

After waiving his Miranda rights, Jorge told the police that on the day of the shooting, he and his family were having a birthday party at his apartment for his son. At one point during the party, he went out to move his Chevy Tahoe and saw Granillo and others in the parking lot. Granillo started “mad-dogging” him, so Jorge asked him, “What’s up, homey?” Granillo called out Lyon Street, and Jorge said he was from Los Crooks. Then Granillo told Jorge, “Fuck, cucarachas,” which is a derogatory term for Los Crooks, and challenged Jorge to fight. Being outnumbered, Jorge drove away instead. He admitted to the police that he and Granillo had squabbled that day, but he denied driving back to the scene after that with the gunman. When the police told him that witnesses had seen him drive back and had identified him as being at the scene of the shooting, all Jorge could say was, “I can’t say that I was there.”

When the police asked Jorge when he last saw his brother, he said that Juan had moved to Mexico a couple of weeks before the shooting and that he had not seen him since then. He also claimed the gang evidence found in his apartment and vehicle was old, and he didn’t spend much time with Los Crooks anymore because he had a family and worked full-time.² However, Jorge also told police that, as a matter of pride and loyalty, he still considered himself to be a member of Los Crooks, and he always would. He said he wasn’t out there “gangbanging like he used to,” but if anybody ever asked him or “hit him up,” he was never going to “punk out” or back down from a gang challenge. Jorge’s gang ties were further evidenced by the fact that, while he was in custody awaiting trial in this case, guards found Los Crooks graffiti in his cell that he admitted writing.

² Jorge was a construction worker. His boss testified he was a reliable employee and never displayed any violent tendencies.

As part of their investigation, the police also interviewed Alex Diaz. He said he was walking home from the store when he saw a passenger alight from a vehicle in the parking lot and shoot Granillo. He identified the driver as Jorge but did not see the passenger's face and was unable to identify him.

Despite Jorge's claim that Juan had moved to Mexico, the police spotted him driving on the 91 freeway nine days after the shooting. Using their sirens and overhead lights, they tried to pull him over, but Juan refused to yield. Instead, he led the police on an extended high-speed chase before eventually pulling over on the 57 freeway near Brea. After he was arrested and placed in the back of a police car, an officer asked him if he was comfortable. Juan didn't answer the question; he simply wanted to know, "Is the guy going to be all right?" The officer told Juan he could not discuss that with him and did not attempt to engage him in further conversation.

Appellants' sister Martha testified that Juan called her on his cell phone during the high-speed chase and frantically declared, "It was not me. It was not me." However, Police Officer Andy Alvarez testified that when he spoke to Martha about the conversation she had with Juan during the chase, she said that Juan had told her, "The cops are chasing me for what I did."

Santa Ana Police Officer David Rondou was the lead investigator on the case. He also testified as a gang expert for the prosecution. Rondou stated the primary goal of criminal street gangs such as Los Crooks is to obtain respect by committing acts of violence that spread fear in the community. He called guns the "bread and butter" of gangs and said they are highly prized by most gangs, including Los Crooks. Indeed, according to Rondou, Los Crook's primary activities at the time of the shooting in 2007 were illegal firearms possession and robbery. Court records also reflected that over the years Los Crooks members have been involved in other crimes, such as auto theft, residential burglary and street terrorism.

Rondou said Los Crooks was the predominant gang at the apartment complex where the shooting occurred until about a decade ago, and then Lyon Street began to emerge as a serious power in the neighborhood. Since then, both gangs have been vying for control of the complex. Rondou said gang members are expected to retaliate severely when they or their gang are disrespected by a rival gang member. Even when the disrespect takes the form of a derogatory remark, a violent response such as murder is not out of the question. In fact, Rondou has seen that scenario played out so many times in his career that he referred to it as “gangs 101.”

