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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN LORENZO SOTO et al.,

Defendants and Appellants.

H034605

(Santa Cruz County

Super. Ct. Nos. F17281, F17283)

On the morning of July 25, 2004, defendants Juan Lorenzo Soto and Francisco Javier Valenciano, Jr., along with Anthony Gonzales, drove from Watsonville to Santa Cruz to commit a robbery. They were armed with a shotgun and a pistol. The liquor store they intended to rob was too busy, so the three men decided to rob a group of men they had seen playing cards in a nearby driveway, with a pile of money on the ground. When Gonzales, armed with the shotgun, and Soto, armed with the pistol, approached the card players and directed them to hand over their money, all but one of them, Rodolfo Escobar, complied. Escobar instead insulted Gonzales, and picked up the money off the ground. As one of his friends implored him to cooperate with the gunmen, Escobar said he had to work hard for his money to support his family, and that if Gonzales wanted his money, he should “ask [his] mama for [it].” Gonzales pressed the shotgun against Escobar’s forehead and pulled the trigger, blowing off the top of his head. Gonzales and Soto collected the money off the ground, went back to the car, where Valenciano had been acting as a lookout, and drove off.

Following a jury trial, Soto and Valenciano¹ were convicted of conspiracy to commit robbery (Pen. Code, § 182, subd. (a)(1), count 1);² first degree murder (§ 187, subd. (a), count 2); second degree robbery of Escobar, Antonio Baires, Jose Edgardo Navarro, Gerardo Navarro and Jose Saul Ayala Baires (§ 211, counts 3-7); and attempted second degree robbery of Francisco Ayala and Manuel Ayala (§§ 664, 211, counts 8 & 9). The jury also found true the allegations that counts 2 through 9 were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), that a principal personally discharged a firearm causing death as to counts 2 and 3 (§ 12022.53, subds. (d), (e)(1)), and that a principal personally used a firearm in the commission of counts 4 through 9 (*id.*, subds. (b), (e)). Soto and Valenciano were each sentenced to total terms of 84 years to life, consisting of determinate terms of 34 years followed by indeterminate terms of 50 years to life.

On appeal, Valenciano and Soto raise the following arguments: (1) the trial court erred in allowing the prosecution's gang expert to proffer an opinion that the crimes were gang-related in response to a hypothetical scenario which closely tracked the facts of this particular case; (2) the trial court erred in admitting statements made by Gonzales to his girlfriend, Vanessa Martinez, under the declaration against interest exception to the hearsay rule; (3) there was insufficient evidence to support the criminal street gang enhancement allegations; (4) the trial court erred in refusing to bifurcate the trial on the gang enhancement allegations; (5) the trial court erred in allowing the prosecution to admit evidence of predicate offenses involving Soto; and (6) there was insufficient evidence to support their convictions on counts 6 and 7, i.e., the robberies of Gerardo Navarro and Saul Baires.

¹ Soto and Valenciano were originally charged by information with Gonzales on December 8, 2004. On about November 16, 2005, the trial court granted Soto and Valenciano's motion to sever their trial from Gonzales' trial.

² Further unspecified statutory references are to the Penal Code.

As discussed below, we reject all of these arguments and shall affirm the judgments.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution case

1. Santa Cruz Police Officer Thomas Young

On the morning of July 25, 2004, Young was dispatched to 318 Spruce Street in Santa Cruz based on a report of an assault with a deadly weapon. On arriving at the address, Young was directed to the body of a man, later identified as Escobar, who had been shot. Young saw that the top of Escobar's head was gone, with portions of his skull, blood and brain matter scattered near his body. Some cash and playing cards were also on the ground in the driveway. In addition to taking photographs of the crime scene, Young sought to keep other people away from Escobar's body.

2. Santa Cruz Police Officer Arnold Vasquez

Vasquez was also dispatched to 318 Spruce Street on the morning of July 25, 2004, and assisted Young in moving people away from the crime scene. Vasquez is bilingual in Spanish and English and is certified as a Spanish-language interpreter for the Santa Cruz Police Department. He spoke with three individuals at the scene, Gerardo Navarro (Gerardo), Antonio Baires (Antonio) and Francisco Ayala (Francisco). Gerardo was "extremely afraid," but "the most calm [of the three]." He told Vasquez he had been standing next to Escobar when he was shot, and Vasquez could see blood, brain matter and skull fragments on Gerardo's shirt.

Gerardo said that he and his friends, including Escobar, were playing poker in the driveway of the apartment complex. A vehicle pulled into the driveway, made a three-point turn and went back the direction it initially came from. The same vehicle returned in a few minutes and parked on the street. Gerardo saw his friends put their hands up and noticed that two men had exited the car, one of them carrying a shotgun, while the other had a revolver. The man with the shotgun was a Hispanic male, about five feet eight

inches or five feet nine inches tall, and weighing 180 to 190 pounds. He was holding a double-barreled shotgun, with a barrel about 18 inches in length.

The man with the shotgun said, “Dame dinero, putos,” which translates to “give me the money, fucking ass holes [*sic*].” Gerardo’s friends began emptying their pockets and throwing money on the ground. Escobar, who was standing to Gerardo’s left, said, “Chinga su madre.”³ The man with the shotgun pointed it at Escobar’s head and pulled the trigger. Escobar fell to the ground, and the two men picked up money off the ground before going back to their car.

Antonio was even more frightened than Gerardo and had difficulty speaking, but told Vasquez essentially the same story about the robbery and murder. Francisco was the most frightened of the three, and was not able to give Vasquez “well-thought-out” responses.

Before Vasquez began interviewing the three witnesses, a white man about 40 years old approached him and described seeing a green Honda, containing four males, leave the scene just after the shooting. The man had written down the Honda’s license plate number, so Vasquez broadcast the description of the car and the license plate number before directing the man to talk to a nearby officer.

3. *Santa Cruz Police Officer Saul Rodriguez*

Rodriguez was at the police station on the morning of July 25, 2004 and was dispatched to 318 Spruce Street. Rodriguez is bilingual in Spanish and English and is certified as a Spanish-language interpreter for the Santa Cruz Police Department. Rodriguez interviewed three individuals at the scene, Manuel Ayala (Manuel), Jose Saul Ayala Baires (Saul) and Jose Edgardo Navarro (Jose). Manuel, who appeared to be in his late forties, was “visibly shaken up,” but told Rodriguez that two gunmen had approached and demanded money from him and the others in his group. The two men were Hispanic

³ “Fuck your mother” in Spanish.

and one was armed with a “double-barrel” shotgun while the other was armed with a small “revolver-type” gun. Manuel could not provide any additional details about the gunmen, such as their height, weight, age or clothing. According to Manuel, shortly after the gunmen approached, the man with the shotgun shot Escobar in the head. Manuel ran toward the staircase of the apartment complex and hid until the police arrived.

Jose also was shaken up, and kind of pacing back and forth during his interview with Rodriguez. Jose said that two armed men approached him and his friends as they played poker and demanded their money. He said one man was holding a double-barrel shotgun and the other was carrying a small gun. Jose took \$80 out of his wallet and gave it to the man with the shotgun. At some point, that man hit Jose across the back, leaving a “red, charleyhorse laceration.” Before the two armed men fled, the man with the shotgun shot Escobar.

Saul was the most nervous, and was “literally shaking, [and] having . . . trouble speaking.” He said that he and his friends were playing poker and were surprised by two gunmen. Saul tried to walk away, but the man holding a small revolver told him not to leave. When he came back to the group, there was a brief conversation and then Escobar was shot in the head.

