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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LUIS OROZCO et al., Defendants and Appellants.	B276130 (Los Angeles County Super. Ct. No. NA090280)

APPEAL from judgments of the Superior Court of Los Angeles County. James D. Otto, Judge. Affirmed in part, and remanded with directions.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant Luis Orozco.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Shawn Verrette.

Mathew D. Alger, under appointment by the Court of Appeal, for Defendant and Appellant Frank Ervin.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Luis Orozco, Shawn Verrette, and Frank Ervin were convicted in a joint trial of the special circumstance murder and robbery of Franklin R. (Frank).[1] Defendants challenge the admission at trial of gang evidence, wiretapped communications discussing uncharged crimes, and testimony regarding domestic violence. They contend the challenged evidence was irrelevant to the underlying charges against them and unduly prejudicial. We remand the matter for the trial court to address several sentencing issues, but otherwise affirm the judgments.

FACTS

The Defendants

April P. was a small-time drug dealer who also helped her brother deliver and package methamphetamine. April's brother had been a major drug dealer in the Lake Elsinore area for over 20 years. In July 2010, he violated his probation and turned himself in to serve a 30-day sentence. April's brother intended for Frank, another drug dealer and their childhood friend, to run his business while he served his sentence. Before he left, he gave Frank two cell phones and his remaining supply of methamphetamine. He asked April to help Frank run the business until his return.[2]

Frank lived across the street from April's mother, and April described their relationship as one of brother and sister. Frank was on parole, and he kept two homes. One, located on Franklin

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[1] To protect personal privacy interests as required under rule 8.90 of the California Rules of Court, we refer to victims and witnesses in this matter by their first name and last initial.

[2] April's brother remained in prison in August 2010, during the relevant time period.

Avenue, was where Frank told his parole officer he lived. As a result, he usually did not keep any drugs or weapons in the Franklin house. The second or "safe" house, located on Beachwood Avenue, was where Frank's girlfriend and their son lived. He kept a supply of drugs, money, and weapons at the Beachwood house.

April's brother supplied methamphetamine to Orozco, a member of the Compton Tortilla Flats gang known by the moniker "Stalker." April was distantly related to Orozco by marriage; her husband's brother was married to Orozco's sister.

Verrette was a member of the Looters Park Piru gang, who used the moniker "Ace." This moniker was used by two or three other men in the area. Verrette and Orozco grew up in the same neighborhood and had been friends since childhood. Although they were members of rival gangs, they were allowed to maintain a relationship and Orozco was allowed in Looters Park territory without being harassed. He often visited Verrette at his home on San Marcos Street in Looters Park territory. Orozco was seen near Verrette's home a few days before Frank's murder.

Ervin was known as Casper and was also a member of the Looters Park Piru gang. He was a known associate of Verrette's.

The Crimes

Frank asked April to introduce him to Orozco. April arranged for the introduction at Orozco's house on August 3, 2010, and it appeared to go well. The next day, April and Frank again met with Orozco in order to give him some drug samples. On their way back from the meeting, Orozco called Frank and

asked if he knew anyone they could "jack" to make quick money.[3] Frank replied he would work on it.

The following day, Orozco called and again asked Frank whether he knew of someone they could rob. Frank suggested Jose, a drug dealer who supplied methamphetamine to April's brother. April overheard the conversation and objected, because she believed her brother would be upset about it. Frank assured her the drug dealer would not know he was involved because they would make it appear as if Frank was robbed as well.

On August 6, April arranged for Frank to deliver another sample of methamphetamine to Orozco. At that meeting, Orozco asked Frank for an advance of the drugs and to allow him to pay for them later. Frank refused. Orozco was angry and asked April to intervene. April did, but with no success. Despite this disagreement, April believed they planned to go forward with the robbery.

Orozco and Frank arranged for the robbery to take place on August 9, just before Jose planned to leave for Texas with his family. The day before, April drove Frank to Jose's auto body shop in Long Beach so Frank could place an order for 10 pounds of methamphetamine. Jose confirmed it would be delivered the next day.

On August 9, April arrived at the Franklin Avenue house to accompany Frank to Jose's auto body shop. She left her car there, and they drove Frank's car to Long Beach. April called Orozco to let him know Frank was on the way and that he should not go into the auto body shop until Jose, who would be driving a black Cadillac, went in first. When they arrived, they parked

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[3] April testified this meant he was looking for someone to rob.

down the street from the auto body shop and Frank walked to the entrance to speak with one of the body shop's employees. Frank told April, who was waiting in the parked car, that Jose would be back in about 10 or 15 minutes and asked her to call Orozco to determine where he was. Orozco reported he was "stuck at his home boy's house" and that he would be there in a few minutes.

Frank instructed April to go get something to eat. He took his keys, several cell phones, his wallet, and the remote to the automated gate at the Franklin house with him. As April prepared to leave, she noticed an older model, dark-colored van parked on the opposite side of the street with its nose towards the curb. It was dented and had a gray bumper. She also noticed two African-American men, later identified as Ervin and Verrette, trying to open the door to a neighboring business with a screwdriver. She watched them for a few seconds and then pulled out onto the street. She traveled to the end of the block and made a u-turn at the intersection. On her way back down the street, she observed that the two men were in the van and backing up towards the auto body shop, sideswiping a few cars along the way.

She continued past them and had reached the main street when Frank called to tell her to come back for some money. She went around the block to get back to the auto body shop, but as she approached, she saw Frank's shoes and his feet on the ground behind the gate of the auto body shop with no one around. April continued past the shop and onto the freeway, because Frank had told her to leave if anything went wrong.

The employees of the auto body shop confirmed April's account. One of the employees said he recognized Frank and greeted him as he arrived. The employee then went to the back

of the shop to speak with his coworker and call his boss, who told him to give Frank a car. When he returned to the front of the shop a few minutes later, he saw Frank lying face down on the ground with two African-American men standing over him, one of whom held a gun and was rifling through Frank's pockets while the other man held Frank's head. He later identified Verrette as the man with the gun.[4] The employee called his coworker over; the coworker saw the two men going through Frank's pockets. The employees also saw an older model purple van with holes made by a dent puller parked in the driveway of the auto body shop.

Upon seeing the employees, Verrette pulled what looked like a badge from around his neck and ordered, "Get out. Police." Both employees complied and went to the back office to hide. They did not believe the men were police officers, however. They were about to call 911 when they heard three gunshots in quick succession. They dropped the phone and hid. When they went back to the front of the shop a few minutes later, Frank was lying face up on the ground with three gunshots to his head. The employees called 911. Frank died shortly thereafter from his wounds. Forensic evidence showed the gun was a semiautomatic weapon, which was shot at close range. There were no defensive wounds.

Meanwhile, April called Orozco in a panic to tell him what she had seen and he directed her to meet him at a car wash near the freeway. He arrived in a tan Suburban approximately 30 minutes after she did. April immediately thought something was wrong because Orozco was wearing black gloves and a black

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[4] The employees were initially unable to identify Verrette from a photographic lineup.

hooded sweatshirt in 98 degree weather. Orozco told her he never made it to the auto body shop. He agreed to drive with her to ensure she got home safely. As they headed to Lake Elsinore, he instructed her to get off the freeway so they could get rid of Frank's car. April abandoned it on a residential street and got into the back of the Suburban, which had followed them. Orozco's best friend, also a member of the Compton Tortilla Flats gang, was driving.[5]

Once in the Suburban, April recognized the two African-American men she had just seen near the auto body shop. April later identified them as Ervin and Verrette. Verrette sat in the front passenger seat. April sat between Ervin and Orozco in the back.

