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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO CRUZ et al., Defendants and Appellants.	B212118 (Los Angeles County Super. Ct. No. BA313955)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Reversed and remanded with direction to rehear the motions for new trial. The judgment is otherwise affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Roberto Cruz.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant Juan C. Sanchez.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendants and appellants Roberto Cruz and Juan C. Sanchez guilty of the attempted murder of Miguel Rincon. Cruz was also found guilty of two counts relating to possession of a firearm. On appeal, both defendants contend that a remand is necessary because the trial court employed the incorrect standard when it ruled on their motions for a new trial and because of prejudicial prosecutorial misconduct. Cruz raises additional contentions regarding sufficiency of the evidence to support his conviction for attempted murder and the true finding on a gang enhancement allegation; the denial of his motion to sever counts for trial; and the exclusion of a polygraph test. We agree with defendants that remand is necessary so that the trial court can reconsider the new trial motions using the correct standard, but we reject their remaining grounds for reversal.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution's case.*

1. The shooting of Miguel Rincon on October 18, 2006.

Miguel Rincon joined the Marianna Maravilla gang when he was 11 years old. Rincon hung out with Roberto Cruz (Pollo) and Juan Sanchez (Little Puppet), who were also members of the gang. When Rincon was 15, he testified against Tweety, a fellow gang member, in a murder trial. Rincon's testimony took place over the course of several days beginning on October 18, 1999. Rincon testified that Tweety shot a member of the Stoners gang. After testifying, Rincon quit the gang and left the country for a few months. When he returned, he lived with his aunt in Rowland Heights. He returned to East Los Angeles in 2003.

Years later, on September 22, 2006, Deputy Sheriff Ken Kaufman had contact with Sanchez in the field. Sanchez was driving a black, primered Honda Civic with shattered front and rear windows and a dented hood. He admitted he was a gang member and that his moniker was Little Puppet.

Less than a month later, on October 18, 2006, at about 8:35 p.m., Rincon was in his car at the intersection of Hillview Avenue and Fourth Street in East Los Angeles. He

was on his way to see Diana Ramos, the mother of his child. Rincon was talking on his cell phone, so he didn't pay attention to a two-door, black, primered, hatchback Honda that was following him. Rincon tried not to let the car pass him, but it got alongside his car. The car's passenger shot at Rincon. A third person whom Rincon could not identify sat in the back. Some of the shooter's body hung out of the window. The driver stopped the car, preventing Rincon from going forward. Rincon caught a glimpse of the driver and wondered if he knew him. More shots were fired at Rincon from the passenger side of the car, and Rincon could see that the passenger side door of the car was open. Hunched down and paralyzed, Rincon used his hand to put the car in reverse and to press on the gas pedal, causing his car to crash into a parked car.

Rincon screamed for Ramos, who heard him and came. He told her it looked like Little G's brother shot him.[1] A few months before Rincon was shot, Little G's brother called him a snitch. Little G's brother's girlfriend lived on the same street as Ramos. Little G's brother drove a black car that looked like the one involved in the shooting.

Little G and his brother[2] could not have been involved in the shooting: they had been arrested on October 5, 2006 and they remained in custody throughout the month of October. Rincon explained that he initially identified Little G's brother because he wasn't paying attention; he thought he was going to die. When Ramos asked who shot him, Rincon said it looked like Little G's brother's car and he thought it was him.

When Rincon woke in the hospital, he was intubated, unable to speak, and permanently paralyzed. After his surgery, knowing that he would live, Rincon relived the shooting and realized who had really shot him. A few days after he was shot, Rincon had

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[1] When asked at the preliminary hearing, " 'When you said you thought it was Little G or Little G's brother who shot you, you didn't know who shot you. Is that fair to say?' " Rincon answered, " 'Yes. Yes.' "

[2] Little G and his brother were brought out at trial so the jury could view them.

the tubes removed. He then told Detective Jorge Valdez that Cruz shot him, and he identified Cruz from a photographic six-pack on October 26, 2006.[3]

He did not, however, identify the driver at the same time, although he knew it was Sanchez. Having grown up with Sanchez, Rincon didn't want to believe his once good friend was capable of doing this to him. He finally identified Sanchez as the driver from a photographic six-pack on November 13, 2006.[4] Before identifying Sanchez from the six-pack, he never said that the driver of the car was someone he had grown up with. When he identified Sanchez, he cried.

Rincon believed he was shot because the Marianna Maravilla gang "green lighted" him—approved his murder. He knew he'd been green lighted because "they had paperwork on me. They had paperwork saying that I was the informant and they were trying to, like, pay me off. And then they had c[o]me looking for me. They wanted to take me on a ride and I didn't go outside that day."

When interviewed in December 2006, Sanchez said he knew Rincon, but that he didn't know anything about the shooting. He knew that Rincon was a snitch, but he'd never seen any paperwork about it. Sanchez also said he knew Cruz but didn't really hang out with him, although he last saw him in September 2006. He admitted being a member of Marianna Maravilla since he was 12 or 13 years old, that he was in the Santitos Clique, and that his moniker was Little Puppet. When asked if he owned a black primered Honda Civic, Sanchez said he'd sold it four months ago to Ecology Wrecking.