Rondou also testified about the concept of “back-up.” He said gang members rely on their fellow members to help them out when they are in trouble and to commit crimes when they are on the offensive. They must be able to trust each other in all respects and honor the code of silence. Under that code, “snitching” or “ratting” on fellow gang members is strictly forbidden, and even implicating rival gang members is frowned upon. As Rondou put it, “A rat is a rat, whether you are telling on your buddy or you’re telling on a rival gang member for shooting someone in front of you, it is still a no-no in the gang subculture.”

As far as appellants are concerned, Rondou opined they were both active members of Los Crooks at the time of the shooting. Rondou reached that opinion based on the following factors: 1) Appellants have multiple Los Crooks tattoos; 2) when contacted by Rondou and other officers over the years, they have consistently identified themselves as Los Crooks members; 3) they have received numerous gang notices, documenting their status as Los Crooks members; and 4) their conduct in the present case is consistent with gang behavior.

Given a hypothetical scenario steeped in the facts of this case, Rondou opined the shooting would “absolutely” promote, further or assist the criminal activities of the shooter’s gang. He explained a gang member who was disrespected and outnumbered “goes and gets back-up, . . . arms himself, and . . . [t]o save face, he handles

that disrespect. [¶] Him shooting that rival gang member not only elevates his status, to come back and do the murder, but it elevates the gang they are from. That sends a message to everyone else that even if you say something to us that we don't like, we will shoot and kill you. [¶] Those rumors fly. Those things go all through the gang subculture. That's how these gangs get these ruthless reputations of being killers, and not to mess with us.”

In their defense, appellants presented alibi evidence from several of their relatives. Some of them testified that Jorge was with them at the birthday party for Jorge's son at the time of the shooting. And some of them testified that Juan was with them at an unrelated BBQ that day. (The birthday party and the BBQ were only a few miles apart.) Several people who attended the BBQ told police that someone, possibly a “brother,” came and picked up Juan and that the two of them were gone for some period of time.

In the end, the jury convicted appellants of first degree murder and active participation in a criminal street gang, aka street terrorism. The jury also found true several gang-related allegations, as detailed below. The court sentenced appellants to life in prison without the possibility of parole on the murder count, plus additional time for the gang offense. This appeal followed.

I

Appellants argue there is insufficient evidence to support the jury's findings on the gang charges. We disagree.³

In determining the sufficiency of the evidence to support a criminal conviction, we “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is

³ Appellants' arguments in this regard are presented primarily in Jorge's brief. However, appellants have joined each others' arguments, so our discussion is applicable to both of them. The one exception is the issue presented below in section IV, which pertains solely to Juan.

reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] “‘Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]” [Citation.]” (*People v. Loza* (2012) 207 Cal.App.4th 332, 346-347.) The same standard applies when we review the sufficiency of the evidence to support a true finding on an enhancement allegation or a special circumstances allegation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791; *People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

In addition to convicting appellants of first degree murder, the jury found appellants guilty of violating Penal Code section 186.22, subdivision (a).⁴ That provision states, “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished” up to three years in prison. (§ 186.22, subd. (a).)

The jury also found true three gang-related allegations attendant to the murder count. First, the jury found true the special circumstances allegation that appellants murdered Granillo while they were “active participant[s] 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).)

Second, the jury found true the enhancement allegation that appellants murdered Granillo “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members[.]” (§ 186.22, subd. (b).)

⁴

Unless noted otherwise, all further statutory references are to the Penal Code.

And lastly, the jury found true that, in acting with such intent, appellants intentionally discharged a firearm and thereby proximately caused Granillo's death. (§ 12022.53, subs. (d) & (e).)

Appellants do not dispute they were members of Los Crooks when the shooting occurred. However, they maintain the prosecution failed to prove that Los Crooks was a criminal street gang at that time. A criminal street gang is "an ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) As interpreted by our Supreme Court, the term primary activities requires that the "commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

Appellants argue the record does not contain substantial evidence of that requirement. Although gang expert Rondou testified specifically about the primary activities of Los Crooks, appellants claim his opinion was insufficient to support the jury's findings on that issue. The claim is not well taken.