Ervin asked for April's cell phone and removed the battery, telling her he would return it to her later. He and Verrette broke down three other cell phones and threw the pieces out of the window. April asked Orozco what happened to Frank and he responded, "he is not coming back." At some point, Orozco also said, he was "straight through that fool in sector 8." To this, Verrette responded, "Yeah, we did." Orozco asked Verrette, "are you cool, Ace?" Verrette put his hand back to high five Orozco.

April told them her car was parked at the Franklin house and she directed them to it. Orozco opened the gate with the remote that Frank had taken with him when he left April. Orozco unlocked the front door of the house and the men began to search it with socks on their hands. They eventually found money in a canister in the kitchen as well as a few laptops and other items. They took those things. Verrette used a towel to

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[5] Orozco's best friend died in 2011.

wipe away the Suburban's tire tracks from the driveway as they left.

The men then decided to drive to Frank's safe house on Beachwood. Verrette rode with April in her car. They made a stop at a Circle K store for water and to get gas for the Suburban at a Chevron station. As they neared the Beachwood house, April parked her car and got into the Suburban. When they drove by the Beachwood house, they saw Frank's son playing outside. April warned Orozco that Frank's girlfriend would be in the house if her son was outside. He replied, "I'm about to just go inside and crack that bitch up side the head and tie her up." They drove by the house a few more times, but left without entering when a police car drove up behind them.

They returned to April's car, and Ervin gave her back her phone. She and Orozco got out of the car, and she asked him again what happened to Frank. He shook his head and told her he was not coming back. Orozco instructed her to tell the police she did not know anything and to say that she was at home all day if they questioned her. He told her no one would find out what happened because the men with him had been doing this for a while and knew what they were doing. He also gave her $600 to buy a new cell phone. April saw Verrette, who was still in the Suburban, put his finger over his lips, which April understood as a message to her to keep quiet. April did not report the crimes to the police because she feared for her own safety as well as her family's.

The Investigation

Frank's family suspected April was involved in his murder and gave the police her cell phone number. April's cell phone records indicated she was in Long Beach and had contact with

Frank on the day he was killed. After accessing Frank's cell phone records, the police determined there were an unusual number of calls to April's phone. They searched April's cell phone records, which led them to interview Orozco, his best friend, his daughter, and Ervin's former girlfriend, among others. When she was first interviewed by the police, April denied any knowledge of the murder.

On October 7, 2010, April was arrested and charged with Frank's murder and robbery. She was also found with nine grams of methamphetamine and charged with possession of narcotics. The night before her arrest, Orozco's sister threatened her to keep quiet. After her arrest, April admitted to the police that she dropped Frank off at the auto body shop and saw two African-American men in a van there, but refused to provide any other details about the murder.

However, April thereafter gave a recorded statement to the police on February 5, 2011, describing the events leading to Frank's murder. She identified Orozco, Ervin, and Orozco's best friend from six-pack photographic lineups. On March 14, she identified Verrette, who was not yet a suspect at the time, as "Ace" from a photographic lineup. She also identified the van she saw at the crime scene. The same day, April entered into a plea agreement under which she pled guilty to robbery and agreed to testify at trial in exchange for three years in state prison. Her account was corroborated by statements from the auto body shop employees and nearby surveillance video, which showed the car she and Frank used that day driving in the area. In addition, her cell phone records showed her travelling from Lake Elsinore to Long Beach on August 9. It then tracked her to the area where she met Orozco at the car wash. It also showed she returned to

Lake Elsinore that evening. The cell phone records correlated with the timeframes she gave to the police.

During the investigation, the police became aware of various telephone numbers the defendants had used. Cell phone records placed each of the defendant's cell phones near the auto body shop at the time of the murder, and the police were able to track their movements before and afterward.[6] The police noticed a pattern of telephone calls on the day of the murder, which showed calls between April's cell phone and the cell phone numbers used by Orozco, his best friend, Verrette, and Ervin. The records showed April calling Orozco, who then immediately called Verrette, who then called Ervin. The records also showed April called Ervin's telephone number after the murder. Orozco had given her that cell phone number earlier that morning because his cell phone's battery was running low.

In the course of their investigation, the police were able to link the purple van to Ervin. Ervin's then-girlfriend owned a van fitting the description provided by the auto body employees and April. Ervni's girlfriend testified that Ervin drove her van from approximately June 2010 to the end of December 2010. At some point after the murder, Ervin told his girlfriend not to drive the van in Long Beach or Compton, but did not explain why. Ervin told his daughter he stopped driving the van because he had gotten into trouble with some people he knew. Ervin changed his

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[6] Verrette's cell phone records showed it used a tower near the auto body shop on the morning of Frank's murder. It then was tracked to Compton. During the time of the murder, calls were routed to voicemail so the phone's location could not be determined.

hairstyle after his sister told him the police came to her house asking about him.

In December 2010, Ervin's girlfriend saw him with a black handgun and argued with him about it. She testified it looked like a nine-millimeter semiautomatic gun. The cartridge casings, bullet, and bullet jacket collected from the murder scene were determined to have been fired from a semiautomatic firearm.

The day before Easter in April 2011, Ervin brought a black nine millimeter-type semiautomatic handgun to his girlfriend's house. She hid it while he was taking a shower. He became angry when he could not find the gun and threatened his girlfriend with a fireplace poker, yelling, "You stupid bitch. It's your fault that I killed that Mexican." The next morning, Ervin's girlfriend went to the Long Beach Police Department and spoke to a detective investigating Frank's murder about Ervin and her van.

The police obtained wiretaps for various phone numbers they had reason to believe belonged to the suspects. To stimulate conversations for the wiretaps, the police put out bulletins and news reports with information about the murder, some of which were false. They also disseminated sketches of the suspects. In the wiretapped calls, Verrette discussed plans to rob a drug dealer living in Victorville and plans to sell a handgun. He disclosed his concern about the police investigation, including the sketches. He indicated he was worried about helicopters, which had been hovering over his home. In one call, Orozco can be heard in the background telling Verrette that his sister told him to watch the news because bulletins had come out about "your murder case."

The Trial Proceedings

Orozco, Verrette, and Ervin were charged with special circumstance robbery/murder (count 1; Pen. Code,[7] §§ 187, subd. (a)(1), 190.2, subd. (a)(17)), second degree robbery (count 2; § 211), first degree residential burglary (count 3; § 459), and conspiracy (count 4; § 182, subd. (a)(1)). As to Verrette, it was further alleged in count 1 that he personally used a firearm (§ 12022.53, subds. (b)–(d)). In counts 1 through 3, it was alleged as to Orozco and Ervin that a principal was armed with a handgun (§ 12022, subd. (a)(1)). It was further alleged that Orozco served one prior prison term (§ 667.5, subd. (b)), that Ervin had four prior strike convictions (§§ 667, subds. (a)(1) & (b)–(i), 1170.12, subds. (a)–(d)), and that Verrette had one prior strike conviction (§§ 667, subds. (a)(1) & (b)–(i), 1170.12, subds. (a)–(d)).[8]

A mistrial was declared in the first trial due to juror misconduct. At the second trial, the prosecution presented evidence of the events leading to the murder and the Long Beach Police Department's investigation, as previously described.

Defendants did not testify. Verrette's grandmother provided an alibi for him. She testified Verrette had scheduled a colonoscopy on August 10 and that she was with him all day on August 9, the day of Frank's murder, to help him prepare for it. She explained the doctor had ordered Verrette to drink a gallon of laxatives by 9:00 p.m. that day as well as complete a fleet enema. She testified she was with him until 5:30 p.m., at which point his

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[7] All further section references are to the Penal Code unless otherwise specified.