4. *Robbery victims’ testimony*

Gerardo testified he was playing cards with his friends in the driveway at 318 Spruce Street on the morning of July 25, 2004. A green Honda Accord pulled into the driveway for a short time, then backed out. The car returned about five minutes later, and Gerardo then became aware a “light skinned dark” Latino man was pointing a black revolver at his head. The man told him to get on the ground, and Gerardo complied. He heard another man, armed with a shotgun, arguing with Escobar who was refusing to hand over his money. Gerardo raised his head to see what was going on and the man shot Escobar in the head. The man with the shotgun picked up the money on the ground and the two gunmen left. Gerardo had about five \$1 bills on the ground, one which was in the

pot and four others near his feet for future betting. Gerardo was not sure if the gunmen took his \$5, because “after they picked up some money they left a lot of money around, and with the gunshot, the blast blew some of the money all around.” Gerardo was asked to view some police lineups, but was unable to identify anyone.

Saul was one of Escobar’s roommates and they had gone to breakfast the morning of July 25, 2004. After they returned to their apartment at 318 Spruce Street, several of them began playing poker in the driveway, while three other friends watched. Saul had \$18 to \$20 in the pot. A green Honda pulled into the driveway, so he and his friends stood up to make way. It left after a minute or so, and he noticed three Hispanic men inside.

The car returned five or 10 minutes later and stopped in front of the entrance to the driveway. Saul heard a voice say, “Put all the money on the ground,” and he turned to see a man in a “blue, black, dark” hooded sweatshirt holding a double-barreled shotgun. He tried to move away, but a second man holding a revolver told him to “Go and put all your money down.” Saul noticed there was a third man sitting in the front passenger seat of the car. Escobar gathered money off the ground and said, “I am not giving you my money.” The man with the shotgun pointed it at Escobar’s forehead and shot him. The two men picked up money from the ground and left. Saul could not remember if there was any money left on the ground afterwards.

Saul was shown two photo lineups by police on July 28, 2004. In one lineup, he identified a photo of Soto, writing on the card “It seems to be him but I would have to see his body.” He was unable to identify anyone during a subsequent live lineup. At trial, Saul identified photographs of the shotgun and the revolver as the weapons used in the robbery-murder.

Francisco, Saul’s brother, went to breakfast with Saul, Escobar and Antonio the morning of July 25, 2004. After breakfast, he watched Saul, Escobar, Antonio and Gerardo playing cards in the driveway. A green Honda pulled into the driveway, then

backed out and drove off. The car returned about 10 minutes later. Francisco saw three men get out of the car. The driver was a dark-skinned Hispanic man wearing a black hooded sweatshirt and gloves. The man who got out of the front passenger seat was Hispanic, a little shorter than Francisco, and was wearing a yellow or orange jacket. The driver and front passenger came towards Francisco while the third man, also Hispanic, stayed on the sidewalk. The front passenger was carrying a black revolver and the driver was carrying a short, double-barreled shotgun. The driver approached the card players and said, "Give me your money, pinches putos." The man with the revolver demanded money from Francisco and the other spectators.

Antonio pulled out his wallet and took some money out to give to the robbers. Francisco pulled out his wallet as well, but had not yet handed any money to the man with the revolver. Escobar said "I'm not giving you my money. I have to work hard for this and I have a family to support." Antonio told Escobar to give the man his money, but Escobar picked up money off the ground and the man with the shotgun shot him. The man with the shotgun "gathered what was on the ground" and hit Jose in the back with the shotgun, and the two gunmen ran back to the car.

Francisco was shown several photo lineups, and in one of them, he identified a picture of Gonzales as "someone who looked like the person with the shotgun." At a live lineup, he identified Gonzales and another man as being similar to the man with the shotgun.

Antonio worked with Escobar at a landscaping company and went to breakfast with Escobar on the morning of the shooting. When they returned Antonio played poker with Saul, Escobar and Gerardo, while Francisco, Manuel and Jose stood nearby and watched. A green car pulled into the driveway, then drove away. The car returned, and two men with guns came out. One man had a pistol and one had a double-barreled shotgun. They demanded money and Antonio took \$40 out of his pocket and put it on the ground. Escobar told the man with the shotgun "go fuck yourself," then bent down to

pick up the money on the ground. Antonio told Escobar to give them his money, but he did not. The man with the shotgun said, in Spanish, “Puto, give me the money.” When Escobar did not do so, the man put the shotgun to Escobar’s forehead and shot him. As the man with the shotgun was leaving, he hit Jose in the back with the gun, knocking him down. Antonio’s money was gone. He viewed two photo lineups and two live lineups afterwards, but could not identify anyone.

Manuel also worked with Escobar and they were from the same village in El Salvador. He stopped by the apartment complex where Escobar lived on the morning of July 25, 2004, in order to arrange a ride to work the next day. He remained to watch some of the men play poker in the driveway. A green car that had previously passed by the driveway came back and two young men got out. One man had a double-barreled shotgun, and the other had a pistol. The man with the shotgun demanded that they hand over their money, but Escobar told him to ask “his mama for the money.” Manuel did not see anyone put any money on the ground. Escobar cursed at the man with the shotgun, who then shot him. The man with the revolver told Manuel to give him his money, but as Manuel began to reach for his money, Escobar was shot. The man with the revolver took off without waiting for Manuel to hand over his money. The two men left in the car, but Manuel did not notice which way it went. Manuel was subsequently asked to look at some photo lineups and some live lineups, but could not identify anyone.

Jose was watching his friends playing poker in the driveway on the morning of July 25, 2004. A green Honda pulled into the driveway, then backed out and drove away. About five minutes later the car returned. Two men got out, one with a shotgun and the other with a pistol. The man with the shotgun demanded money and Jose handed him \$80. After taking the money, he pushed Jose and hit him in the back with the shotgun. Jose fell to the ground, and he saw Escobar try to leave when the man with the shotgun shot him. The two men walked back to their car, aiming their weapons at Jose and his

friends, and drove off. Jose viewed a couple of live lineups afterwards, but was unable to identify anyone.

5. *Albert Chavez and Michael Clem*

Chavez and Clem had run the Wharf to Wharf race in Santa Cruz with some friends the morning of July 25, 2004, and they had parked their car near Spruce Street. Chavez was changing his clothes by the car when he saw a green Honda four-door driving rapidly down the street. The Honda suddenly stopped in the middle of the block and a large man wearing a gray sweatshirt, Levis and tan work boots got out of the passenger side. The man was five feet 10 inches or five feet 11 inches tall and weighed 170 to 180 pounds. Chavez, who used to work in an emergency room, noticed the man was wearing latex or some other kind of gloves on his hands.

The man went into what Chavez thought was an alleyway or a walkway. “Moments later” Chavez heard what sounded like a gunshot, after which he saw the man jump back in the passenger side of the Honda. Chavez could see movement on the other side of the car and heard a second door close. The Honda began moving quickly toward him, and Chavez moved to the back of his friend’s car. Chavez called out to Clem to write down the license number of the car as Chavez said it out loud. The Honda made a sharp right turn on Laurel Street and drove off.

Chavez used a cell phone to call 911, and relayed what he had seen, including the license plate number and description of the car, to the 911 operator. He walked over to where the green Honda had been pulled over and a crowd of people had moved to the sidewalk. Chavez saw a man lying in the driveway with the top of his head missing.

Clem was also changing his clothes by the car after the race. He noticed a car double-parked on Spruce Street, and saw more than one person get out of the passenger side of that car. Clem next heard what he thought was a firecracker, followed by an engine revving with a high rate of acceleration. He saw a four-door green Honda, which

had been double-parked on Spruce, heading straight toward him. Clem and one of his friends began repeating the license plate number of the Honda and he wrote it down.