Rondou testified he has been working as an investigator in the gang unit of the Santa Ana Police Department for over 20 years. He has investigated "thousands of gang-related incidents, including murders, attempt[ed] murders, firearms, assaults, [and] things of that nature." In addition, he has "talked to probably 10,000 gang members over the years, both in and out of custody, in regards to the gang subculture, the in's and out's, the issue of respect, [and] the role of guns. Just, basically, what makes them tick." Rondou also has vast experience with the California Street Terrorism Enforcement and Prevention Act (STEP), which includes the crimes and enhancements at issue in this case.

(§§ 186.20 et seq.) In fact, he teaches police officers and prosecutors how to investigate gang crimes and has testified as a gang expert in over 100 cases.

Rondou's experience with and knowledge of Los Crooks allowed him to testify extensively about the gang's history, territory, identifying symbols, activities and membership. When the prosecutor asked him what Los Crooks' primary activities were at the time of the shooting in 2007, he said robbery and illegal firearms possession, activities which encompass two or more of the statutorily enumerated offenses set forth in the gang statute. (§ 186.22, subd. (e) (2), (23) & (31)-(33).)

Notwithstanding Rondou's extensive experience with the subculture of gangs and his familiarity with Los Crooks, appellants assail his testimony about Los Crooks' primary activities as being "conclusory" and argue it is insufficient to support the jury's findings on that issue. In so arguing, appellants draw our attention to *In re Alexander L.* (2007) 149 Cal.App.4th 605, in which the evidence on the primary activities requirement was found to be lacking. But in that case, the gang expert merely testified he knew the subject gang was "involved" in certain offenses; he did not testify directly to the gang's primary activities or explain the basis for his opinion. (*Id.* at pp. 611-612.)

Here, in contrast, Rondou specifically testified that robbery and illegal firearms possession were Los Crooks' primary activities. And he detailed the foundation for his opinions about the gang by saying they were based on his training, experience, review of documents and conversations with other officers. Explaining the extent of his personal experience with Los Crooks, Rondou said, "I've driven through [their] neighborhood. I've seen the graffiti. I have talked to other people involved in [that] gang." Considered as a whole, we are convinced Rondou's expert testimony constitutes substantial evidence of the primary activities requirement and provides sufficient evidence from which the jury could find Los Crooks constituted a criminal street gang for purposes of the charged crimes and enhancements. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620.)

II

Irrespective of that issue, appellants claim the particular elements of the special circumstances allegation are not supported by substantial evidence. The record shows otherwise.

Consistent with the language of section 190.2, subdivision (a)(22), the jury was instructed that in order to find the special circumstances allegation true, the prosecution had to prove beyond a reasonable doubt that appellants were active participants in Los Crooks at the time of the shooting and that they murdered Granillo to further the activities of that gang. (CALCRIM No. 736.) In addition, the jury was instructed the prosecution had to prove appellants knew that Los Crooks members engage in or have engaged in a pattern of criminal gang activity. (*Ibid.*) Although this knowledge requirement is not expressly contained in section 190.2, subdivision (a)(22), it is constitutionally mandated as a matter of due process. (*People v. Carr* (2010) 190 Cal.App.4th 475, 487-488.)

A “pattern of criminal gang activity” includes the commission of two or more statutorily enumerated offenses, provided they occurred within a specified time period and were committed on separate occasions or by two or more persons. (§ 186.22, subd. (e).) In this case, the prosecution presented evidence that a Los Crooks member other than appellants was convicted of auto theft and active participation in a criminal street gang in 2005, and another Los Crooks member was convicted of residential burglary in 2004. Appellants concede this evidence satisfied the pattern requirement. However, they maintain there is insufficient evidence they were aware of these offenses, so as to satisfy the knowledge requirement of the special circumstances allegation.