[8] Charges were also alleged against Orozco's sister, which are not a part of this appeal.

girlfriend picked him up. The prosecution countered with testimony from a nurse who confirmed that a patient could begin to prepare for such a procedure as late as 7:00 or 7:30 p.m. the night before.

The second jury found all three defendants guilty of first degree special circumstance murder. The jury also found true the firearm allegations for count 1 as to each defendant. The defendants were also found guilty as charged on counts 2 and 4, but not guilty on count 3. The jury found the count 2 firearm enhancement under section 12022, subdivision (a)(1), to be true as to Ervin and Orozco. As to Verrette, the count 2 firearm allegations pursuant to sections 12022, subdivision (a)(1), and 12022.53, subdivision (b), were found true. The prior conviction allegations were found true as to each defendant after a court trial.

Defendants each filed a notice of appeal.

DISCUSSION

Defendants challenge the admission at trial of three categories of evidence: (1) gang evidence; (2) wiretap evidence; and (3) domestic violence evidence. They contend such evidence was irrelevant and more prejudicial than probative under Evidence Code section 352.[9] They additionally contend the same evidence tended to show they had a propensity to commit violent crimes in violation of Evidence Code section 1101. We find no

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[9] Defendants each raise separate issues in their appeals, but join in the others' arguments. As a result, we treat each issue as jointly raised by defendants unless it applies only to a particular defendant.

evidentiary error justifying reversal.[10] In addition, we find any error resulting from the admission of the evidence was harmless. We, however, remand to the trial court to address certain sentencing issues.

I. Standard of Review

We review for abuse of discretion the trial court's decision to admit or exclude evidence. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223–225 (*Albarran*); *People v. Avitia* (2005) 127 Cal.App.4th 185, 193 (*Avitia*).) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125, italics omitted.) It is appellant's burden on appeal to establish an abuse of discretion and prejudice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) We review a court's order denying a motion for a new trial de novo. (*People v. Ault* (2004) 33 Cal.4th 1250, 1262.)

II. Gang Evidence

Defendants assert that the trial court erred in admitting evidence of their gang membership. We disagree and find the trial court did not abuse its discretion in admitting the gang

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[10] Defendants contend the cumulative prejudice from the evidentiary errors require reversal of their convictions. As discussed below, we find the trial court did not err by admitting the challenged evidence. Where there is no error, there can be no prejudicial error, cumulative or otherwise. Moreover, any errors were harmless and did not amount to a clear miscarriage of justice, as discussed at length in this opinion. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1064.)

evidence because it was relevant to prove motive, intent, and access to weapons.

A. The Gang Evidence at Trial

Defendants moved prior to trial to exclude evidence of their gang membership under Evidence Code section 352. Defendants argued they would be portrayed as violent gang members with a propensity to commit a violent crime in violation of Evidence Code section 1101. The trial court found the evidence was relevant to motive and intent to commit conspiracy, and that it would corroborate other anticipated evidence.[11] The trial court further found that the probative value of the evidence outweighed any undue prejudice or consumption of time under Evidence Code section 352.

At trial, the People presented testimony from gang expert Richard Sanchez, a gang investigator with the Los Angeles County Sheriff's Department who had worked in the Compton area for 25 years. Deputy Sanchez testified generally about gang culture and gang terminology. He identified the different gangs located within Compton. He explained there were rivalries among the gangs, including one between the Looters Park Piru and the Compton Tortilla Flats gangs, which "always have an active beef." Despite the rivalries among the gangs, Deputy Sanchez testified he has recently noticed more crimes in which different gangs cooperate.

Deputy Sanchez testified that the Compton Tortilla Flats gang is a Hispanic gang comprised of approximately 450 members. Its members have committed crimes ranging from

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[11] The trial court later instructed the jury it could only consider the gang evidence for the limited purpose of deciding intent, motive, and access to weapons.

murder to petty theft, including robbery, extortion, narcotics sales, weapons sales, kidnapping, assault with a deadly weapon, burglary, and vandalism. He previously investigated Tortilla Flats members for robbing known drug dealers. He explained that the advantage to robbing a drug dealer was that he or she was likely to have a large amount of cash and drugs, but was unlikely to report the crime to the police. Deputy Sanchez explained the Looters Park Piru gang engaged in similar conduct.

Deputy Sanchez testified he had known both Orozco and Verrette since the 1990s. He knew Verrette to have the street moniker "Ace." He also understood Verrette was an "O.G.," known as an original gangster, or shot caller for the Looters Park Piru gang. This meant that he had freedom to do things that a younger member of the gang would not.

Detective Sanchez testified he knew Orozco, also known as "Stalker," since the mid-1990s. He described the tattoos Orozco had on his head and body and what each meant. He considered Orozco to be a shot caller or "O.G." within the Compton Tortilla Flats. Detective Sanchez further testified another gang investigator working in Compton told him Verrette and Orozco grew up in the same neighborhood and were childhood friends. As a result, they were allowed to maintain their friendship, despite their gangs' rivalry. Detective Sanchez opined that no one would question two O.G. shot callers from rival gangs committing a crime together. Moreover, the police might not think to investigate a gang member as an accomplice in a crime committed by a rival gang member.

The People also presented testimony from Deputy Erick Martinez, a Los Angeles County Sheriff's Deputy assigned to patrol the northern and central portion of the City of Compton.

He testified he came in contact with Orozco on August 5, 2010, shortly before Frank's murder. Orozco was standing with a few other Hispanic men on San Marcos Street, where Verrette lived, in an area controlled by the Looters Park gang. During that contact, Orozco confirmed to Martinez that he was a member of the Compton Tortilla Flats gang and his moniker was Stalker.

Deputy Martinez testified to Orozco's appearance in 2010, and photographs of Orozco were shown to the jury. Martinez described Orozco's tattoos, including a tattoo on the back of his head which read "Flats" and the letters T and F on his left and right arms. Orozco also had a tattoo of the letters C, P, and T on the top of his head, which signified Compton, with an X over the P. Deputy Martinez testified the "P" was crossed out as a sign of disrespect towards the Piru gangs, which were rivals to the Compton Tortilla Flats gang. He pointed out the number 13 tattooed just below Orozco's lip, and explained that it indicated that Orozco and his gang were affiliated with the Mexican Mafia, a prison gang.

In addition to Deputy Martinez's and Deputy Sanchez's testimony, defendants' membership in their respective gangs were detailed by other trial witnesses, including, but not limited to April, Orozco's wife, Orozco's friend, Orozco's niece, Ervin's daughter, Ervin's former girlfriend, Verrette's grandmother, Verrette's friend, and Verrette's girlfriend. Each witness discussed his or her knowledge of each defendant's gang affiliation as well as his or her knowledge of their tattoos and other signs of gang affiliation.

The trial court instructed the jury that it could consider the gang evidence for the limited purpose of deciding intent, motive, and access to weapons, but not to conclude any defendant had a

bad character or disposition to commit crime from the gang evidence. Defendants moved for a new trial on the ground that the evidence regarding their gang affiliation was irrelevant and highly prejudicial. The motion was denied.

B. Admissibility of Gang Evidence

California courts have long recognized the potentially prejudicial effect of gang membership. Where a gang enhancement has not been alleged, for example, the Supreme Court has held evidence of gang membership should be excluded if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) Therefore, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*); *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) Evidence of gang affiliation is not admissible when its only relevance is to establish a defendant may be predisposed to commit a crime solely because of membership in the gang. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904–905.) However, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, is not more prejudicial than probative, and is not cumulative. (*People v. Avitia, supra,* 127 Cal.App.4th at p. 192; see generally Evid. Code, § 352.)