6. *G.G. and Julie M.'s testimony*

G.G., a minor, was asleep in her bedroom with her older sister, Julie, at a nearby apartment complex on the morning of July 25, 2004. She woke up to the sound of people outside arguing in English and Spanish. She went to the kitchen and heard what sounded “like a big bang.” She then heard people yelling outside, and G.G. went into her mother’s room and looked out the window. She could see a green Toyota or Honda stopped in the street outside. A Hispanic man in a black hooded sweatshirt, carrying a shotgun,⁴ ran to the car and got into the front passenger seat. A second Hispanic man wearing a red hooded sweatshirt got into the rear seat behind the driver’s seat. A third Hispanic man, also wearing a black hooded sweatshirt, got into the rear passenger seat. G.G. did not see the driver, and the car drove off. Her mother called 911, but handed the phone to G.G. since she could not speak English. G.G. and Julie spoke to the police.

G.G. heard people outside screaming her friend Escobar’s name. She went outside and saw a body lying next to the trash can, but got scared and ran back inside before she saw the person’s face.

On July 27, 2004, G.G. viewed two photo lineups and picked out Gonzales from the first lineup. She wrote on the lineup witness form: “Number 4 looks like the one who shot the guy but not really and it’s because he didn’t have a bottom mustache and the guy who shot him looked like he didn’t have any hair.” She explained that she was referring to the small goatee Gonzales was sporting in the picture when she wrote “bottom mustache.”

⁴ On cross-examination, G.G. said the man was carrying something black that had holes in it, wrapped in a towel, but she did not actually see a shotgun.

On August 3, 2004, G.G. was taken to the county jail to view an in-person lineup through a two-way mirror. When Gonzales, in position No. 2, stepped forward, G.G. cried and said she did not want to do this. When the third man stepped forward, G.G. thought he could see her and she was afraid. She told the officer “I can’t do this,” “I don’t want to do this” and left. Neither Soto nor Valenciano was present at this lineup.

Julie, who had recently turned 16, was sleeping in G.G.’s room on the morning of July 25, 2004, when she was awakened by the sounds of people arguing. She walked out the front door and heard a loud noise. Her neighbors were saying, “Oh, my God. Oh, my God,” and Julie saw Escobar’s body on the ground next to the dumpster outside. She saw the back of someone running off, but never saw a face. The person yelled, “Northside.”

Julie also went by the name “Piedad,” and her brother is a gang member. She has a tattoo of three stars on one hand and a tattoo of one star on the other hand, but denied that the tattoos were gang-related. She was aware that Northside was a gang based in Santa Cruz. She also knew what a Sureno is, that Surenos claim the number 13, which is often represented by a number 3, and the color blue. During her testimony, Julie was wearing a blue cross, though she said “anybody can wear any color they want.”

7. *Vanessa Martinez*

Martinez met Gonzales when she was 18, at the house of Francisco “Frankie” Valenciano. After Gonzales was incarcerated for violating his parole, Martinez developed a relationship with him through letters, phone calls and prison visits. When he was released in March 2002, they lived together at his grandparents’ house and in January 2003, she gave birth to Gonzales’ child. In mid-July 2004, Martinez bought her own home in Watsonville and Gonzales moved in with her.

During this time, Martinez learned that Gonzales was a gang member. She saw his tattoos, including “VGV” (for Varrio Green Valley) on his stomach and “Norteno” across his lower back, and asked him about them. Gonzales also cut his hair in a fade hairstyle called a Mongolian. He also owned a lot of Oakland Raiders clothing.

From April to December 2003, Gonzales was incarcerated at the Santa Cruz county jail for possession of marijuana for sale. Valenciano gave Martinez \$25 a month to put on Gonzales' book to buy items at the commissary, money to give to Andrea Gonzalez, who had a son with a VGV gang member; and \$1,500 to give to Gonzales' mother for an attorney. He also gave Martinez Christmas cards containing money to mail. While in county jail, Gonzales obtained more tattoos, including "14," which stands for the Northern gang, on his chest, and stars on his left shoulder.

As a gang member, Gonzales was obligated to pay monthly "taxes" or dues to the gang. Oscar Cabrera, a member of a Norteno gang and the Nuestra Familia prison gang, would beat up members who failed to pay their taxes. Martinez witnessed Cabrera beating up a VGV gang member, Armando Cardenas, for such a failure.

Martinez had known Valenciano for about two years, and first met Soto about a week or two before July 25, 2004. She believed both men were also gang members.

The week before the shooting, Martinez twice heard Valenciano tell Gonzales he needed money. Valenciano said that if Maria Zamora did not lend him money, he was going to rob somebody. Valenciano needed the money because his car was impounded and he had to pay \$200 in tax to Cabrera, which he and Gonzales paid monthly. Gonzales also needed money. She knew that if Valenciano and Gonzales did not pay, they would be beaten up.

On July 24, 2004, at around 6:00 or 7:00 p.m., Charal Hernandez came to Martinez's house to have her hair and make-up done for a party. Valenciano, Soto and Julio Cabrera, Oscar Cabrera's brother, were there, too. Gonzales asked Martinez to leave them and go upstairs. Soto, who was dating Hernandez, asked to borrow her car, a 1999 green Honda Accord EX. Hernandez agreed, and Soto drove her to the party down the street. At 9:00 p.m., Soto, Valenciano and Gonzales left in Hernandez's car, while Julio walked down the street to the party.

Soto, Valenciano and Gonzales returned sometime after midnight. Valenciano left, but Soto stayed overnight, as did Hernandez.

The next morning, Sunday, July 25, Soto asked Hernandez if he could borrow her car again. Hernandez refused at first, and asked why. She offered to drive him where he wanted to go, but he took the keys from her and knocked on the door to Gonzales' bedroom.

It was about 7:00 or 8:00 a.m. when Soto knocked on the door, but Gonzales did not answer. Soto knocked again, and Gonzales kissed Martinez and told her he would be right back.

Some time later, Martinez was driving with her son, her younger sister and Hernandez to get breakfast. Gonzales called her cell phone, and said that Soto needed to talk to Hernandez. Martinez gave the phone to Hernandez, and Soto told her she needed to report that her car had been stolen. She asked what happened, but Soto did not explain. He was upset and said to just report that it was "fuckin' stolen." Hernandez was crying, as the car was registered to her grandparents and she did not know how to explain to them about their car. She refused to call 911.

Martinez warned Hernandez they would be in trouble if they did not do as they were told. She was worried that the call might have something to do with the robbery that Gonzales and Valenciano discussed a few days prior, and was also worried that any blame would fall on Gonzales because he was on parole and was not supposed to be around other gang members, such as Soto and Valenciano. Hernandez agreed to call the police and report the car stolen, so she and Martinez fabricated a story about how the car was stolen from in front of Martinez's house the night before.

Martinez then noticed she had missed a call from Gonzales and called him back, telling him she and Hernandez had filed a police report. While talking to her, Gonzales seemed distracted, and yelled at Soto, "[W]here's [Valenciano]?" She could hear people talking in the background and Gonzales said, "Excuse, excuse me, where's [Valenciano]?"

Where the fuck is [Valenciano]?” Martinez heard either Gonzales or Soto say, “There he is at the payphone.” Gonzales said that they were in Santa Cruz and asked her to pick him up. Martinez initially said no, but called back 20 minutes later to ask if he still needed a ride. Gonzales said he did not.

Julio called Martinez later in the afternoon and told her to come by his house with her son. When she arrived she saw Soto, Valenciano, Gonzales, Julio and Oscar sitting in a truck outside. Gonzales told Martinez he was going to Mexico. He was emotional and told her he was sorry. Soto told Martinez to tell Hernandez he was sorry.

The next day, however, Martinez saw Gonzales at his grandmother’s house. He had a bad case of poison oak. She asked him what had happened but he could not really speak. She drove him back to their home, and about a week later, he was arrested. During that week, Gonzales told Martinez what had happened on July 25, 2004.

Gonzales told Martinez he and Soto went to rob a liquor store in Santa Cruz, with Valenciano driving. Because the store they had selected was crowded, they drove around the block. As they did, they saw some men playing poker in a driveway, with money lying on the ground. They pulled over and robbed the guys, with Valenciano staying by the car as he and Soto confronted the men. Gonzales said one of the men was killed after trying to take back his money and talking back to the shooter. Gonzales denied killing the man even though Martinez asked him many times. When describing how the man was shot, Gonzales said Soto “ate brains.”