Appellants are mistaken. The special circumstances allegation “does not require a defendant’s subjective knowledge of particular crimes committed by gang members” (*People v. Carr, supra*, 190 Cal.App.4th at p. 488, fn. 13.) Rather, the prosecution must merely prove the defendant was aware of “the gang’s illegal purposes.”

(*Id.* at p. 488.) And there was plenty of evidence from which the jury could infer such awareness in this case.

Rondou testified that when he interviewed Jorge, Jorge admitted he had been “jumped in” Los Crooks, i.e., initiated into the gang, at an early age. Rondou also knew that Jorge’s gang moniker was “Spy” and that he had several Los Crooks’ tattoos, which demonstrated his allegiance to that gang. In addition, Jorge had received five “STEP Notices” between 2002 and 2005. Rondou explained that STEP Notices are used by the police to keep track of suspected gang members. The notices informed Jorge that Los Crooks is criminal street gang and that he has been identified as an active participant in that gang.

Over the years, Juan has received about the same number of STEP Notices as Jorge. Speaking to Juan’s gang connections, Rondou said he has “been a free-admitter of being a Los Crooks gang member with the moniker of Looney since about 1996, and he has numerous [Los Crooks] tattoos. And for the most part, any time the police have contacted him and asked him, he has been proud of that affiliation.” Juan also has an extensive criminal record, which includes convictions for kidnapping, robbery and active participation in a criminal street gang.

Focusing on their STEP Notices, appellants contend the notices may be sufficient to prove the police considered them to be gang members, but they are insufficient to prove they were subjectively aware Los Crooks members engaged in illegal activity. But, as shown above, it wasn’t just the STEP Notices that provided proof on that issue. Rather, the prosecution presented evidence indicating that appellants have long associated with Los Crooks and proudly identified themselves as members of that gang. Given appellants’ loyal affiliation with the gang, as well as their prior conduct and actions in the present case, the jury could reasonably infer they were sufficiently immersed in the gang to know that its members have engaged in a pattern of criminal activity. There is no reason to disturb the jury’s finding on that issue.

In attacking the special circumstances finding, appellants also insist there is insufficient evidence they carried out the shooting to further the activities of Los Crooks. They contend the motive for the shooting was more personal than gang related, but again, the record belies this contention. The Lyon Street-Los Crooks rivalry was well documented by the evidence, as was appellants' allegiance to Los Crooks. And a few months before the shooting, Jorge confronted Lyon Street member Vasquez over the presence of Lyon Street graffiti in his parking lot. That set the stage for Jorge's subsequent encounter with Granillo, which had all the trappings of a typical gang encounter. Granillo "mad dogged" Jorge and claimed Lyon Street, and in response, Jorge hoisted Los Crooks' flag by announcing his allegiance to that gang. Then Granillo upped the ante by saying "fuck, cucarachas," which is a derogatory term for Los Crooks.

Rather than taking on Granillo's group by himself, Jorge left to get Juan, and they returned a short time later to get their revenge. Rondou described appellants' actions in shooting Granillo as "gangs 101" because gang members so often react with violence when they or their gang are disrespected. Indeed, it's been Rondou's experience that is how gang members spread fear and obtain respect in the community, which is the ultimate goal of criminal street gangs. As Rondou explained, gun violence in particular is an effective way to achieve respect because it "sends a message to everyone else that even if you say something to [gang members] that [they] don't like, [they] will shoot and kill you. [¶] Those rumors fly . . . [and] [t]hat's how these gangs get these ruthless reputations of being killers, and not to mess with [them]."

All told, the circumstances of the shooting, coupled with Rondou's expert testimony on the subculture of gangs, were amply sufficient to support the jury's finding that appellants acted to further the activities of Los Crooks. We therefore reject their challenge to the sufficiency of the evidence to support the jury's finding on the special circumstances allegation.

III

Appellants challenge their convictions for street terrorism on one of the same grounds upon which they challenged the true finding on the special circumstances allegation. They contend there is insufficient evidence they were aware that Los Crooks members have engaged in a pattern of criminal activity. For reasons explained above, we find that argument unconvincing. Therefore, we affirm appellants' convictions for active participation in a criminal street gang.