Evidence Code section 1101, subdivision (a), provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." However, pursuant to section 1101, subdivision (b), the admission of such evidence is not prohibited

by subdivision (a), when evidence of a past bad act is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) Accordingly, under section 1101, subdivision (b), "[i]f an uncharged act is relevant to prove some fact other than propensity, the evidence is admissible, subject to a limiting instruction upon request." (*People v. Bryant, Smith, and Wheeler* (2014) 60 Cal.4th 335, 406.)

The California Supreme Court has held gang evidence to be relevant to establish the defendant's motive, intent, or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. (*Williams, supra,* 16 Cal.4th at p. 193.) "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.]" (*People v. Hernandez, supra,* 33 Cal.4th at p. 1049.)

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352; *Albarran, supra,* 149 Cal.App.4th at pp. 223–225 (*Albarran*).)

C. The Gang Evidence Was Properly Admitted

Defendants contend the gang evidence was irrelevant because there was no gang enhancement alleged. Further,

Verrette contends the gang evidence was particularly irrelevant as to him because the only thing at issue in his case was his identity due to the alibi provided by his grandmother. Defendants also argue the gang evidence was cumulative and its prejudice outweighed its probative value. We find no abuse of discretion.

1. The gang evidence was relevant.

There is no question that the gang evidence was relevant to the issues presented at trial. Defendants concede as much. In fact, Orozco admits the gang evidence had two legitimate purposes: to explain the meaning of the terms used in the wiretapped calls and to explain the prosecution's theory that defendants were members of rival gangs who were temporarily working together as a ploy to mislead police.

We agree the gang evidence was relevant. Although it was not alleged that defendants committed the crimes to benefit a criminal street gang, each was charged in count 4 with the crime of conspiracy to commit robbery in violation of section 182. Accordingly, the People were required to prove defendants specifically intended to agree or did agree to commit the crime of robbery, that they intended that one or more of them would commit robbery, and at least one of them committed an overt act to accomplish the robbery. (§ 182, subd. (a); *People v. Morante* (1999) 20 Cal.4th 403, 416.) Further, "common gang membership may be part of circumstantial evidence supporting the inference of a conspiracy. [Citation.] The circumstances from which a conspiratorial agreement may be inferred include 'the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties [and]

the interests of the alleged conspirators . . . .' [Citation.]" (*People v. Superior Court* (*Quinteros*) (1993) 13 Cal.App.4th 12, 20–21.)

Here, the gang evidence was necessary to describe to the jury the relationship of the parties and the interests of the alleged conspirators. It was relevant to explain why defendants, who are members of rival gangs, would agree to a conspiracy to rob Frank. Deputy Sanchez's testimony that Orozco grew up in the area claimed by Looters Park Piru and was childhood friends with Verrette, was relevant to explain how an agreement between rival gang members could be achieved. Further, the fact of Orozco's and Verrette's status in their respective gangs as shot callers was relevant to explain why they were allowed to work together without repercussions from their gangs.

The gang evidence also helped to prove motive, particularly as to Verrette and Ervin. Although April testified to Orozco's personal dispute with Frank, it was Deputy Sanchez's testimony that explained Verrette's and Ervin's motivation to conspire with Orozco. Specifically, Deputy Sanchez testified that both the Looters Park Pirus and the Compton Tortilla Flats gang had previously robbed drug dealers. He explained that the advantage to robbing a drug dealer was that he was likely to have a large amount of cash and drugs, but was unlikely to report the crime to the police.

Although there was no gang enhancement alleged, their gang membership was relevant to the prosecution's case against them. The relevance of the gang membership in this case is what distinguishes it from the gang evidence introduced in the cases relied upon by defendants. In those cases, the gang evidence was not relevant to the underlying charges. (*People v. Perez* (1981)

114 Cal.App.3d 470; *People v. Memory* (2010) 182 Cal.App.4th 835.)

We also reject Verrette's contention that the gang evidence was not relevant to his case because the only issue at his trial was identity. Verrette contends that as a result of his grandmother's alibi testimony, the jury was left only to decide whether he was the "Ace" who was a perpetrator, as witnesses testified there were a few men who were known as Ace. This contention lacks merit. In addition to discrediting his alibi, the prosecution was still required to prove the conspiracy and Verrette's part in it. There is no indication Verrette agreed to admit to the conspiracy charge against him if the jury disbelieved the alibi provided by his grandmother.

Contrary to Verrette's contention, the evidence of Verrette's gang monicker also corroborated April's identification of Verrette as the "Ace" who was in the Suburban with her shortly after Frank' murder because it linked Verrette to Orozco.

2. The gang evidence was more probative than prejudicial.

Defendants further contend the gang evidence should not have been admitted because it was cumulative and the resulting prejudice far outweighed its probative value. Defendants argue the gang evidence was impermissibly used by the jury to conclude they had a propensity for violence and crime because they associated with other violent criminals. Orozco, in particular, asserts the gang evidence was inflammatory because it highlighted his reputation for violence and affiliation with the Mexican Mafia. While they concede some of the gang evidence was necessary, they assert the evidence should have been

curtailed to allow the prosecution to make its case without "belabor[ing] these points."

The exclusion of evidence under Evidence Code section 352 is not designed to avoid the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "Prejudice" in the context of this statute "is not synonymous with 'damaging': it refers to evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal.4th 141, 188.) Evidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a defendant and casts him in a bad light. (*People v. Robinson* (2005) 37 Cal.4th 592, 632 (*Robinson*).) Rather, undue prejudice is that which " 'uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' " (*Ibid.*, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 134.)

As discussed above, the gang evidence in this case did not have "only slightly probative value." Rather, it was highly relevant to the issues of motive, intent, and access to weapons. That it also may have cast defendants in a bad light does not render it unduly prejudicial.

Moreover, the trial court instructed the jury with CALCRIM No. 1403, stating that the jurors may consider the gang evidence only for the limited purpose of deciding whether defendants acted with the intent required to prove conspiracy or whether defendants had the motive to commit the charged crimes or whether they had access to weapons. We presume the jury followed the limiting instruction given by the trial court. (*Williams, supra,* 16 Cal.4th at p. 256.) Although defendants assert the limiting instruction was ineffective because it was

given long after the jury heard the testimony about the gang membership, there is no indication in the record that the jury failed to follow the court's instruction during its deliberations.

3. The admission of the gang evidence did not render the trial fundamentally unfair.

Defendants also assert the admission of the gang evidence violated federal due process and rendered their trial fundamentally unfair. " 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' " (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) Moreover, the mere erroneous exercise of discretion under ordinary rules of evidence does not implicate the federal Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

To prove a deprivation of federal due process rights, Defendants must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (1991) 926 F.2d 918,920; *Albarran, supra,* 149 Cal.App.4th at p. 232.)

We do not agree with defendants that this is the "rare and unusual" case, such as that presented in *Albarran*, in which the admission of gang evidence violated due process and rendered the trial fundamentally unfair. In *Albarran*, a gang expert testified about the defendant's membership in a criminal street gang and presented a panoply of other crimes its members had committed, including making threats to kill police officers and connections

with the Mexican Mafia. The court determined the gang evidence was insufficient to prove the crime was committed to benefit a criminal street gang as no one announced their affiliation with the gang at the time of the crime and no one later took credit for it or bragged about it. (*Albarran, supra*, 149 Cal.App.4th at p. 227.) Nevertheless, the trial court found the gang evidence relevant to prove motive and intent of the underlying crime. Division Seven of our court disagreed. It found the gang testimony regarding other gang members' crimes and threats to police was completely irrelevant to show motive or intent and had no bearing on the underlying charges. (*Id.* at p. 229.)