Bertha Vega was Sanchez's fiancée. She confirmed that Sanchez once owned a black, primer colored Honda. It didn't run, and they had to push it from one side of the street to the other on street sweeping days. Because the car wasn't working, she asked Sanchez to junk it. All of its windows were visibly cracked, and the hood was bent.

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[3] Detective Valdez recorded his interview with Rincon, but not all of it. He first talked to Rincon without recording their conversation, and he then went back over what Rincon told him, recording this part of the conversation.

[4] Detective Valdez associated Sanchez with the black car and, based on that association, placed him in the six-pack.

Sanchez called Ecology Wrecking on October 16, two days before Rincon was shot. Ecology Wrecking recorded the date of sale as October 17 and picked up the car on October 20, 2006.

The gun used in the shooting was a nine-millimeter semiautomatic handgun. No firearms were recovered from either Cruz's or Sanchez's homes.

At trial, Rincon identified Cruz as the shooter and Sanchez as the driver. He was "[a] hundred percent" certain of his identifications.

2. **Gang evidence.**

The Marianna Maravilla gang has been around since the 1970's, and it has over 140 documented members and 4 cliques, including the Winitos Cherries and the Santitos. The 60 Freeway forms the gang's northern border, Eastern is the westerly border, Atlantic is the eastern border, and the southern border is Whittier Boulevard. The gang uses " 'MMV' " for shorthand, and the gang's symbols include 13, M and 22. The gang's primary activities are vandalism, possession for sale of narcotics, robberies, assaults, assault with a deadly weapon, drive-bys, and murder. Drive-bys are the gang's "more typical" activity.[5]

In Detective Valdez's opinion, Cruz and Sanchez were Marianna Maravilla gang members. He based his opinion that Cruz was a member of the gang on Cruz's admission to him of membership, tattoos on Cruz's body (M, Marianna, and Pollo), and his admission to Deputy Duran that he was a gang member. Cruz lived within the gang's territory, under one mile from where the shooting of Rincon occurred. Sanchez also admitted his gang affiliation to Detective Valdez. Sanchez said that his moniker was Little Puppet and that he belonged to the Santitos clique. He had been in the gang since he was 12 or 13 years old and he had gang-related tattoos. He lived just over a mile away from where the shooting occurred.

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[5] Detective Valdez also testified about two predicate crimes that qualify Marianna Maravilla as a criminal street gang within the meaning of the gang statute, Penal Code section 186.22.

Detective Valdez was asked: "[I]f a victim of an attempted murder tells you he was shot in a drive-by shooting by two individuals that were members of the Marianna Maravilla street gang and the reason why he was shot was because he had previously testified against a fellow gang member in a murder trial and was subsequently labeled as a snitch due to this testimony, do you have an opinion as to whether this alleged attempted murder was committed for the benefit of or at the direction of or in association with the Marianna Maravilla street gang?" The detective answered that in his opinion such a crime was committed for the benefit and furtherance and at the direction of the gang. He added that the number one rule gang members are taught is not to snitch, especially on members of the same gang: "If you do that, you're going to face the consequences being death or you're going to be assaulted, you're not going to be part of that gang no more." "[T]hese guys are hard-core, Marianna Maravilla is hard[-]core, they're so hard-core they're going to take care of their own gang members, hell, they'll take care of us, too."

3. Evidence concerning the firearm counts.

Months after Rincon was shot, an officer, on December 11, 2006, spotted Cruz sitting in a parked car, a loaded firearm visible on the floorboard. Cruz said he had the gun for his protection because he'd been shot in the past. He'd bought the gun for $150 from "some Black guy in Los Angeles." Cruz wrote an admission that the gun was his, and he signed it " 'Pollo MMV' "—Marianna Maravilla. The gun, however, was not the gun that was used to shoot Rincon.

B. *Defense case.*

Diana Ramos had a child with Rincon. On October 18, 2006, she was putting her son to bed when she heard gunshots and a crash. Looking out her window, she saw Rincon's car and heard him scream her name. She ran to him. She asked who did this to him, and he said it was Little Grimace. Ramos told him that was impossible, because Little Grimace was in jail. The next time she saw Rincon, she asked again who shot him, and he repeated, " 'Little Grimace.' " When Ramos repeated that Little Grimace was in

jail, Rincon said it was Little Grimace's brother. Ramos said that he too was in jail. Rincon also wasn't sure if the car was dark gray, blue or black.

While en route to the hospital after being shot, Rincon told Deputy Xochilt Rosas that he believed Little G's brother shot him. He also said the car was black. Later, at the hospital, Rincon told the deputy the car was dark, primered and a two-door hatchback.

Hilda Padilla was Cruz's girlfriend and the mother of their daughter. The night that Rincon was shot, Cruz was home.