IV

Next, Juan contends the trial court erred in admitting Jorge's statement to police that he (Juan) was in Mexico at the time of the shooting. Juan avers the statement was unduly prejudicial within the meaning of Evidence Code section 352 and violated his right to a fair trial, but we cannot agree.

The admissibility of Jorge's statement about Juan being in Mexico was litigated extensively before trial. The prosecutor argued the statement was highly probative as to Jorge because it was a false statement that reflected his consciousness of guilt. He also claimed that because the statement did not explicitly incriminate Juan, its admission would not violate the *Aranda-Bruton* rule, which prohibits the admission in a joint trial of one defendant's confession that powerfully and facially incriminates another defendant. (See *Bruton v. United States* (1968) 391 U.S. 123; *People v. Aranda* (1965) 63 Cal.2d 518.) Although it was clear that Jorge was not going to testify, and thus Juan would not be able to cross-examine him about the statement, the prosecutor believed that any possible "spill-over" prejudice that Juan might engender from the statement could be cured by admonishing the jury to consider the statement only as to Jorge.

Juan's attorney argued a limiting instruction to that effect would not suffice to stem the prejudice to Juan because the jury would naturally infer that the only reason Jorge lied about Juan being in Mexico was to protect his brother by attempting to throw the police off his trail. However, finding the statement to be relatively benign in nature,

the court allowed the prosecution to introduce it to show Jorge's consciousness of guilt. To protect Juan's right to a fair trial, the court admonished the jurors that they could not consider the statement in deciding whether he was guilty of the charged offenses. However, the court did not believe the statement was so prejudicial so as to compel its exclusion altogether.

Juan disagrees. However, he admits that because the statement was not offered for the truth of the matter asserted, it did not implicate the Sixth Amendment or come within the ambit of the *Aranda-Bruton* rule. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1208-1209; *People v. Smith* (2005) 135 Cal.App.4th 914, 921-924.) This is an important point because *Aranda-Bruton* created a "narrow exception" to the "almost invariable assumption of the law that jurors follow their instructions. . . ." (*Richardson v. Marsh* (1987) 481 U.S. 200, 206-207.) Given that the *Aranda-Bruton* rule is inapt in this case, we may presume the jury followed the court's limiting instruction regarding the permissible use of Jorge's statement. Nevertheless, Juan insists the statement should have been excluded under Evidence Code section 352 and as a matter of due process.

Evidence Code section 352 empowers the trial court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." However, "[t]he trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value." (*People v. Horning* (2004) 34 Cal.4th 871, 900.) On review, we give great deference to the court's determinations in this regard and will not disturb them unless an abuse of discretion has been shown. (*People v. Thomas* (2011) 51 Cal.4th 449, 488.)

We must also keep in mind that the prejudice referred to in Evidence Code section 352 is not synonymous with damaging to one's case: "Evidence need not be excluded under [this] provision unless it 'poses an intolerable "'risk to the fairness of the

proceedings or the reliability of the outcome.”” [Citation.]” (*People v. Alexander* (2010) 49 Cal.4th 846, 905.) This risk exists only when the subject evidence is “of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction.” (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

Jorge’s statement about Juan’s whereabouts at the time of the shooting did not rise to that level. Jorge’s claim that Juan was in Mexico was obviously contrary to appellants’ alibi evidence, but it did not directly implicate Juan in the shooting. It was not so powerfully incriminating that the jury would be unable to consider it only for the limited purpose for which it was offered. That limited purpose was to assess Jorge’s culpability for the shooting. As the court instructed, the jury could logically infer from the statement that Jorge made a false or misleading statement about the shooting that reflected his consciousness of guilt. The statement didn’t involve him, but by trying to weaken the identification of his brother, Jorge was effectively trying to absolve himself of liability for the shooting. The lie was an obvious attempt by Jorge to discredit the police theory that he and his brothers were the culprits. It was perhaps not the most compelling argument in the prosecution’s quiver, but it was not bad enough to allow us to find an abuse of discretion in its admission.