Here, there were permissible inferences the jury could draw from the evidence. As discussed above, the gang evidence was relevant to demonstrate motive, intent, and access to weapons. The gang expert testimony explained defendants' motive to target drug dealers and testified to their friendship to explain why they agreed to conspire to rob Frank. Unlike in *Albarran*, the gang evidence here was relevant to the underlying charges and was not presented merely to poison the jury against defendants. Defendants have not satisfied the high constitutional standard to show that the erroneous admission of the gang evidence resulted in an unfair trial.

4. Any error was harmless.

Even if some portion of the gang evidence was inadmissible, reversal of defendants' convictions is not warranted because the error was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) This is because the evidence against defendants was overwhelming.

We need not repeat the entirety of April's testimony here; it is detailed above. In short, April had personal knowledge of the motive behind and execution of Frank's murder and robbery. She was present while Orozco and Frank planned the robbery of her brother's methamphetamine supplier. She explained why Orozco had a motive to rob Frank instead. She also was present on the day of the planned robbery and saw Verrette and Ervin at the auto body shop. She again encountered them with Orozco after Frank's murder. She was there when Defendants searched Frank's home and Orozco admitted to her several times that Frank was dead. Indeed, both Orozco and Verrette warned her to keep quiet about what she knew.

April's account was corroborated by the two auto body shop employees, by cell phone records, by surveillance video from a nearby store, and by defendants' own statements. The auto body shop employees identified Verrette and the van at trial. Their account of the events leading to Frank's murder correlated with April's. The cell phone records tracked defendants' movements, showing them near the auto body shop on the day of the murder, and disclosed defendants' pattern of calls to one another. These supported April's timeline.

In addition, defendants made statements incriminating themselves. During arguments with his then-girlfriend, Ervin threatened her multiple times, saying, "A bitch will get you killed." He also told her, "That could be you, like that fucking Mexican." During a separate argument with his girlfriend, Ervin said: "You stupid bitch. It's your fault that I killed that Mexican." In a recorded phone call, Orozco could be heard telling Verrette about his sister telling him to watch the news broadcast about "your murder case."

Moreover, Ervin's girlfriend and his daughter both saw him with what looked to be a black semiautomatic firearm, which was the type of gun used to kill Frank. Additional evidence from his girlfriend tied Ervin to the purple van, which he stopped driving sometime after September 2010. He also told his girlfriend not to drive it in Compton or Long Beach.

Verrette discussed committing a similar robbery of a drug dealer. He also indicated he was concerned about the police bulletins issued about Frank's murder. He discussed at length his worry about people talking about the murder and alerting him to the news bulletins and flyers. Both Orozco and Ervin also became worried about the police investigation. Orozco and his family discussed the news bulletins and sketches often. Ervin changed his appearance and his daughter testified he became even more paranoid after his sister told him the police were asking about him. All of these actions demonstrated defendants' consciousness of guilt. From this evidence, it is not reasonably probable defendants would have received a different verdict.

D. The Gang Evidence Was Not Inadmissible Hearsay

Defendants further challenge some of the gang testimony provided by the two Sheriff's deputies as inadmissible case-specific hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In particular, defendants challenge Deputy Sanchez's testimony that both Orozco and Verrette were shot callers or O.G.'s in their respective gangs and that he was aware from another gang investigator that they were childhood friends. Defendants also take issue with Deputy Martinez's testimony regarding the field identification card which he completed after his contact with Orozco shortly before the murder. They contend

these three statements were inadmissible hearsay under *Sanchez.* We disagree.[12]

In *Sanchez,* the California Supreme Court held, "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra,* 63 Cal.4th at p. 686, fn. & italics omitted.) An expert may not relate as true case-specific facts asserted in hearsay statements, "unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Ibid.*) The *Sanchez* court made clear, however, that an expert may still rely on general "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory," which is relevant to the "gang's history and general operations." (*Id.* at p. 698.)

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[12] We note that the Fourth District in *People v. Perez* (2017) 16 Cal.App.5th 636 (*Perez*), held that given the holdings in *Williams v. Illinois* (2012) 567 U.S. 50 and *People v. Dungo* (2012) 55 Cal.4th 608, competent counsel should have objected to this evidence even before the *Sanchez* case was decided, and that failure to do so resulted in forfeiture of the issue on appeal. We decline to address this issue, because we find that even had an objection been interposed, there was no prejudicial error in the admission of the evidence. The California Supreme Court granted review of *Perez* on February 28, 2018.

As a preliminary matter, we find two of the three challenged statements were not inadmissible hearsay. First, Deputy Sanchez testified based on his personal knowledge that Orozco's and Verrette were shot callers or O.G.'s in their respective gangs. He did not rely on out-of-court statements for this testimony, but on his own knowledge about general gang behavior, history, and operations. He testified an O.G. was someone who had been in a gang and had been an active participant through the years. From his general knowledge of gang hierarchy and his personal knowledge of Orozco and Verrette, based on numerous contacts with them going back to the 1990s, Deputy Sanchez testified he considered them to be O.G.'s or shot callers. This testimony was admissible and not hearsay.

Second, Deputy Martinez's testimony about the field identification card falls within a hearsay exception. Deputy Martinez testified he encountered Orozco a few days before Frank's murder and filled out a field identification card. During that contact, Orozco admitted he was a member of the Compton Tortilla Flats gang and his moniker was Stalker. A party's admission falls within a hearsay exception and may be admitted for its truth. (Evid. Code, § 1220; see *People v. Jennings* (2010) 50 Cal.4th 616, 661–662 [a party's adoptive admissions do not implicate the confrontation clause].) Moreover, the testimony regarding the contact was not hearsay because Deputy Martinez was present, had personal knowledge of the facts, and was subject to cross-examination at trial. (*Sanchez, supra,* 63 Cal.4th at pp. 676, 680.)

Having dispensed with two of the three challenged statements, we now turn to Deputy Sanchez's testimony that he was made aware of Orozco's and Verrette's childhood friendship by another Compton-based gang investigator. Even if we assume the information conveyed to Deputy Sanchez was inadmissible hearsay, it was independently proven by competent evidence and therefore admissible under *Sanchez*. (*Sanchez, supra,* 63 Cal.4th at p. 698.)

The fact of Orozco's and Verrette's relationship was established in other ways. School records showed Orozco and Verrette grew up in the same area and attended the same school, but they were about five years apart in age. The wiretapped conversations between Orozco and Verrette demonstrated they had a relationship. Cell phone records showed Orozco and Verrette were in constant contact. Witnesses also testified they saw Orozco at Verrette's home in Compton, speaking with him, and knew they were friends. Deputy Martinez observed Orozco standing with other Hispanic men near Verrette's home. April testified to their friendly interaction in the Suburban on the day of the murder. This is sufficient to independently prove Deputy Sanchez's testimony.

III. Wiretapped Communications

Defendants next challenge the admission of the wiretapped communications at trial. They contend the vast majority of it was irrelevant to the issues at trial, and was merely a ploy to admit evidence of uncharged crimes and gang membership to cast them in a bad light. As a result, defendants assert the wiretapped communications were inadmissible under Evidence Code sections 352 and 1101. We conclude the trial court did not

abuse its discretion to admit the wiretapped communications. Alternatively, we find any error was harmless.

A. Wiretap Evidence at Trial

In 2011, the police obtained wiretaps for various phone numbers they believed were relevant to their investigation of Frank's murder. In addition to the wiretaps, they utilized an investigative technique called a "stimulation," during which they posted flyers and bulletins about the crime to elicit conversation among the individuals whose phones were wiretapped.