Sanchez's aunt, Maricela Sanchez, testified that on the day of the shooting, Sanchez came to her house in Pomona at about 2:00 o'clock in the afternoon and stayed until about 8:30 p.m., because they were celebrating Maricela's daughter's birthday. Sanchez left with his brother in a green truck. According to Bertha Vega, Sanchez's car stopped running in September 2006.

Kathy Pezdek is an experimental psychologist who researches memory and factors that affect eyewitness identification. Memory doesn't work like a video camera. Instead, memory is a three-stage process of input, storage and output. Input is how much information goes into our heads. What we store drops off over weeks and months. Output is the retrieval stage. Factors that affect memory include: (1) Exposure time: the less time we have to look at someone, the less likely we are able to identify them, although a person's general characteristics (e.g., gender, race) can be remembered after even a brief look. During a stressful event, exposure time tends to be exaggerated by a factor of 2.5. (2) Lighting and distance. (3) Distractions or what else was going on during the time of exposure; for example, a witness looking at several things cannot see the detail of a person, gun and car at the same time. (4) Weapon focus: weapons are the most salient form of distraction. (5) Cross-race effect: people are more accurate identifying people of the same race. (6) Familiarity: people are more accurate identifying people we know. When we see someone familiar, an alarm goes off in our head even if we can't immediately identify them. (7) Memory doesn't increase with clarity over time, and stress hampers perception. Witnesses can, however, become more confident in their identification, even though memory degrades over time. There is a

weak correlation between accuracy and confidence. If you expect to see a specific person, you fill in the details of that person.

II. Procedural background.

On February 29, 2008, the jury found Cruz guilty of count 1, the attempted murder of Rincon (Pen. Code, §§ 187, subd. (a) & 664)[6] and found true gang (§ 186.22, subd. (b)(1)), gun use (§ 12022.53, subd. (d)), and personal infliction of great bodily injury causing paralysis (§ 12022.7, subd. (b)) allegations. The jury also found him guilty of count 2, unlawfully causing a firearm to be carried/concealed in a vehicle (§ 12025, subd. (a)(3)), and of count 3, carrying a loaded firearm in a vehicle (§ 12031, subd. (a)(1)).

The jury found Sanchez guilty of the attempted murder of Rincon (§§ 187, subd. (a) & 664) and found true gang (§ 186.22, subd. (b)(1)) and gun use (§ 12022.53, subds. (d), (e)), allegations.

On November 12, 2008, after denying defendants' motion for a new trial, the trial court sentenced the defendants. The court sentenced Sanchez to 7 years, doubled to 14 years under the Three Strikes law,[7] for count 1 plus 5 years for a prior conviction plus 25 years for the firearm allegation under section 12022.53, subdivision (e)(1). The court sentenced Cruz to 7 years on count 1 plus 25 years for the firearm allegation under section 12022.53, subdivision (d). The court imposed the midterms of two years each on counts 2 and 3, and ordered the sentence on count 2 to be served concurrent to the sentence on count 1 and stayed the sentence on count 3 under section 654.

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[6] All further undesignated statutory references are to the Penal Code.

[7] Sanchez admitted prior conviction allegations.

DISCUSSION [8]

I. Motion for a new trial.

Both defendants filed motions for new trial under section 1181.[9] Employing the incorrect standard of review, the trial court denied the motion. Both defendants now contend that the matter must be remanded so that the trial court can employ the correct standard, which involves the trial court acting, in effect, as the 13th juror. The Attorney General concedes that the court employed the wrong standard, but argues that the court "in effect" acted as the 13th juror and, in any event, reversal is unnecessary because the court would come to the same result. We disagree.

At the hearing on the motion, there was a long discussion about the appropriate standard of review, with defense counsel for Cruz arguing that the trial court had to independently review the evidence and determine if there was a reasonable doubt the defendant was guilty.[10] The result of granting the motion, defense counsel argued, would be a new trial rather than a dismissal of the cause. The trial court, however, made numerous statements denying that this was the correct standard:

- "I'm not sure the court asks itself whether it has a reasonable doubt. Do you have a case that says that I am to do that for reasonable doubt? I believe the cases say that I review the evidence independently to determine whether . . . the evidence is credible and probative to sustain the verdict."
- "I'm not sure that I use the standard beyond a reasonable doubt in reassessing independently the evidence before the court. I believe that the standard I use is whether or not the evidence is credible and whether it was

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[8] Cruz joins in Sanchez's arguments to the extent applicable. Sanchez only raises prosecutorial misconduct and error in connection with the new trial motion.

[9] Section 1181 provides that a new trial may be granted when, for example, the prosecutor has committed prejudicial misconduct and when the verdict or finding is contrary to law or evidence.

[10] At the hearing on the motion, Sanchez joined in Cruz's arguments.

probative. There are cases that say . . . the trial court is not a 13th juror." "Because I am not sitting as a 13th juror."