They fled after the shooting, and Gonzales might have been driving at that point. They had a police scanner and heard that the police were looking for the Honda so they left the car by a creek or river and threw the weapons in the bushes. Gonzales said they were in Santa Cruz when Soto called Hernandez and told her to report the car had been stolen.

Also during the week before his arrest, Martinez saw Gonzales dividing up about \$150 in cash. As he did so, Gonzales said to himself, “One for Soto,” “one for

Valenciano,” and “one for me.” Gonzales seemed angry with Valenciano and felt the “whole thing” was his fault. Gonzales said the money was going to Julio and Oscar Cabrera.

Before his arrest, Gonzales told Martinez and Hernandez not to talk to the police. After Gonzales and Soto were arrested, Valenciano waved Martinez over as she was driving one day. He told her not to talk to the police and that there was no evidence. He said if she needed to talk to him, she should do so in person, so there would be no phone records.

When Martinez was interviewed by Detective Christine Bentley, she did not tell the truth because she was afraid of Oscar Cabrera, who had threatened both her and Hernandez. Martinez believed Oscar would kill her if she cooperated with the police. On July 31, 2004, Oscar had gone to her parents’ house looking for her, but she was not there. She arranged to meet Oscar at Valenciano’s parents’ house later that day. When she arrived, she saw Valenciano’s father was bleeding from a wound on his head. Oscar had asked Valenciano’s father for money to post bail, and when he refused, Oscar slashed his head open. Martinez met with Oscar later and he reminded her that people who talk to the police end up dead.

Martinez lied about a number of things over the course of several interviews with Bentley, including that Gonzales was working on his car at his grandmother’s house on the morning of the murder. After being arrested and threatened with prosecution, Martinez told Bentley essentially the same story that she testified to at the trial. She did not recall, however, asking Bentley to fabricate evidence against Soto. After the first time she testified in the case, she moved out of the area and changed her name.

8. *Alberto Anguiano and Maria Zamora*

Alberto Anguiano worked with Valenciano and Gonzales in Watsonville for a couple of months at Sambrailo Packaging. They became friends and Anguiano cut their hair weekly. He knew that Valenciano was a gang member because he had a tattoo that

read “Norteno” on the back of his head. Anguiano knew that Gonzales was also a gang member because he had a tattoo of the “Northern star” on his left arm, and had a fade haircut with a “Mongolian” ponytail.

On July 25, 2004, at 10:20 a.m., Anguiano called Gonzales, who answered, but seemed hurried. Gonzales passed the phone to Valenciano who asked Anguiano for Maria Zamora’s phone number. Valenciano was interested in Zamora, who also worked at Sambrailo’s. Before hanging up, he told Anguiano to call him later. Later that afternoon, Anguiano called Valenciano at his house, but could not reach him and did not leave a message.

Zamora confirmed she worked with Valenciano and Gonzales at Sambrailo’s Packaging for a few months. At about 11:18 a.m. on July 25, 2004, Valenciano called Zamora on her cell phone. She told Valenciano she was on her half-hour lunch break at work. He did not ask her for a ride and never said he was in trouble.

9. *Further investigation, autopsy and forensic evidence*

Meredith Baker used to date Soto in high school. After graduating, she went to college and Soto went to “jail” so she did not see him for approximately three years. At 10:31 a.m. on July 25, 2004, she got a call from Soto. Soto hurriedly said, “Meredith, I really need you to come get me. Can you please come get me.” Meredith refused saying she needed to get ready for work, but Soto pleaded with her, “Please, I need you to do me a favor. Please come get me.” She was upset and struggled with her feelings for Soto, answering “I can’t go through this again.” She asked where he was and Soto said he was off Frederick Street. At a later date, Soto’s sister Doreen came into Meredith’s workplace and told her she did not need to testify. If Meredith did testify, Doreen said, it would be her fault if Soto went to jail. Meredith believed that Soto was affiliated with the Nortenos. She did not hear from him again.

Meredith’s mother, Linda Baker, saw her daughter was upset because she wanted to help Soto but could not. She later checked the caller ID on Meredith’s phone which

showed the 10:31 a.m. phone call came from Gonzales's phone number. Linda contacted the police and Detective Bentley came to their house.

At 1:30 p.m. on the day of the shooting, Santa Cruz County Sheriff's Deputy Daniel Brierley was assigned to find the suspect vehicle, a 1999 green Honda Accord with license plate number 4BFR732. He went to every known Norteno gang house in Santa Cruz and started a grid search. At the 400 block on Owen Street, with Clinton as the nearest cross street, Brierley found the vehicle unoccupied next to a bamboo hedge. Other officers arrived to secure the scene and assist in collecting evidence. In the thick bamboo hedge, the officers found an expended red 16-gauge shotgun shell, a sawed-off double-barrel 16-gauge shotgun, and a revolver loaded with three .38-caliber bullets. When the vehicle was subsequently searched, officers found a glove and collected samples of what appeared to be blood and tissue from its interior.

On July 25, 2004, Lore James lived at the corner of Clinton and Owen Street in Santa Cruz. Between 9:30 and 10:30 a.m., she left the house and saw a green car across the street on Owen. She heard loud rustling noises in the bushes across the street. As she walked out to the sidewalk, she heard a car door close, and saw three young Hispanic men, between 18 to 25 years old, walk from the green car across the street toward her. They talked softly to each other, and one man turned and looked directly at James as he passed. She drove away, picked up her son and returned to find police securing the area. James told Officer Northrup she had seen three Hispanic men in their early 20s, five feet 10 inches to six feet tall. One had a medium build, dark complexion and wore a red bandana and baggie jeans. Another had a medium build, wore a white tank or v-neck shirt, baggie jeans, a baseball cap and carried a white bag.

At approximately 7:52 p.m. on July 25, 2004, Katy O'Doyle, whose front door faces Clinton Street, found a black Raiders sweatshirt in her backyard. She turned the sweatshirt over to the police. A couple of days later, Timothy Field, who lived at Darwin

and Clinton Streets, found a red sweatshirt, a baseball cap, and a pair of gloves inside the green waste trash can on the side of his home.

A DNA analysis on the red sweatshirt revealed three contributors from a stain on the back of the neck area, near the tag. Escobar's DNA was definitely present, and Soto and Valenciano could not be excluded as contributors to the mixture. Gonzales was excluded as a contributor of the DNA found on the sweatshirt.

Several different samples from the baseball cap were taken for DNA analysis. The bill and outside of the cap contained only Escobar's DNA. The tag included a mixture of DNA, with Valenciano representing the major contributor with at least two minor contributors. Soto could not be excluded as a possible minor contributor to the DNA on the tag.

One of the two gloves from the trash can contained a mixture of DNA consistent with two donors, Escobar and Soto. Soto could not be excluded as a possible major contributor and Escobar was a possible minor contributor. The other glove contained only Escobar's DNA. The glove found in the Honda contained DNA from Escobar and Gonzales. Soto and Valenciano were excluded as possible contributors of DNA on the glove.

Samples from the black Raiders sweatshirt included DNA from Escobar and Gonzales, and Escobar's blood was also found on the sweatshirt. Soto and Valenciano were excluded as contributors to the DNA found on that garment.

Santa Cruz Police Detective Warren Barry, along with other officers, searched the neighborhood where the Honda and weapons were found, looking for witnesses or businesses which may have videotapes. He reviewed a security videotape from a gas station mini-mart at Frederick and Soquel, but did not see any unusual activity and returned it. A few days later, he saw a picture of Soto at a police briefing and recalled seeing a man on the videotape with the same tattoo on the back of his neck and short black hair. He mentioned this to Northrup, who went to the mini-mart and obtained the

video. The video showed Soto purchasing a soda at the store on July 25, 2004, at about 11:18 a.m. Barry obtained phone records for the payphone outside the mini-mart, and those records showed three calls were made at about the time of the murder: one at 11:03 a.m. to Valenciano's mother; one to Jose Carranco, who lived with Valenciano's sister, at 11:13 a.m. and one to Zamora at 11:14 a.m.