During the course of the stimulation and the wiretaps, the police gathered numerous phone calls and texts among defendants. Some of the wiretapped communications involved Verrette discussing potential criminal activity. In an August 22, 2011 call between Verrette and a woman named Gina H., he told her he was "supposed to be doing a lick man tomorrow."[13] In a separate conversation with Gina, she tells Verrette she needs a lick because she needs money. On August 31, 2011, Verrette indicated in a phone call he intended to sell a gun, because he would "rather get that money . . . instead of the BB gun . . . I can't kill nobody with that . . ." A recording of Orozco talking about selling "a 357 Magnum" was also admitted.

In a series of phone calls in September 2011, Verrette discussed a plan to rob a drug dealer in Victorville that was "supposed to be all gravy." Verrette's co-conspirator, who was unidentified, reported he had inspected the drug dealer's house while he was in Las Vegas in preparation for the robbery and

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[13] The prosecution presented testimony that a "lick" meant a robbery.

monitored the dealer's Facebook feed for his whereabouts. Verrette said, "We liable to get money, weed and the extras."

In a separate conversation on September 22, 2011, Verrette stated his "little Mexican buddy" had something "lined up" for the next day because he was "hungry too." Verrette also reported he "was ripping and running back and forth to call Clavo."[14]

In other phone calls, defendants made references to Frank's murder and that they were apprehensive about the police investigation. In one, Orozco could be heard speaking in the background while Verrette was making a call to someone. He stated that his sister had told him to watch the news and that bulletins had come out about "your murder case."

In recorded calls, Orozco's family frequently discussed the police bulletins and the investigation into Frank's murder. His niece told investigators that "everyone" was talking about Frank's murder. She called Orozco and told him to watch the news on September 4, 2011, but stated she could not tell him why over the phone. Orozco's sister directed her daughter, Orozco, and their other sister to the Long Beach Police Department's website, which provided information on Frank's murder and sketches of the suspects. This occurred on the same day the police performed a stimulation. Orozco's sisters speculated that April was providing information to the police.

In wiretapped phone calls between August and October of 2011, Verrette often vented about the police investigation to Cameron M., his friend of more than 20 years. During these

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[14] Clavo was a Compton Tortilla Flats gang member who associated with Orozco. The prosecution presented testimony that "ripping and running" could refer to someone "running up, ripping somebody off, taking off running."

conversations, Verrette fretted about the sketches the police were passing out of the suspects to Frank's murder. On September 20, 2011, Verrette discussed these sketches with Cameron, which Verrette said did not look like him. Cameron told Verrette that the police were "just fishing." Cameron testified he meant that if the police had a case against Verrette, they would already have arrested him.

In phone calls a week later, Cameron and Verrette lamented about other people talking too much and speculated that someone was communicating with the police. Verrette told Cameron, "cause fo sho, it's a leak in the firm and I don't know who." Cameron referred to a "bird" and a "kid in a cage." Verrette referred to a "pigeon already in a cage" and to someone "with the same blood line." The prosecution presented testimony that "a bird in the cage with the same blood line" meant someone who was in jail and who was a family member or from the same neighborhood. Cameron knew that appellant Ervin was in jail at the time.

Later that night, Verrette told Cameron about being pulled over by the Long Beach Police Department and Cameron assured him that "they are just fishing." While discussing a flyer handed out by the police in October, Cameron asserted, "that's someone inside running the mouth, running of the mouth, homie."

Verrette told another friend he had changed his phone number, and would change it again, because the police could have used his number to find out who had been in contact with him. Verrette also indicated he was lying "lower than an ant with chucks on." He refused to go to Long Beach because "[t]hey been showing pictures of mutha fuckas and doing all kinds of shit. I been seeing sketches and shit all kinds of shit over here."

On September 27, 2011, a Long Beach Police Department helicopter repeatedly flew low over the home Verrette shared with his grandmother. In telephone conversations with his grandmother, Cameron, and others, Verrette expressed concern about the helicopters and suggested police cars would soon come around to be "nosey." He told his grandmother he would not be home because of the helicopters. He also expressed frustration that so many people were discussing sketches on fliers that the police had distributed. He complained about people coming to his house to specifically show him the police sketches. After the helicopters flew over his house, Verrette was recorded telling a friend that because of an emergency, he may need to cut his hair and change his appearance.

At trial, defendants objected to the admission of the wiretapped conversations which took place between September and October of 2011 under Evidence Code sections 352 and 1101. The prosecutor argued the phone calls were necessary to show the relationship among the defendants and the conspiracy, which was ongoing at that time, as well as defendants' intent and modus operandi. The prosecutor admitted that some portions of the calls were irrelevant to the issues at trial, but argued they were necessary to provide context to the portions that were relevant. The trial court overruled the objections, finding the communications more probative than prejudicial.

B. The Wiretapped Communications Were Properly Admitted

The wiretapped communications may be divided into two categories: those in which Verrette discusses uncharged misconduct and the remaining ones in which defendants discuss

the police investigation and other topics. We address the uncharged misconduct communications first.

As we have already noted, Evidence Code section 1101 does not prohibit the admission of evidence of uncharged misconduct when it is offered as evidence of some other fact in issue, such as motive, common scheme or plan, preparation, intent, knowledge, identity, or absence of mistake or accident. (Evid. Code, § 1101, subd. (b).) The California Supreme Court has held that evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401–402.)

The high court explained, "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual . . . evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.)

Here, the evidence of Verrette's uncharged misconduct—the other "licks" or robberies and having access to guns—and the charged crimes are sufficiently similar to support the inference they are manifestations of a common design or plan. The wiretapped communications in which Verrette discusses other "licks" or robberies are relevant because they supported the prosecution's theory that these were individuals who had experience with robberies, knew how to plan them, and knew how to avoid detection, in particular by targeting drug dealers. The wiretapped communications corroborated April's testimony that both Frank and Orozco told her the perpetrators of the robbery knew how to do it discretely and had been doing it for a while.

Also, the wiretapped communications showed defendants knew what they were likely to recover from the robbery of a drug dealer. Specifically, Verrette said he believed they would get "money, weed, and the extras" from a robbery of the drug dealer in Victorville. This statement explains why they ransacked Frank's Franklin house and why they wanted to go to the Beachwood house. This evidence was helpful in proving the case, given there was no indication April told them that was where Frank kept his money and drugs. The wiretapped communications also show defendants typically conspired with others to commit robbery. These common features are sufficient to overcome the exclusion of uncharged misconduct under Evidence Code section 1101.

Notwithstanding the Evidence Code section 1101 analysis, defendants also claim these communications should have been excluded under Evidence Code section 352. We acknowledge the wiretapped communications regarding these uncharged crimes were damaging, but do not find them so unduly prejudicial as to

have warranted their exclusion. Again, Evidence Code section 352 is not designed to avoid the damage to a defense that naturally flows from relevant, highly probative evidence. This evidence was relevant, highly probative evidence of a common plan or design of targeting drug dealers to rob; it was not evidence that evoked an emotional bias against an individual while having only slight probative value with regard to the issues. (*Robinson, supra,* 37 Cal.4th at p. 632.) As a result, we find the trial court did not abuse its discretion in admitting the wiretapped communications regarding other robberies.

As to the second category of wiretapped communications in which defendants discussed the police investigation and other topics, we also conclude the trial court did not abuse its discretion in admitting them. The conversations were highly probative of defendants' consciousness of guilt. It is apparent the police's stimulation did precisely what it was designed to do—it stimulated conversations about the murder and made the defendants and their friends and family concerned about the investigation into Frank's death. Verrette's apprehension about the helicopter activity and the police investigation demonstrated his consciousness of guilt and fear of apprehension. Likewise, the Orozco family's discussions of the police investigation were also directly relevant to their awareness of Orozco's guilt.