- "I did not focus my attention on the standard as cited by the prosecution. I'm fully aware of what the standard I ought to employ is, but you argued to me something I did not see in any of the cases, that is, that I should independently look at this case from the standard of proof of beyond a reasonable doubt to see whether or not the trial court is convinced beyond a reasonable doubt that the defendant is guilty. I don't believe any of the cases say that."
- "I don't agree with you. *People [v.] Dickens* at 130 Cal.App.4th 1245—this is a case you cited me—says in deciding a motion for a new trial made on the ground that the verdict is contrary to the evidence, the trial court's function is to see that the jury intelligently and justly performed its duty and, in the exercise of proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict."
- "No. The court does not ask itself whether it believes that the defendant is guilty beyond a reasonable doubt. It asks itself whether or not there is sufficient credible evidence to sustain a verdict by independently looking at the evidence to determine whether or not there is evidence that supports the conviction."
- "It's not asking itself does the court believe beyond a reasonable doubt that the defendant is guilty? I do not believe the trial court is doing that in this scenario. It is asking itself whether or not there is sufficient credible evidence to sustain the verdict. I don't think there is any case that says that the court employs a standard beyond a reasonable doubt in reaching its decision on a motion for a new trial."
- "[T]he language you're using, 'substantial evidence', is getting into the realm of [the prosecutor's] argument that the court simply review the evidence to determine whether or not there is substantial evidence to

sustain the verdict, which is an appellate review. I understand the distinction, that I'm not doing that, but I am actually assessing credibility of witnesses, independently looking at the case. I understand that. **[¶]** I do see the difference between the two, but I do not think that the court asked itself does it believe beyond a reasonable doubt that the defendant is guilty in making its decision on a motion for a new trial. The defendant is entitled to an independent weighing of the evidence by the trial court, but I do not believe that the trial court uses the standard beyond a reasonable doubt. **[¶]** It is different than when a Court of Appeal looks at the evidence to determine whether or not substantial evidence supports the verdict, which is similar to a [section] 995 motion when the trial court looks at the four corners of the preliminary hearing transcript to determine whether or not the magistrate erred. So those two standards are similar. This [is] more than that. I understand this is more than that."

- "When confronted with the issue that the verdict is contrary to the evidence, the trial court does not sit as a super juror reassessing the case by using the standard beyond a reasonable doubt. The appropriate question[s] to be answered [are] whether or not Rincon's explanation viewed independently is credible and probative to sustain the verdict."

After making these statements that it was not reviewing the evidence independently as the 13th juror, the trial court denied the motions for new trial. Not long thereafter, our California Supreme Court confirmed that trial courts *do* sit as the 13th juror in evaluating a motion for new trial. (*Porter v. Superior Court* (2009) 47 Cal.4th 125 (*Porter*).) In *Porter*, the jury found true deliberation and premeditation allegations in connection with attempted murder counts. The trial court granted a motion for new trial under section 1181, subdivision (6) (the verdict is contrary to the law or evidence) as to those allegations. The issue before the Supreme Court was whether granting the motion barred retrial on the allegations. *Porter* held it did not. A motion under section 1181, subdivision (6), seeks a new trial because the verdict is " 'contrary to law or evidence.' "

(*Porter*, at p. 132.) The "court extends no evidentiary deference in ruling on a section 1181(6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' " (*Porter*, at p. 133.) If the trial judge is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is contrary to the evidence. "In doing so, the judge acts as a 13th juror who is a 'holdout' for acquittal. Thus, the grant of a section 1181(6) motion is the equivalent of a mistrial caused by a hung jury." (*Porter*, at p. 133.)

The Attorney General concedes that the trial court said it wasn't sitting as the 13th juror in reviewing the new trial motion. But in the same breath that the Attorney General makes that concession he states that the court "in effect" *did* act as the 13th juror. In other words, the Attorney General urges us to find that the court said one thing, but did another. The Attorney General argues that we can do so because the trial court's detailed review of the evidence shows that it independently reviewed the evidence as required by *Porter*. The trial court, for example, recited portions of Rincon's testimony about how he recalled it was Cruz rather than Little G's brother who shot him. After noting that the defense introduced evidence that potentially impeached Rincon, the court said it nevertheless found Rincon to be a credible witness: "I certainly understand the defense argument that if, in fact, he knew it was them, he would have said so at that same time, at the time he was shot and being taken to the hospital; however, I cannot say . . . to a degree that it renders his testimony not credible and not probative."

Although we agree that the trial court reviewed the evidence in some detail, we disagree with the Attorney General that the court acted as the 13th juror when it said it wasn't doing so. Nothing in the trial court's statements conclusively show that it independently reviewed the evidence to determine if it had a reasonable doubt that the prosecution proved all elements constituting the crime, as opposed to whether the evidence was sufficient to sustain the conviction. The difference is significant. It is the difference between asking whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and requiring the trial judge to

ask him or herself whether the evidence was sufficient to prove each element of the offense. (*Porter, supra*, 47 Cal.4th at p. 132.) Unlike the Attorney General, we take the trial court at its word: when it said it wasn't acting as the 13th juror, it did not ask itself whether it had a reasonable doubt that all the elements of attempted murder had been proven. The trial court therefore did not determine whether it should be a "holdout juror." Remand is necessary so that the trial court can independently review the evidence in accord with the standard in *Porter*.