And, as a safeguard against its misuse, the court properly informed the jury that, standing alone, the statement was insufficient to prove the charged offenses. More importantly, the court admonished the jurors they could not use the statement in deciding Juan’s culpability. These were not terribly difficult concepts for the jury to understand and apply. Considering both the content of the statement and the limited purpose for which it was offered, we do not believe it was so inflammatory as to invoke an emotional reaction from the jurors or prevent them for deciding the case in a fair and impartial manner. As such, its admission did not violate Evidence Code section 352 or due process.

Following the shooting, Lyon Street gang member Miguel Chavez was interviewed by gang detective Eric Paulson, and at trial, a tape recording of that interview was played for the jury. In addition, the prosecution was allowed to question Paulson about the circumstances of the interview and why it is sometimes hard to elicit information from gang members. Appellants assert Paulson's testimony in this regard constituted improper opinion testimony, but we do not find that to be the case.

Paulson first testified about the identification procedures he went through with Chavez. He explained that he showed Chavez two photographic lineups and that Chavez identified Jorge from one and Juan from the other. Then he had Chavez put his initials next to appellants' photos and sign an admonishment form.

Following Paulson's preliminary testimony on these points, the tape recording of his interview with Chavez was played for the jury. The interview revealed that Chavez was reluctant to identify anyone in the lineups and that Paulson had to work to overcome Chavez's resistance in that regard. For example, when shown the lineup containing Jorge's photo, Chavez initially claimed that no one looked familiar to him. In response, Paulson told Chavez, "You're scared and you're playing games. You've seen this guy and you're looking at his picture right now. You've seen this guy once a day over the last two years. Now I realize that he may not look exactly the way that he looks right now but you recognize him. I can see you looking right at his photograph right now." At that point, Chavez stated, "I think its number four," referring to Jorge's photo.

Anticipating that Paulson's interrogation techniques would be a ripe subject for the defense to attack the reliability of Chavez's identifications, the prosecution engaged Paulson in the following line of questioning:

"Q [by the prosecutor]: Now, you kind of heard at the end [of the tape] there you were a little bit persistent with [Chavez]?"

"A [by Paulson]: Yes.

“Q. Why was that?

“A. “His body language, some of his answers he was very hesitant. It was obvious he was scared.

“[Jorge’s attorney]: Your Honor, we’re going to object to this type of analysis here about the witness. The testimony speaks for itself and the tape.

“THE COURT: Overruled. Answer may remain. Ask your next question.

“Q [by the prosecutor]: So, you were persistent because you noticed his body language, he looked scared and why else?

“A [by Paulson]: Having literally done hundreds of these interviews --

“[Jorge’s attorney]: This is improper right here, his analysis about a witness.

“THE COURT: Overruled. You may answer.

“A [by Paulson]: It is difficult to get information out of people who are scared. They are scared. They just saw something horrific happen in front of them. Often, they feel it’s going to happen to them. They don’t want to be labeled as a rat. That’s more important than being forthcoming, and being honest and cooperating with the police. It is hard for witnesses, who have witnessed stuff like this, to overcome that.

“[Jorge’s attorney]: This is improper. This needs to be struck, your Honor.

“THE COURT: Answer may remain. Feel free to cross examine.

“Q [by the prosecutor]: You can continue with your answer.

“A [by Paulson]: You have to push. Each witness, the victims, you don’t know these people, so you don’t know how far to push or how to push. It is a difficult job. And you have to push to get enough information from them to, you know, continue with the case, to get them to tell you what you believe is important to the case. [¶] It’s, you know, sometimes not pleasant. Sometimes we swear. Some people don’t understand that, but it’s the nature of the beast. That’s what we do. Sometimes it’s not pretty, but that’s just what we have to do.