We are aware that defendants contend and the prosecutor admitted that some of the conversation transcribed in the wiretapped communications were irrelevant to the issues at trial and included prejudicial references. For example, Verrette's conversations with Cameron included gang references. Also, his conversation with Gina became sexually explicit; he told her she "was yelling for mercy" while he "was drilling for oil." He told her

that talking with her aroused him. She replied, "Yeah, I know it do." However, each of his conversations with Cameron, Gina, and others were relatively short and the inclusion of these passing comments was necessary to provide context to the relevant statements. For example, Verrette's conversation with Gina about doing a lick was only a few minutes long. The trial court was within its discretion to admit the entirety of the communications.

C. Any Error Was Harmless

Even if we were to conclude the trial court erred in admitting the wiretapped evidence, we find any error harmless because it is not reasonably probable defendants would have received a more favorable verdict given the overwhelming evidence against them.[15] (*Watson, supra,* 46 Cal.2d at p. 836.) As discussed above, April identified Orozco, Verrette, and Ervin as co-conspirators in the scheme to rob Frank and testified to their participation in Frank's murder. She sat in a car with them during the ride from approximately Buena Park to Lake Elsinore. During that time, she heard Verrette agree with Orozco that "he was straight through that fool in sector 8," which April understood to mean Frank was dead. Further, the auto body shop employees identified Verrette at trial as the man who had Frank on the ground with a gun to his head. The cell phone records tracked defendants to the area around the auto body shop

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[15] Defendants have not satisfied the high constitutional standard to show that the admission of the wiretapped communications deprived them of a fair trial. (*Jammal v. Van de Kamp, supra*, 926 F.2d at p. 920.) In any event, any error is harmless under the standard enunciated in *Chapman, supra*, 386 U.S. at p. 24.

and revealed the pattern of calls before, during, and after the murder. All of this evidence linked defendants to the crime and provided independent evidence of their guilt, such that we are confident they would have been convicted even without the wiretap evidence.

D. The Wiretapped Statement About "Your Murder Case" Did Not Violate the Confrontation Clause

Verrette also challenges the admission of Orozco's wiretapped comment to Verrette about Orozco's sister telling him to watch the news and that a bulletin had come out about "your murder case." He contends he was deprived of the Sixth Amendment right of confrontation under *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*). (See also *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).) We are not persuaded.

The *Aranda/Bruton* rule bars the admission of one defendant's out-of-court confession incriminating a codefendant, even if the court instructs the jury to consider the confession only against the declarant. (*Aranda, supra*, 63 Cal.2d at pp. 529–530; *Bruton, supra*, 391 U.S. at pp. 135–136.) Under such circumstances, the trial court must either sever the trials or redact the statement to avoid references to the codefendant. (*Aranda, supra*, 63 Cal.2d at pp. 530–531.)

As an initial matter, defendants have forfeited this claim because they failed to raise the issue below. (*People v. Redd* (2010) 48 Cal.4th 691, 730 ["He did not raise an objection below based upon the confrontation clause, and therefore has forfeited this claim"]; see also *People v. Chaney* (2007) 148 Cal.App.4th 772, 779 ["A *Crawford* analysis is distinctly different than that of a generalized hearsay problem"].)

Even if they have not forfeited the right to raise the issue on appeal, the argument lacks merit because the statement is not testimonial. The *Aranda/Bruton* rule is violated only by the admission of testimonial hearsay statements. (*People v. Washington* (2017) 15 Cal.App.5th 19, 28 [*Crawford* "narrow[ed] the reach of . . . the []*Bruton* doctrine" to testimonial statements]; *People v. Gallardo* (2017) 18 Cal.App.5th 51, 69, fn.10; *Whorton v. Bockting* (2007) 549 U.S. 406, 420 [confrontation clause applies only to testimonial hearsay statements]; *People v. Loy* (2011) 52 Cal.4th 46, 66 [same].) Remarks made to friends or "off-hand" comments are not testimonial. (*Crawford, supra*, 541 U.S. at p. 51; see also, *Loy*, *supra*, 52 Cal.4th at pp. 66–67 [conversation between friends not testimonial].) Likewise, remarks made to a government informant to be used later at trial are not testimonial for confrontation clause purposes. (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402.) Thus, the admission of Orozco's comment, made off-hand to his friend Verrette, did not violate a confrontation right under the *Aranda/Bruton* rule. As the authorities we have cited indicate, this is true even when the comment was recorded by the police with the intent to use it at trial.

IV. Evidence of Ervin's Domestic Violence

At trial, Ervin's former girlfriend, Cherry P., and their daughter testified to incriminating comments Ervin made during arguments he had with Cherry. In the course of this testimony, Cherry and their daughter revealed occurrences of domestic violence perpetrated by Ervin. Ervin challenges the admission of the domestic violence evidence under Evidence Code sections 352 and 1101. We find no error.

A. Domestic Violence Testimony at Trial

The evidence with which Ervin takes issue is as follows:

(1) In 2010, Ervin and Cherry had been in a long-term relationship and had children together. They often fought and sometimes the fights became physical. Ervin and Cherry's daughter confirmed the domestic violence. She testified that Ervin became angry once and threw her cell phone out a car window. Another time, he broke his own phone in a rage.

(2) Cherry owned a purple van fitting the description of the one seen by April and the two auto body shop employees on the day of Frank's murder. Cherry testified at trial that in June 2010, Ervin picked her up from work in the van and they argued while they drove home. He threatened her, and the fight became physical. They continued to argue at home for the next few days. At some point, Ervin left with the van. Ervin returned a week later, but left after another fight, taking the van and Cherry's phone with him.

(3) During the holidays in 2010, Ervin and Cherry took their children to dinner one night. Cherry wanted to leave when she saw that Ervin had a gun in his waistband. They fought, and Ervin left with their children, but returned with the children a few hours later. He came back to Cherry's house on Christmas Eve, climbing through an upstairs sliding door. He yelled at her and was violent, scaring Cherry. He left the next morning. During other fights in this time period, Ervin threatened Cherry multiple times, saying, "A bitch will get you killed." He also said, "That could be you, like that fucking Mexican."

(4) Ervin again appeared at Cherry's house uninvited the day before Easter in April 2011. He wanted to eat and take a shower. She let him in. While he was in the shower, Cherry

found his handgun in his pants and hid it behind the refrigerator. When Ervin could not find his gun, he became angry. He shook a fireplace poker at Cherry and yelled, "You stupid bitch. It's your fault that I killed that Mexican." Their daughter confirmed that statement in her testimony. Cherry became frightened and left with the children that night. They slept in a Walmart parking lot. The next morning, Cherry went to the Long Beach police station and spoke to an officer who was investigating Frank's murder. She told him about Ervin and the van.

Defense counsel made continuing objections throughout this testimony and moved for a mistrial on the ground that the evidence of Ervin's domestic violence rendered the trial fundamentally unfair. The prosecutor argued the evidence provided context for Ervin's admission about killing a "Mexican" and having access to a weapon. She reminded the court that it had previously instructed her to lead the witness so as to elicit testimony on these points and limit testimony of the details of the domestic violence. She contended she did so.

The trial court found there was no violation of its prior ruling. It found some of the testimony to be "highly relevant," but that it was intertwined with testimony that cast Ervin in a poor light. The court noted the prosecutor could not completely control Cherry even by leading and as a result, the court struck some of the testimony that Cherry "blurted out" and allowed in other testimony. The court denied the mistrial motion.

A few days after Cherry's testimony, the court instructed the jury with CALCRIM No. 375. Among other things, it limited the jury's consideration of the domestic violence evidence to determining Ervin's intent, motive, and access to weapons.