II. Sufficiency of the evidence to support the conviction for attempted murder.[11]

Cruz openly acknowledges that the victim, Rincon, identified him as the shooter. Cruz, however, contends that the evidence—in particular Rincon's identification—was insufficient to sustain the judgment that he attempted to murder Rincon. Notwithstanding a less than iron clad identification of Cruz as a perpetrator of the crime, the standard of review sets a high bar for reversal that Cruz has not met.

That standard of review requires us to "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) "[A] reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] 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. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711.)

We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913,

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[11] Although we are remanding the matter so the trial court can rehear the motions for new trial, we still address the remaining arguments because, if they were meritorious, then remand would not be required.

919.) But a finding of fact must be an inference drawn from evidence rather than mere speculation as to probabilities without evidence. (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on another ground by *In re Sassounian* (1995) 9 Cal.4th 535 , pp. 543-544, fn. 5.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "Evidence is sufficient to support a conviction only if it is substantial, that is, if it ' "reasonably inspires confidence" ' [citation], and is 'credible and of solid value.' [Citations.]" (*People v. Raley* (1992) 2 Cal.4th 870, 891 [speculative to infer that because defendant orally copulated one victim, he necessarily attempted the same crime on another victim].)

Rincon identified Cruz as the shooter: he picked him from a photographic six-pack on October 26, 2006, and he identified him as the shooter at trial. Evidence that Sanchez knew Cruz and drove a car similar to the one Rincon had described buttressed Rincon's identification. Cruz, however, argues that the identifications were insufficient because Rincon initially told Diane Ramos and a deputy sheriff that "Little G's brother" was the shooter. Rincon explained at trial that he implicated Little G's brother because he thought he was going to die and he wasn't really paying attention. Rincon made the leap to Little G's brother because the car looked like one he drove, and they had recently argued. After Rincon had some time to think over what had happened, he recalled Cruz's face.

We do not deny that Rincon's identification of Cruz and his explanation for misidentifying Little G's brother are questionable. But that we might—based on the cold, reporter's transcript—question his identification, however, is simply not a ground for reversal. Rather, it is well settled that the testimony of a single witness, *unless physically impossible or inherently improbable*, is sufficient to prove a disputed fact. (Evid. Code, § 411; *People v. Young, supra*, 34 Cal.4th at p. 1181.) An in-court identification of the perpetrator of the crime is sufficient to sustain a conviction. (*People v. Hughes* (1969) 271 Cal.App.2d 288, 291.) And "when the circumstances surrounding

the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court. [Citation.]" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) Questionable the identification may be, but physically impossible or inherently improbable it is not. The jury here had before it all of the circumstances surrounding Rincon's identification of Cruz as the shooter, as well as the benefit, which we do not, of seeing Rincon as he explained himself. The jury also heard an expert explain why an identification such as that made by Rincon may be inaccurate. They jury had all of this before it and determined that the identification was accurate.

Moreover, the jury could have relied on other evidence to resolve any questions it had against Cruz. Rincon said the shooter was in a dark, primered car. Although he associated such a car with Little G's brother, it turned out that Sanchez, who was in the Marianna Maravilla gang with Cruz and a former friend of Rincon's, drove a similar car. Cruz argues that the evidence established that Sanchez's car could *not* have been used in the shooting because it was broken. That was, however, just one inference from the evidence, not an indisputable one. The evidence was that in September 2006, a month before the shooting, Deputy Sheriff Ken Kaufman had contact with Sanchez in the field. Sanchez was driving a black, primered Honda Civic with shattered front and rear windows and a dented hood. Sanchez's fiancée, Bertha Vega, testified that from then on the car did not run. Indeed, the undisputed evidence was that Sanchez sold the car to Ecology Wrecking on October 16, 1999—two days before Rincon was shot. But Ecology Wrecking did not pick up the car until October 20, 1999—two days after Rincon was shot. Therefore, unless the jury believed Vega, this evidence merely established that Sanchez owned a car similar to the one involved in the shooting and the car may or may not have been working on October 18, 1999. This is not what we would call overwhelming corroboration of Rincon's identifications, but it did link Sanchez to the car, to Cruz, and, by virtue of a reasonable inference, to the crime. The jury was entitled to rely on it.

III. Sufficiency of the evidence to support the true finding on the gang enhancement allegation in count 1.

Cruz contends there is insufficient evidence to show either that the attempted murder of Rincon was committed in association with a criminal street gang or that he had the specific intent to promote, further or assist in criminal conduct by the gang. He further contends that the insufficiency of the evidence violated his due process rights under the Fourteenth Amendment of the United States Constitution. We disagree.