On July 30, 2004, Bentley went to Hernandez's workplace and showed her a still photo from the videotape to see if she could identify the person as Soto. When she looked at the photo, she cried and became hysterical, yet claimed she could not recognize the person in it since it was too blurry.

According to Dr. Richard Mason, forensic pathologist for the Santa Cruz County Coroner, Escobar was killed by a contact⁵ shotgun wound to the head.

10. Jailhouse informant's testimony

Nonu Randy Aluni was in the Santa Cruz jail, awaiting sentencing for a bank robbery, when he met Soto, Gonzales and Valenciano. Aluni, who was facing a sentence of 25 or 30 years for his role in the bank robbery, agreed to testify in this case in exchange for a sentence of between 10 and 13 years.

At separate times, Aluni was housed with Valenciano and Soto. Soto told Aluni he was a member of VGV and he discussed the shooting. Soto said the night before the shooting he and Gonzales planned to rob a liquor store in Santa Cruz, and he and Gonzales drove to Santa Cruz that morning in Hernandez's car. They first went to Valenciano's house and picked up the guns. When they got to the liquor store, there were too many people there, so they drove around the block and saw some guys playing poker. They drove around the block again and pulled over by the poker players. Valenciano stayed back at the car to listen to the police scanner. Gonzales and Soto walked up to the men and said, "Give me your money." One guy disrespected Gonzales so he shot him.

⁵ The barrel of the shotgun was in contact with Escobar's head when it was fired.

As they were walking away, Soto yelled out another gang name, “Northside,” to throw them off.

They got back in the car, drove down the block, hid the guns, threw the clothes away and started running towards the creek. Valenciano threw the police scanner, its batteries and the car keys in different directions. Soto went with Gonzales to call Hernandez, and he told her to report the car stolen. They caught up with Valenciano who was calling for a ride from a payphone at a church. The three got a ride to Hollister.

Soto showed Aluni a picture of himself taken by a gas station surveillance camera and asked if he could see blood on Soto’s shirt. Soto claimed they committed the robbery because they needed the money. He also said his father owned a mechanics shop and someone there could provide him with an alibi.

At some point, Soto found out that Aluni was talking to the district attorney, and he threatened to kill Aluni’s family if he testified. Soto had Aluni write a letter saying he made the whole thing up, and that he had obtained information about the case by reading Soto’s paperwork when Soto was not in the cell. Aluni wrote a letter to his own attorney, Charlie Stevens, and another to Soto’s attorney. In his letter to Stevens, Aluni lightly wrote in pencil that he was being threatened. Aluni also told Stevens he had been threatened by Soto.

About a month before he was housed with Soto, Aluni was housed with Valenciano who also told him about the shooting several times. Valenciano’s version was consistent with Soto’s, but he added the detail that the guns used belonged to their gang, VGV. Soto had the revolver and Gonzales had the shotgun, which they hid in some bushes after the robbery/shooting. They also hid some of their clothing in a garbage bin, before running to a lake or creek where they discarded the police scanner and car keys.

Aluni met Gonzales once, for 10 or 15 minutes, while in a holding cell going into court. He told Gonzales he already knew why Gonzales was in jail, and Gonzales

described the robbery and shooting in much the same way as Soto and Valenciano. Gonzales also admitted killing Escobar.

11. Gang evidence

Santa Cruz County Sheriff's Office Sergeant Roy Morales testified as an expert on criminal street gangs. According to Morales, in California there are two sets of Hispanic criminal street gangs, Nortenos and Surenos, and those gangs are normally rivals. Nortenos associate with the color red, the letter "N" and the number 14 (because "N" is the 14th letter of the alphabet). Surenos associate with the color blue, the letter "M" and the number 13 ("M" is the 13th letter of the alphabet).

Norteno gang members are expected to help fellow gang members in any way they can, such as committing robbery. Varrio Green Valley, VGV, is a subset of the Nortenos in the Watsonville area and, in 2004, was one of the most violent gangs in the area.

In the city of Santa Cruz, there are several Sureno gangs, including the Beach Flats Surenos, Santa Cruz Eastside, Mexican Side Locos, Villa San Carlos Boys and Brown Pride Santa Cruz. Morales said that Frankie Ayala, a known member of Brown Pride Santa Cruz, lived at 318 Spruce Street, though Morales believed that Ayala was incarcerated at the time of the shooting.

In a gang, "violence equals respect." Violence instills fear in the community, so residents will not report gang-related crimes or cooperate with police investigating such crimes. Violence intimidates rival gang members from entering the other gang's territory or challenging the other gang. A gang member who is involved in a violent act is feared and gains more respect from his fellow gang members and with rival gang members.

Gang members perceive disrespect in a variety of ways, such as a "mad dog," or dirty look, or challenging a gang member's affiliation. Where a gang member feels he has been disrespected, he is expected to retaliate, which may include killing someone.

Morales opined that on July 25, 2004, Soto, Valenciano, Julio Cabrera, and Gonzales were all members of VGV. At that time, VGV's primary gang activities were narcotics sales, serious assaults and homicides.

Morales' opinion about Valenciano's membership in VGV was based on his prior contacts with Valenciano, Valenciano wearing VGV clothing and his numerous associations with gang members. On July 4, 2007, kites⁶ were removed from Valenciano's cell. Valenciano also had gang tattoos including a tattoo of his last name inscribed within a Huelga bird, as well as dots on his wrists representing the number 14.⁷ Photos seized from Valenciano's residence showed him with other known Norteno gang members, such as Oscar and Julio Cabrera and Gonzales; making Norteno hand signs; and wearing Norteno-affiliated clothing, such as a red football jersey featuring the letter "N."

Morales met Gonzales in the 1990s and has had contact with him over the years, always in a law enforcement capacity. Based on his personal contacts with Gonzales, as well as Gonzales' clothing, his self-admission, and the results of numerous probation searches at Gonzales' home, Morales opined that Gonzales was an active member of VGV on July 25, 2004. When shown a photo of Gonzales with a Mongolian haircut, Morales said that style of haircut was associated with Norteno gangs. Gonzales was convicted for participating in a VGV "jump-in"⁸ which occurred in May 2000.

⁶ Kites are pieces of paper with very small writing, which are used by gang members to communicate with each other.

⁷ Morales testified that the Huelga bird, which is the symbol for the United Farm Workers, has been adopted by Norteno gangs as well, and its usage by an individual is currently viewed by the California Department of Corrections and Rehabilitation as an indicator of membership of the Nuestra Raza, a subset of the Nuestra Familia.

⁸ One may join a gang by being "jumped in," which involves being beaten up by current gang members, or by "walking in," though Morales testified the latter method is available only to those with existing strong family ties to the gang.

Oscar Cabrera was a regiment leader for the Nuestra Familia in Watsonville. The Nuestra Familia is the chief Norteno prison gang, which seeks to control all Northern criminal street gangs and filters out orders for those gangs to follow. In September 2008, John Mendoza, the overall representative of the Nuestra Familia in charge of its different regiments, turned state's evidence and confirmed that Oscar worked for and reported to him (Mendoza) and, along with other representatives, collected taxes from the Norteno gangs. In July 2004, the average tax on a gang member was \$200 per month. Failure to pay the tax would lead to an assault, and members paid because they were intimidated and feared Nuestra Familia.