The court also gave CALCRIM No. 375 as part of its instruction in the case.

B. The Domestic Violence Evidence Was Properly Admitted

The trial court was within its discretion to admit the domestic violence testimony by Cherry and her daughter. The evidence of Ervin's domestic violence was intertwined with highly probative evidence of Ervin's intent, motive, or access to weapons. During arguments with Cherry, Ervin told her, "A bitch will get you killed." He also said, "That could be you, like that fucking Mexican." During another fight, he said, "You stupid bitch. It's your fault that I killed that Mexican." These admissions are highly relevant to the underlying charges, demonstrating Ervin's consciousness of guilt. Cherry's and their daughter's testimony about the fights explained how these statements came about and contributed to their credibility. Indeed, Ervin acknowledged that the domestic violence evidence tended to show Cherry had reason to fear him and explained why she was reluctant to report him to the police.

Other incidents of domestic violence stemmed from arguments over Ervin's access to a firearm. Cherry testified Ervin's firearm was a semiautomatic nine-millimeter handgun. This was consistent with the forensic evidence that Frank was shot with a semiautomatic nine-milimeter handgun at close range. Accordingly, it was highly relevant to the underlying charges.

Although the evidence of his domestic violence likely was damaging to Ervin, he fails to demonstrate how it was unduly prejudicial—the challenged testimony provided necessary context and the trial court struck the more inflammatory and irrelevant

statements. It also limited the testimony as much as possible by allowing the prosecutor to lead the witness. The record shows the trial court carefully considered the probative value of the evidence of domestic violence against its potential for prejudice. The court did not abuse its discretion in admitting it. For the same reasons, the court did not abuse its discretion when it denied defendants' motion for mistrial. (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 679.)

C. Any Error Was Harmless

Even if we assume the trial court erred by admitting this evidence, it is harmless under any standard of review. (*Watson, supra,* 46 Cal.2d at p. 836; *Chapman, supra,* 386 U.S. at p. 24.) The trial court twice gave the jury a limiting instruction regarding this evidence. The jurors are presumed to have understood and followed these instructions. (*People v. McKinnon* (2001) 52 Cal.4th 610, 670.) To the extent defendants contend the limiting instruction was defective, they have forfeited this claim by failing to object to the instruction below or to request clarification. (*People v. Bolin* (1998) 18 Cal.4th 297, 327–328.) Also, as we have already explained, the case against defendants, including Ervin, was overwhelming. Ervin was identified by April as a co-conspirator. Indeed, April sat next to him in the Suburban on August 9. Ervin also drove the distinctive van which was seen by April and the employees at the auto body shop on the day of Frank's murder. The cell phone records placed him in the area of the auto body shop on August 9.

V. Sentencing Issues

A. The Sentences

Orozco was sentenced in count 1 to life imprisonment without the possibility of parole (LWOP), plus one year for the firearm enhancement pursuant to section 12022, subdivision (a)(1). The trial court imposed and stayed the sentences on counts 2 and 4 pursuant to section 654. It also struck a one-year enhancement under section 667.5, subdivision (b).

In count 1, Ervin was sentenced to LWOP, tripled under the Three Strikes Law, plus 11 years, comprised of one year for the firearm enhancement pursuant to section 12022, subdivision (a)(1), and two five-year enhancements pursuant to section 667, subdivision (a)(1). The court imposed and stayed the sentences for counts 2 and 4 pursuant to section 654. It also struck the one-year enhancement under section 667.5, subdivision (b).

Verrette was sentenced in count 1 to LWOP, doubled under the Three Strikes Law, plus a 10-year enhancement pursuant to section 12022.53, subdivision (b), and a five-year enhancement pursuant to section 667, subdivision (a)(1). The court also imposed and stayed the sentences on counts 2 and 4. It struck the one-year term pursuant to section 667.5, subdivision (b).

B. Orozco's Presentence Custody Credits

Orozco contends, and the Attorney General concedes, his presentence custody credits were miscalculated by one day. We agree. The record shows Orozco was in presentence custody from October 6, 2011 to July 7, 2016. Thus, Orozco should have received 1,737 days of credit for his actual time in presentence custody, not 1,736 days, which was awarded by the trial court. The abstract of judgment should be modified to reflect an accurate accounting of Orozco's presentence custody credits.

C. Three Strikes Provisions Do Not Apply to LWOP

Verrette and Ervin each received LWOP sentences, which were doubled and tripled, respectively, under the Three Strikes Law. (§§ 667, subd. (e), 1170.12, subd. (c).) Relying on *People v. Smithson* (2000) 79 Cal.App.4th 480 (*Smithson*) and *People v. Coyle* (2009) 178 Cal.App.4th 209 (*Coyle*), they contend on appeal that the portion of the "Three Strikes" Law that provides for doubling or tripling their sentence does not apply to LWOP sentences.

There is a split of authority on the proper sentence to impose when a crime is punishable with an LWOP sentence. *People v. Hardy* (1999) 73 Cal.App.4th 1429, concludes that the Three Strikes Law applies to double or triple the LWOP terms, reasoning it fulfills the Three Strikes Law's intent to ensure longer prison terms for those who fall within its reach. (*Id.* at p. 1433.)

Smithson and *Coyle* take the opposing view. They hold that the unambiguous language of the statute clearly excludes LWOP sentences from being doubled or tripled. These cases recognize that the plain language of section 667, subdivision (e)(1), a part of the Three Strikes Law, permits doubling or tripling only " 'the determinate term or minimum term for an indeterminate term.' " (*Smithson, supra,* at p. 503, italics omitted.) Since LWOP's are indeterminate terms with no minimum terms, those courts found the Three Strikes Law does not apply. (*Id.* at pp. 503–504; *Coyle, supra,* at p. 219.)

We find *Smithson* and *Coyle* the better reasoned decisions. Accordingly, we reverse the trial court's sentence which doubles Verrette's LWOP sentence and triples Ervin's and modify them to impose a single term of LWOP for both.

D. Remand is Necessary for the Trial Court to Consider the Firearm Enhancement Against Verrette

Verrette received a 10-year sentence enhancement pursuant to a true finding under section 12022.53, subdivision (b). At the time of Verrette's sentence, the trial court was prohibited from striking or dismissing any firearm enhancements under section 12022.53.

On January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect, which amends section 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

In supplemental briefing, Verrette urges us to reverse that portion of his sentence related to the firearm enhancement and remand this matter for the trial court to exercise its discretion. The Attorney General concedes a limited remand is appropriate in this case. We agree.

The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) There is no dispute that Verrette's appeal was not final when SB 620 went into effect on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal."]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a

petition for certiorari have expired"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

On remand, the court may exercise its discretion under section 12022.53, subdivision (h), to strike the firearm enhancement or impose it. In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).)

DISPOSITION

The judgment as to Ervin is modified to reflect the imposition of a single LWOP term for count 1. The judgment as to Orozco is modified to reflect 1,737 days of actual presentence custody. The trial court is directed to prepare amended abstracts of judgment to reflect the modifications to the sentences of Ervin and Orozco and to forward certified copies of the amended abstracts to the Department of Corrections and Rehabilitation.

The matter is remanded to the trial court to allow it to exercise its discretion to decide if it is appropriate to strike or dismiss the firearm enhancement against Verrette pursuant to section 12022.53, subdivision (h). The judgment as to Verrette is

modified to impose a single LWOP term for count 1. This modification shall be reflected in the new abstract of judgment prepared after the sentencing hearing on the firearm enhancement. The abstract of judgment shall then be forwarded to the Department of Corrections and Rehabilitation.

The judgments are otherwise affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

ROGAN, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.