Section 186.22, subdivision (b)(1), provides for a sentence enhancement when a defendant is convicted of enumerated felonies " ' "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 any criminal conduct by gang members." ' " (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) The substantial evidence test we articulated above applies to our determination whether there is sufficient evidence to support the jury's true findings on the gang enhancement. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) We add that it "is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 18-19.)

Cruz analogizes this case to *People v. Martinez* (2004) 116 Cal.App.4th 753 and *In re Frank S.* (2006) 141 Cal.App.4th 1192, where the evidence was insufficient to support the gang allegations. The defendant in *Martinez* was convicted of auto burglary and the trial court imposed a gang registration requirement based on defendant's gang membership. (*Martinez,* at p. 758.) The Court of Appeal found that the gang registration statute, section 186.30, focused exclusively on the crime committed, not the defendant's personal history or associations. Because there was no evidence the current crime was connected to the gang's activities, the registration requirement was reversed. (*Martinez,* at pp. 761-762.) The court said that "the record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or

personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*Id.* at p. 762.)

In *Frank S.*, the minor was stopped on his bicycle and found in possession of a red bandana, drugs, and a concealed knife. (*In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1195.) The minor explained he had been attacked two days prior and needed the knife for protection against "the Southerners" because they felt he supported northern street gangs, to which several of his friends belonged. The prosecution's gang expert testified she believed that the minor was a member of the Nortenos gang and that the minor possessed the knife to protect himself from rival gang members, which benefited the Nortenos by providing them protection should they be assaulted. (*Id.* at pp. 1195-1196.) The Court of Appeal reversed a finding that the crime was gang-related under section 186.22, because the prosecution "presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang . . . .' (§ 186.22, subd. (b)(1).) The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection." (*In re Frank S.*, at p. 1199.)

Martinez and *In re Frank S.* are distinguishable from this case. This is not a case like *Martinez* where the only evidence produced to show that the crime was committed in connection with the gang was the defendant's gang membership. Nor is this case like *Frank S.*, where the expert improperly testified on the ultimate issue of specific intent. Here, the evidence supporting the allegation that the attempted murder of Rincon was committed for the benefit of, at the direction of, or in association with the Marianna Maravilla gang with the specific intent to promote, further or assist it in criminal conduct was this: Rincon once was a member of the Marianna Maravilla gang. Cruz and Sanchez were also members of the gang. Rincon knew Cruz and Sanchez, and at one

time was close friends with Sanchez. In October 1999, Rincon testified against another fellow gang member, Tweety. Almost seven years to the day he testified against Tweety, Rincon was shot. At the trial below, he testified that he was "green lighted" and that they had "paperwork" on him. After he was arrested, Sanchez told Detective Valdez that he knew Rincon was a snitch, but he denied seeing any paperwork on him and denied any involvement in the shooting. Detective Valdez, the gang expert, testified that a cardinal rule of gangs is not to snitch. If someone breaks that rule, the consequence could be death.

Cruz faults this evidence by pointing out that although Rincon left the area for awhile after testifying in 1999, he returned and lived there for a number of years before the shooting without incident. And at the time he was shot, nobody shouted gang slogans or otherwise indicated the shooting was in retaliation for Rincon's testimony against Tweety. Cruz then offers alternative explanations for the shooting: perhaps it resulted from "road rage" precipitated by Rincon's not allowing the car to pass him or perhaps it was retaliation for Rincon's spat with Little G's brother. Perhaps. Those are reasonable inferences from the evidence, but so are the ones the jury apparently made—namely, that Sanchez and Cruz were connected by virtue of their gang membership in Marianna Maravilla, that Sanchez was connected to the car used in the shooting, and that Rincon was a potential target for assassination because of his testimony against a Tweety, a Marianna Maravilla gang member. This evidence was therefore sufficient to support the true finding on the gang allegation on count 1 and Cruz's due process rights were not violated. (See generally, *Jackson v. Virginia, supra,* 443 U.S. at pp. 317-320.)

IV. Motion to sever.

The information alleged three counts against Cruz: count 1, the attempted murder of Rincon on October 18, 2006; count 2, possession of a concealed weapon in a vehicle on December 11, 2006; and count 3, possession of an unregistered firearm, also on December 11, 2006. The gun that was the subject of counts 2 and 3 was not the gun used to shoot Rincon. Cruz therefore moved to sever the firearm-related counts from the attempted murder count, but the trial court denied the motion, finding that the firearm

counts were admissible on the gang enhancement allegation applicable to count 1. Cruz contends that the court erred in denying the motion, and therefore a new trial on count 1 is required. We find that any error was harmless.

Because joinder of charged offenses ordinarily promotes efficiency, joinder is an outcome preferred by the law. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) An accusatory pleading thus may "charge two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses . . . ." (§ 954.) " 'Offenses "committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a ' "common element of substantial importance." ' [Citations.]" ' [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 119 [murder charge and escape charged were connected because defendant's motive for escape was to avoid prosecution for the murder].) Given the State's interest in joinder, the trial court enjoys a broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence. (*Alcala*, at p. 1221.) In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. (*People v. Price* (1991) 1 Cal.4th 324, 388.) We assess the ruling in light of the following factors: (1) whether the evidence was cross-admissible in separate trials; (2) whether some of the charges were likely to inflame the jury; (3) whether a weak case has been joined with a strong case so that a "spillover" effect might affect the outcome; and (4) whether one of the joined charges was a capital crime, so that joinder of the charges converts the matter into a capital case.[12] (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.)