“[¶] [¶] Q. And based on your training and experience in the [g]ang [u]nit, is it difficult to get information from gangsters?”

“A. Yes.

“Q. Even rival gangsters?”

“A. Yes.”

With that, the prosecutor yielded the floor, and the court invited appellants to cross-examine Paulson. They declined to do so.

Appellants argue Paulson’s testimony constituted “impermissible lay opinion regarding [Chavez’s] veracity and usurped the jury’s role as the sole fact finder at trial and the determinant of the credibility of witnesses.” However, the Attorney General contends appellant’s argument is “much ado about nothing” because “Paulson did not testify or even suggest that eyewitness Chavez was credible.” We find ourselves something less than one hundred percent sold on the Attorney General’s argument. Although Paulson did not expressly opine on Chavez’s veracity, he did suggest fear of being “labeled as a rat” is what keeps gang members from “being forthcoming, and being honest and cooperating with the police.” The unmistakable implication of Paulson’s testimony was that his technique was used to gain Chavez’s cooperation, and the officer certainly didn’t want Chavez to cooperate in a lie.

Still, we cannot subscribe to appellants’ position that Paulson’s testimony constituted improper lay testimony. While opinion testimony regarding the veracity of a witness is generally inadmissible (*People v. Riggs* (2008) 44 Cal.4th 248, 299), “[e]vidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness’s credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness’s fear of retaliation is directly linked to the defendant for the evidence to be

admissible. [Citation.]’ [Citation.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

The gravamen of Paulson’s testimony was that he could not question Chavez as he would a bystander who had witnessed a traffic accident. This was proper and probative testimony; jurors would not ordinarily understand the role of fear and the gang code of silence, had it not been explained to them. They might not understand why a rival gang member would not be anxious to help in the investigation and immune to the fear an ordinary citizen might feel about rival gangsters.

It was therefore reasonable for the trial court to allow Paulson to testify as to why Chavez may have been reluctant to identify appellants as the people who murdered Granillo. Chavez obviously knew appellants were gang members. And although appellants were Chavez’s rivals, gang expert Rondou testified “a rat is a rat,” and under the “unwritten code” of gang conduct, “it is still a no-no” for a gang member to “snitch” on a rival gang member by implicating him to the police. The jury could reasonably infer that the consequences for such snitching would be severe, and that is why Chavez was reluctant to identify appellants. Even eyewitness Diaz, who was not in a gang, said he held back information from the police at first because he “did not want to get involved” in the case. The gang dynamics of the shooting were clearly such that fear of retaliation played a role in the witnesses’ willingness to cooperate with the police. Since that played into the issue of witness credibility, the prosecution was properly allowed to present evidence as to why Chavez may have been reluctant to identify appellants. Paulson’s testimony on this topic did not violate the rules of evidence or undermine appellants’ right to a fair trial. Indeed, the combination of having them hear the tape and Paulson’s explanation of his interrogation technique was the best way to provide them the tools for evaluating Chavez’s statement.⁵

⁵ Having rejected appellants’ individual claims of error, we necessarily reject their claim that cumulative error compels reversal of their convictions.

VI

Appellants' remaining argument requires little discussion. In count 2, they were convicted of active participation in a criminal street gang for willfully promoting, furthering or assisting felonious conduct by members of their gang. (§ 186.22, subd. (a).) And at sentencing, they both received an additional determinate sentence for that offense. However, a defendant cannot be punished twice for committing a single act. (§ 654.) Here, the prosecution relied solely on the murder alleged in count 1 to satisfy the felonious conduct requirement in count 2, and the jury was specifically instructed to that effect. Under these circumstances, as the Attorney General concedes, appellants' sentences on count 2 must be stayed. (*People v. Mesa* (2012) 54 Cal.4th 191.) We will modify the judgment accordingly.

DISPOSITION

The judgment is modified to stay appellants' sentences on count 2 for active participation in a criminal street gang. The clerk of the superior court is directed to prepare a new abstract of judgment reflecting this modification and send a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.