Regarding VGV members and their involvement in gang-related crimes, Morales testified to the following:

On April 4, 2004, Juan and Jose Hernandez (brothers) confronted a Hispanic man and his young son who were on school grounds to play soccer. The man had a shaved head and his shoelaces were blue.⁹ Juan and Jose confronted the man, asked for his gang affiliation and accused him of being affiliated with a Sureno gang. They proceeded to beat him in front of his son. Juan and Jose were convicted of assault with a deadly weapon with gang enhancements. Morales opined that on July 25, 2004, Juan was a VGV member based on his tattoos, gang associations and participation in gang crimes. Jose was affiliated with a gang called Watson Varrio Norte.

On September 19, 2000, Michael Deanda, Julio Cabrera and Soto approached a 14-year-old boy near the Green Valley Apartments. Deanda recognized the boy and believed he was a rival gang member. The three men asked him for his gang affiliation, then chased after him. They punched and kicked him after they caught him, and the boy eventually identified Deanda and the other two as his attackers. Deanda was convicted of felony assault with force likely to cause great bodily injury with gang enhancements.

⁹ Surenos associate with the color blue.

Soto was neither arrested nor convicted. Based on his numerous contacts with Deanda, his self-admission and his participation in a gang crime, Morales opined that Deanda was an associate of VGV on September 19, 2000. Morales was of the opinion that Julio Cabrera was a member of VGV on July 25, 2004, based on his tattoos, numerous associations and participation in several gang crimes.

On November 11, 2000, Joseph Ramirez, Soto and Julio Cabrera went to a party, but were not allowed inside. The person who refused to admit them walked outside and, while Soto stood there with a box cutter, Ramirez asked the man for his wallet. The victim identified Ramirez and Soto. Morales opined that, on November 11, 2000, Soto was a VGV member based on his numerous associations, his tattoos which read “VGV,” “14,” as well as one of a Huelga bird, and his participation in a gang crime. Morales was of the opinion that Ramirez was also a gang member on November 11, 2000, based on his numerous contacts with law enforcement and participation in gang crimes, and was still a member on July 25, 2004.

On March 30, 2003, at Rolling Hills Middle School, two to three blocks from the Green Valley Apartments in Watsonville, Ramirez exchanged dirty looks with three men sitting on a bench. The three men began to walk home, and Ramirez confronted one of the men, asked for his gang affiliation and asked him to lift his shirt, so Ramirez could see his belt. When the man lifted his shirt, Ramirez shot him and ran off. Another one of the men chased and caught Ramirez, struggling with him. Ramirez shot the second man, killing him. Ramirez was eventually apprehended in Colorado. He was convicted of murder and attempted murder with a gang enhancement. Morales opined that Ramirez was a VGV member at the time of the shooting, and that this was a gang-related murder.

The prosecutor posed the following hypothetical to Morales, asking him to assume the following facts: “There were three members of the Norteno criminal street gang VGV who planned to commit a robbery”; “they get a shotgun and a pistol”; “they drive to Sureno territory” or “Santa Cruz and they go to a card game in an apartment complex

driveway on Spruce Street”; “they park on the street blocking the driveway”; “[t]hey get out of the car and approach the seven men playing cards”; “one of the VGV gang members has a shotgun, one has a pistol and one hangs back near the street”; “guns are drawn”; “[t]he armed gang members point their guns at the players and demand money and . . . several of the players throw money onto the ground”; “one of the players refuses to give his money and insults the man with the shotgun”; “[t]he man raises the shotgun to the uncooperative victim’s head and pulls the trigger, killing him”; “both the armed men finish collecting the money off the ground and run to the car”; “[a]ll three gang members get into the car and drive away.”

Assuming these facts, Morales opined that the offenses were gang-related. Three VGV members were involved, they drove into a Sureno territory, committed a robbery, each person played a role in the offense and once it was over, they returned to Watsonville. The gang’s reputation with both rival gangs and with other Norteno gangs was enhanced, and the community was intimidated.

B. Defense case

1. Soto’s defense

Soto testified and admitted to being a Northern Hispanic and being a member of the VGV gang in Watsonville. He said he claimed VGV only because he lived in the Green Valley Apartments. He denied paying gang taxes, being obligated towards fellow gang members or having enemies among rival Sureno gangs. In 2004, Soto knew of only one other VGV member. Soto said Julio Cabrera and Valenciano were not gang members, and he only recently learned that Gonzales was a gang member. When asked about his various tattoos, Soto denied they had any gang-related meaning. He also denied ever being jumped into a gang, having any relatives who were gang members or participating in any gang activity while incarcerated.

He admitted to being in Santa Cruz on the morning of July 25, 2004, but said he was there to look for a girl at the Santa Cruz Bible Church. He had met the girl a few

days earlier and she told him she attended services at that church. He went to the church the morning of the shooting to look for her during a break between services.

The night before, he stayed at Martinez's house with his friend, Hernandez. Hernandez often gave him rides in her green Honda. Gonzales asked him if he could borrow Hernandez's car the next day, but did not say why he needed it.

The morning of July 25, Soto asked Hernandez for the keys to her car, saying he wanted to go to church. She offered to give him a ride, but he did not want her to know he was going to try to find a girl, so he declined her offer. Eventually, she gave him the keys without much of an argument.

He woke up Gonzales and they drove off. Gonzales drove and the plan was to drop Soto off at the church, while Gonzales used the car. They stopped at Valenciano's house to pick up Soto's cell phone and Valenciano agreed to give Soto a ride back from Santa Cruz about 11:00 a.m. Gonzales and Soto drove to Santa Cruz and Soto got out by the church. Gonzales drove away.

He wandered around the church area for about 20 minutes, but could not find the girl. A stranger approached him and they had a brief conversation, but Soto could not recall what they talked about or what the man looked like.

Gonzales suddenly came up to Soto on foot and asked if he could give him a ride "like right now." Soto had not told Gonzales where he would be in the church complex and the bench on which he was sitting was not visible from the street, but somehow Gonzales found him. Soto called an ex-girlfriend, Baker, whom he had not seen in four years, but she could not pick them up.

Gonzales gave Soto his phone, telling him to call Hernandez and tell her to report her car was stolen. At about that time, Soto saw a green Honda driving down the street with people in the front and back, and Soto realized that Gonzales needed to get rid of the car. He did not ask questions because he did not want to be involved. Soto called

Hernandez and told her to report the car had been stolen. She did not want to do so, but he repeated she should “fucking report it.”

He and Gonzales walked up the street to the gas station where Valenciano was supposed to pick him up. He stopped in the station’s store to buy a drink, and heard a man say in broken English that he had just seen his friend shot.

Valenciano picked them up, dropped Gonzales off and took Soto back to his (Valenciano’s) house. Soto watched some television, then walked to the Green Valley Apartments. The numerous calls he made during this period to Julio Cabrera, Oscar Cabrera, Gonzales, Valenciano and Hernandez were simply him trying to find a ride. He eventually met up with Oscar and spent the night at the Cabrera residence. He did not see Martinez at the Cabrera house.

From that day to the date of his arrest, he never asked Gonzales about the car or what Gonzales was doing that morning, even after Hernandez told him about the shooting. He did not want to be involved or go back to prison. He repeatedly said he never asked Hernandez whether she gave his name to police, though on cross-examination he admitted he might have told her not to mention his name.

While incarcerated, Soto often talked to Aluni about his case, discussing how Martinez’s statements were inconsistent, among other things. Soto also had “stacks of discovery” papers in his cell and Aluni was sometimes alone in Soto’s cell¹⁰ when Soto would get a visit from his lawyer or family.

Aluni gave Soto a letter at some point, saying “Give this to your attorney” and Soto did so, without looking at the letter. After that, Soto’s attorney told Soto to be careful around Aluni. When asked how he knew the contents of that letter, since it was not part of the discovery, Soto said a different letter from Aluni to a deputy district attorney, which was part of the discovery, mentioned that Aluni had written a similar

¹⁰ Soto admitted Aluni was not one of his cellmates.

letter to Soto's attorney. Soto never threatened Aluni at any time, but Aluni was lying in exchange for a reduced sentence.