The trial court here found that Cruz's possession of a firearm two months after Rincon was shot was cross-admissible on the gang enhancement alleged in count 1,

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[12] This fourth factor is not at issue.

because the gun tended to show that he was an active gang member.[13] He argues that the firearm charges were likely to inflame and prejudice the jury on the attempted murder charge, and that the evidence concerning the firearm charges was substantially stronger than the evidence concerning the attempted murder charge.

Even if we were to agree that a weighing of these factors mitigated in favor of severance, we conclude that any error was not prejudicial. The evidence concerning the firearm charges was straightforward and simple in comparison to the evidence concerning the attempted murder: Cruz admitted that the gun was his and the arresting officer testified that he saw and recovered the firearm from Cruz's car. This incident giving rise to the firearm charges occurred two months after the attempted murder of Rincon, and it was clear that the firearm found in Cruz's car was not the gun used in the shooting. It therefore is unlikely that any relative strength of the firearm counts had any spillover effect on the attempted murder count. "In any event, as between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges." (*People v. Soper* (2009) 45 Cal.4th 759, 781.) Moreover, the attempted murder boiled down to a credibility contest, namely, whether the jury believed Rincon had an explanation for wrongly identifying Little G's brother as the shooter. We do not see how the firearms evidence could have significantly affected the jury's evaluation of that issue.

We therefore conclude that any error in not severing the firearm charges from the attempted murder charge was harmless.

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[13] Cruz concedes that the gun possession was "minimally" relevant to the gang enhancement, but argues that resting joinder on such a slim reed constituted an abuse of discretion, given the other overwhelming evidence of Cruz's gang membership.

V. Polygraph

Cruz moved to admit evidence of a polygraph test he took. Citing Evidence Code section 351.1,[14] the trial court refused to hold a hearing under *People v. Kelly* (1976) 17 Cal.3d 24, and ruled that the evidence was inadmissible. On appeal, Cruz argues that Evidence Code section 351.1 is an unconstitutional interference with his right to present a defense as guaranteed by the Fourth and Fourteenth Amendments of the federal Constitution and of his due process rights and that he made a sufficient offer of proof of the scientific reliability of the procedure.

Our California Supreme Court has considered and rejected these arguments. (*People v. Wilkinson* (2004) 33 Cal.4th 821; *People v. Maury* (2003) 30 Cal.4th 342, 413-414.) We are bound by the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

V. Prosecutorial misconduct.

The main issue in this case was the identities of the perpetrators, which turned largely on Rincon's initial statements that "Little G's brother" was the shooter and his later statements that Cruz was the shooter and Sanchez was the driver. During her closing arguments, the prosecutor argued that the "four stages of grieving" explained why Rincon initially misidentified the shooter. Sanchez and Cruz contend that the argument constituted misconduct. We agree, although we do not agree that it requires reversal of the judgment.

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[14] Evidence Code section 351.1 provides: "(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results. [¶] (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible."

A. *Additional facts*.

At the beginning of her closing argument, the prosecutor addressed Rincon's initial misidentification:

"[The prosecutor:] . . . To explain what is going on here, you have to understand what he was going through at that time, Mr. Rincon, when he identified Little G. You have to evaluate the circumstances surrounding [the] identification. **[¶]** When Mr. Rincon made that identification, he ha[d] been confronted unexpectedly with the worst trauma imaginable. Not one trauma, not one tragedy. He is faced with multiple, multiple counts of tragedies, traumatic events. All at the same time within a matter of seconds his life changed. One minute he is driving, picking up his two sons coming from one of the mother's children's household to another. In a matter of seconds his life has completely changed. Since that day he has never walked. When you are faced with traumatic events, your brain needs time to process that information.

"[Defense counsel for Cruz:] Objection. Facts not in evidence.

"The court: Overruled. This is argument. **[¶]** Go ahead.

"[The prosecutor:] When a person is faced with a traumatic event, there is a process that they go through to digest this information.

"[Defense counsel for Sanchez:] Objection. Facts not in evidence.

"The court: This is, again, argument. Circumstantial inference. Whether the evidence exists or not is for you to decide, . . . The attorneys simply argue the facts. **[¶]** Go ahead.