2. *Valenciano's defense*

Valenciano did not testify, but a private investigator, Gregory Lepore, testified in his defense. Lepore spoke with Anguiano three times in April and October 2006, but Anguiano had no specific recollections of a phone conversation with either Gonzales or Valenciano on July 25, 2004. Anguiano denied telling the district attorney's investigator that Valenciano answered Gonzales' phone and talked to him. Anguiano later told Lepore he recalled speaking with Gonzales, but not Valenciano. He had no memory of the call he made to Valenciano's home phone number later in the day, though the phone records showed he made one. However, in his interview with Lepore, Anguiano used plural pronouns, stating "they" called him, and he called "them" back.

C. *Verdict and sentencing*

After deliberation, the jury found Soto and Valenciano guilty on all nine counts and found true each of the special allegations. Soto waived a jury and stipulated to a court trial on the allegations he had suffered two prior strike convictions. His subsequent motion to strike those two prior strikes was granted. The court also denied Soto's and Valenciano's motions for a new trial, which were premised on the admission of Gonzales' out-of-court statements to Martinez and Aluni.

Neither Soto nor Valenciano raise sentencing contentions on appeal; therefore we need not set forth their sentences in detail. Soto and Valenciano were each sentenced to determinate terms of 34 years consecutive to indeterminate terms of 50 years to life.

II. **DISCUSSION**

A. *Gang expert's opinions based on hypotheticals*

Valenciano (joined by Soto) argues that the trial court erred in allowing the prosecution's gang expert to provide opinions on issues relating to the criminal street gang enhancement based on hypotheticals rooted in the facts of the case. Because the

proffered hypotheticals closely tracked the prosecution's version of the case, the opinion amounted to an improper comment on the defendants' state of mind.

After briefing was completed in this case, the California Supreme Court decided *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), holding that it is permissible for gang experts to offer opinions based on hypotheticals, even hypotheticals which closely track the evidence presented at trial. (*Id.* at p. 1051.) Valenciano submitted a supplemental letter brief addressing *Vang*, finding support in the concurring opinion of Justice Werdeger for his claim that the expert's opinion in this case was unnecessary to the jury's decisionmaking process. We invited the People to submit a supplemental letter brief on the case as well. Having reviewed those briefs, we conclude that the holding in *Vang* is dispositive here and the testimony was properly admitted.

As stated in *Vang*, "the prosecutor's hypothetical questions had to be based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Vang, supra*, 52 Cal.4th at p. 1046.)

Similarly, in this case, the gang expert's testimony was permissible opinion testimony in response to a hypothetical question. The expert did not give an opinion on whether Soto and Valenciano took part in the shooting and robbery as described in the hypothetical. Further, the expert did not opine whether Soto and Valenciano had the necessary mental state to commit the crimes alleged. Although the expert's opinion was relevant to the ultimate question of their intent, the testimony explored a gang member's expectations and probable motivations, and was not tantamount to an opinion on whether or not Soto and Valenciano committed the charged offenses. As in *Vang*, the gang expert properly could "express an opinion, based on hypothetical questions that tracked the evidence," whether the shooting and robbery, if the jury found they were committed by

Soto and Valenciano, would have served a gang-related purpose. (*Vang, supra*, 52 Cal.4th at p. 1048.)

Accordingly, the trial court did not abuse its discretion in allowing the gang expert to provide an opinion based on a hypothetical which closely tracked the evidence.

B. No error in admitting Gonzales' out-of-court statements to Martinez

Valenciano and Soto argue the trial court should have sustained their hearsay objections to the statements Gonzales made to Martinez, his girlfriend and mother of his child. The court found the statements were nontestimonial and admissible under the declaration against interest rule. The one false part of Gonzales' statement, i.e., where he denied being the shooter, did not make the remaining statements unreliable, but instead was Gonzales' attempt to tell Martinez what happened without admitting that he was, in fact, a murderer. Soto and Valenciano concede that the statements were nontestimonial and limit their challenge to their admission under the declaration against interest exception.

“In California, ‘[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.’ ([Evid. Code,] § 1230.) The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant’s penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.” (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) “ ‘To determine whether [a particular] declaration [against penal interest] passes [Evidence Code] [section 1230’s] required threshold of trustworthiness, a trial court “may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.” ’ [Citation.] We have

recognized that, in this context, assessing trustworthiness “requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.” (Id. at p. 614.)

“There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against [penal] interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry.” (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334 (*Greenberger*)). “When examining what was actually said by the declarant special attention must be paid to any statements that tend to inculcate the nondeclarant. This is so because a statement’s content is most reliable in that portion which inculcates the declarant. It is least reliable in that portion which shifts responsibility. Controversy necessarily arises when the declarant makes statements which are self-inculpatory as well as inculpatory of another. This is why Evidence Code section 1230 only permits an exception to the hearsay rule for statements that are specially disserving of the declarant’s penal interest. [Citation.] This is not to say that a statement that incriminates the declarant and also inculcates the nondeclarant cannot be specifically disserving of the declarant’s penal interest. Such a determination necessarily depends upon a careful analysis of what was said and the totality of the circumstances.” (Id. at p. 335.)

The Court of Appeal in *Greenberger* considered out-of-court statements made by some defendants implicating other defendants. The court held that “a defendant’s declarations against [penal] interest may be received in a joint trial without denying the codefendant the right of confrontation guaranteed by the United States Constitution.” (*Greenberger, supra*, 58 Cal.App.4th at p. 314.) “Since declarations against [penal] interest may be admitted in evidence without doing violence to the confrontation clause,

we see no reason why such declarations, when made by a codefendant, should not also be admissible.” (*Id.* at p. 332.)

In *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*), a nontestifying codefendant, Morales, inculcated himself and his two codefendants, Cervantes and Martinez, in a murder and an attempted murder while speaking to a friend of all three defendants, Ojeda. (*Id.* at pp. 166-167.) On appeal the two codefendants contended that Morales’ statement to the friend should have been excluded. (*Id.* at p. 169.) The appellate court found that the trial court did not err in admitting evidence of the statement at the defendants’ joint trial. Following *Greenberger*, the court found that the statement qualified as a declaration against penal interest and satisfied the constitutional standard of trustworthiness. (*Id.* at p. 177.) “The evidence here showed Morales made the statement within 24 hours of the shooting to a lifelong friend from whom he sought medical treatment for injuries sustained in the commission of the offenses. . . . Regarding the content of the statement, Morales did not attribute blame to Cervantes and Martinez but accepted for himself an active role in the crimes and described how he had directed the activities of Martinez.” (*Id.* at p. 175.) “Ojeda consistently reported that Morales admitted shooting at the second male with Cervantes. The statement Cervantes shot the first male, as well as the statement Morales shot at the second male, both incriminated Morales because Morales was acting in concert with Cervantes at all relevant times. Thus, the discrepancies in the statement as repeated by Ojeda does not preclude a finding the statement was trustworthy.” (*Id.* at p. 176.) “Regarding the claim the statement should have been redacted to exclude reference to the nondeclarants, *Greenberger* specifically held this is not required where the statement admitted into evidence is disserving to the interests of the declarant. We agree with *Greenberger*’s analysis on this point.” (*Ibid.*)

Here, the statements by Gonzales implicated him, as well as Soto and Valenciano, in the robbery and murder. Gonzales described to Martinez how the robbery and murder

were committed, who was involved in it, and in what manner, and thereby admitted that he was *acting in concert with Soto and Valenciano at all relevant times*. The statements were not made to the police during questioning and Gonzales' only effort to mitigate his own conduct or shift the blame was to consistently deny pulling the trigger. At the time Gonzales made the statements, his only motive to lie was to keep Martinez, the mother of his child, from knowing he had blown someone's head open with a shotgun. "[T]he most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Greenberger, supra*, 58 Cal.App.4th at p. 335; *Cervantes, supra*, 118 Cal.App.4th at p. 175.) After independently reviewing the record, we find that the statements Gonzales made to Martinez bore a particularized guarantee of trustworthiness. Accordingly, admission of the statements did not violate the federal or state Constitutions or state law.

C. Substantial evidence supports the gang enhancement allegations

Soto (joined by Valenciano) contends there was insufficient evidence to establish the murder and robbery were committed 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 criminal conduct by gang members. We disagree.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

“The substantial evidence standard of review applies to section 186.22 gang enhancements.” (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) “To prove a gang allegation, an expert witness may testify about criminal street gangs.” (*People v. Romero* (2006) 140 Cal.App.4th 15, 18.) “The crucial element [of a gang allegation] requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

This case does not involve a gang member acting alone. Soto, Valenciano and Gonzales committed all nine counts in concert. They were all Nortenos and members of the same Norteno gang (VGV). “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.)

We acknowledge that “it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang.” (*People v. Morales, supra*, 112 Cal.App.4th at p. 1198.) Here, however, evidence establishes that the robbery and murder were related to the gang. Prior to the crimes, Valenciano and Gonzales discussed needing money to pay taxes to Oscar Cabrera, a high-ranking gang member, then discussed committing a robbery in order to obtain the money they needed. Soto and Gonzales went to Valenciano’s house to obtain weapons that belonged to their gang, and drove into Sureno territory to commit the robbery. The three men acted

together to rob the seven men in the driveway, with Valenciano acting as lookout while Gonzales and Soto threatened the men with their weapons. After being challenged and insulted by Escobar in front of his fellow gang members, Gonzales killed him. This was, at a minimum, substantial evidence the crimes were committed “at the direction of” and “for the benefit of” the gang.

D. No abuse of discretion in refusing to bifurcate trial on gang enhancements or in admitting evidence of two predicate offenses involving Soto

Soto (joined by Valenciano) contends the trial court erred in declining to bifurcate the gang enhancement allegations because the substantive offenses were not gang-related. Soto alternatively argues the court erred in not excluding evidence of two predicate offenses in which he was involved. We find the trial court acted within its discretion on both counts.

The trial court may, in its discretion, bifurcate the trial of a criminal street gang enhancement allegation pursuant to section 1044. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*)). However, *Hernandez* recognized that there will generally be less need for bifurcation of a gang enhancement, as opposed to bifurcation of a prior conviction allegation because “the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense.” (*Ibid.*) “[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation--including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like--can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (*Id.* at pp. 1049-1050.) The burden is on the

defendant to show that there is a substantial danger of undue prejudice from the evidence. (*Id.* at pp. 1050-1051.)

We review the denial of the motion to bifurcate for abuse of discretion. (*Hernandez, supra*, 33 Cal.4th at p. 1048.) An abuse of discretion may be found when the trial court's ruling falls outside the bounds of reason. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Here the gang enhancement evidence was inextricably intertwined with and was admissible as to the charged offenses. For example, it supported motives for both the robbery--the need for money to pay gang taxes--and the murder--Escobar's challenge to Gonzales. The evidence that Soto, Valenciano and Gonzales were members of VGV supported the theory that they conspired together to commit the robbery. The evidence also corroborated testimony about the offenders' identities, as well as showed that Soto, Valenciano and Gonzales were loyal to each other and their gang, and thus committed these crimes together to benefit VGV.

Furthermore, the evidence served to rebut Soto's testimony in which he professed almost total ignorance about what criminal street gangs are and what they do. Though he admitted being a gang member, he denied having to pay gang taxes, denied owing any obligations to fellow gang members, and denied knowing what his various tattoos meant. According to Soto, neither Julio Cabrera nor Valenciano was a gang member, and he first learned that Gonzales was a gang member in court. Although while he admitted being a Northern Hispanic and claimed VGV, he testified he did so because he is from the Green Valley Apartments. He was never jumped into a gang, did not have relatives who were gang members and did not participate in gang activities in jail.

Since the gang evidence was admissible to prove the charged offenses and to rebut Soto's description of what it means to be in a gang, it follows that the trial court did not abuse its discretion in denying the motion to bifurcate the gang enhancements.

Soto also argues that the evidence of the predicate acts in which he was personally involved aroused the passions of the jurors and caused them to convict him because he is “bad.”

The prosecution introduced a total of five predicate offenses to establish that VGV was engaged in a pattern of criminal gang activity as described by section 186.22, subdivision (e). The description of each offense was brief and neither of the two offenses involving Soto was violent, let alone lethal.

Furthermore, just before gang expert Morales testified, the trial court instructed the jury how to evaluate his testimony and instructed that it was to be used for limited purposes, i.e., witness credibility, gang enhancement allegations, and motive. The trial court further directed the jury that the evidence was not to be used to conclude that Soto and Valenciano are “person[s] of bad character or that either defendant has a disposition to commit crimes in general.” The jury was given a similar admonition in its closing instructions. We presume that the jury followed the court’s instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Consequently, the trial court did not err in admitting evidence of the two predicate offenses involving Soto.

E. Substantial evidence supports the convictions for robbery of Gerardo and Saul

Valenciano and Soto contend that the evidence was insufficient to support the taking element for robbery of Gerardo (count 6) and Saul (count 7), and thus their convictions on those charges should be reversed and dismissed. According to defendants, Gerardo and Saul testified they had money (\$5 from Gerardo; \$18 to \$20 from Saul) either in the pot or on the driveway, but were not sure whether their individual money was actually taken in the robbery. Because 15 one-dollar bills were recovered at the scene, there was no proof beyond a reasonable doubt that Gerardo and Saul were robbed. We disagree.

Again, a challenge to the sufficiency of the evidence requires that we review the whole record in the light most favorable to the judgment to determine whether it discloses

substantial evidence--that is, evidence that is reasonable, credible and of solid value-- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson, supra*, 26 Cal.3d at p. 578.)

A robbery has been committed if the stolen item is so within the victim's reach, inspection, observation, or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it. (*People v. Jones* (1996) 42 Cal.App.4th 1047, 1055.) "The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.) The element of asportation may be fulfilled by wrongfully removing property from the control of the owner even though the property may be retained by the thief but a moment. (*Ibid.*)

With respect to Saul, simple arithmetic proves that Gonzales, Soto and Valenciano robbed him of between \$3 and \$5, if not more. Saul had \$18 to \$20 in the pot, and afterwards only \$15 was recovered at the scene. Though Saul could not be sure that his money was taken, since the amount that remained was less than the amount he said he had placed on the ground, it follows that Gonzales, Soto and Valenciano made off with some or all of his money. Accordingly, there is substantial evidence to support the convictions on count 7.

As to Gerardo, however, arithmetic alone does not compel the same conclusion. Gerardo had five \$1 bills on the ground before the robbery and, after the robbery, there were fifteen \$1 bills scattered on the driveway. Five of those \$1 bills could have been Gerardo's, and no evidence was presented to show they were not.

However, simply because the robbers, in their haste to flee what had become a murder scene, failed to grab *all* the loot does not mean that Gerardo was not a robbery victim. The crime of robbery does not require that the robbers escape with the victim's property, only that they gain possession of it and asport it. (*People v. Cooper, supra*, 53 Cal.3d at p. 1165.) Several of the witnesses, including Gerardo, testified that Gonzales

picked up the money from the ground before fleeing. Any money that was dropped was still asported even if Gonzales ultimately left it behind.

Furthermore, the money that remained was scattered around the crime scene, not piled together like a pot of money in a poker game. A reasonable jury could conclude that the pot of money, which certainly contained at least one of Gerardo's dollar bills, was what Gonzales scooped up off the driveway. Consequently, there was substantial evidence to support the convictions on count 6.

III. DISPOSITION

The judgments are affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.