"[The prosecutor:] The process of digesting this information when your brain is confronted with traumatic events, it has a name. It does have a name. It is called the four stages of the grieving process. Some of you may be familiar with it. Some of you may not know there is a name, but you definitely understand the process that a person goes through when confronted with a traumatic event. **[¶]** For example, a traumatic event is when a person, a cancer patient is first confronted with the fact that they are terminally ill and they are told they have only a few months to live, there is a process of digesting that information. **[¶]** The first process is a shock and disbelief stage. The second process is a

denial, rationalization stage. That is, for example, when a person may ask for a second opinion or rationalize, no, no, no, this can't be happening. I am healthy. I work out every day. I eat right. Cancer doesn't run in my family. You can understand that. **[¶]** The third stage is the depression and the sadness stage. This is when the crying occurs. This is the depression stage. **[¶]** Then the last stage is that acceptance stage where a cancer patient may accept their fate. They are at peace with that diagnosis. **[¶]** The four stages of that grieving process is not limited to just cancer patients. It's a grieving process with anyone subjected to a traumatic event. In this case the traumatic event was the attempted murder of Miguel Rincon's life. **[¶]** Last week, and to make a further point, or a couple of weeks ago[,] you may have heard on the news about a son. He may have been 17 years old. He tried to kill his parents. Attempted murder. He hired a hit man. His friend or another young guy. And there was a—he was arrested. The son was arrested. The hit man was arrested. There was a subsequent confession. They confessed. One or the other confessed. The police told the parents, 'Your son tried to kill you. He confessed.' **[¶]** Watching the news there was a psychologist being interviewed who was close to this family, and the newscaster asked, 'How is the family coping at this time? How is the family'—

"[Defense counsel for Sanchez:] I'm going to object to this line of argument. There is no evidence introduced at this trial. It's not common knowledge that this occurs. She is introducing things that were not introduced into evidence.

"[The prosecutor:] It's an analogy, . . .

"The court: You are talking about a psychologist and there are comments that's not in evidence. **[¶]** I am going to sustain.

"[The prosecutor:] It's [an] analogy of the grieving process.

"The court: I am sustaining the objection. Don't talk about the psychologist's statements. **[¶]** . . . **[¶]** . . . You may argue the generalities of human thoughts and emotions, but you may not argue specifics of what a psychologist may opine or not opine unless it's in the evidence.

"[The prosecutor:] Okay. **[¶]** When the mother, the parents of the 17 year old was told that their son tried to kill them, they were in denial. And the first reaction was: How can that be? How can you be in denial when you have a confession? But when you examine from the person who is confronted with this horrible tragedy, you can understand the denial process. A mom, a dad, at that moment in time cannot accept a fact that their son tried to murder them, and they start rationalizing. It was the hit man. It was the hit man who put their son up to them. He is a bad influence. Whether this is true or not, the blame shifts from the son to the hit man because it's easier for them to processs that information. **[¶]** And taking that same analogy, it's the same thing that you listened to that you heard Mr. Rincon go through, testify to. He testified that when these traumatic events occurred to him when he is lying on the ground, he is in shock, he believes he is dying. . . . **[¶]** And then you have this denial process." The prosecutor went on to argue that Rincon was in denial that his childhood friends shot him, and that was why he initially blamed someone else. After a few weeks, Rincon moved on to the depression stage, and that was when he identified Sanchez as the driver.

Cruz's counsel countered that there was no evidence that some kind of grieving process could explain why Rincon didn't remember the shooter's face until some time after the incident.

Later, after the jury found the defendants guilty as charged but before sentencing, defendants filed motions for new trial, which raised the issue of prosecutorial misconduct based on these statements. The trial court found that the "emotions" described by the prosecutor after a traumatic event were not outside common experience, and it therefore denied the motion. Alternatively, assuming misconduct occurred, the court found it was not prejudicial because the prosecutor's argument wasn't persuasive and because Rincon explained why he didn't immediately identify Cruz and Sanchez as his assailants.

B. *The prosecutorial misconduct was not prejudicial*.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial

with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.) We review a trial court's ruling regarding alleged prosecutorial misconduct for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

A prosecutor commits misconduct by referring during argument to matters outside the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; *People v. Pinholster* (1992) 1 Cal.4th 865, 948, disapproved on another ground in *People v. Williams* (June 28, 2010, S029490) [2010 WL 2557530 (Cal.)].) A prosecutor, however, has wide latitude during argument so long as the argument is a fair comment on the evidence, which includes reasonable inferences or deductions drawn therefrom. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-337.) Thus, a prosecutor " 'may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature.' [Citation.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 193.) In addition, the prosecution has broad discretion to state its views regarding which reasonable inferences may or may not be drawn from the evidence. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1052.)

The broad discretion to argue reasonable inferences from the evidence does not extend to the argument the prosecutor here made about the so-called four stages of grieving. Rincon certainly indicated that he was in denial about Sanchez's, his childhood friend, involvement in the shooting. It cannot be reasonably inferred, however, that this had anything to do with a "grieving process" and its supposed effect on memory. Rather, as defendants point out on appeal, while grief and loss are common experiences, it is not clear (in the absence of evidence) that people commonly experience the so-called "four stages of grieving" or that a shooting victim such as Rincon suffers a grieving process similar to the cancer patient the prosecutor referred to in her summation. It is also not clear what connection, scientific or otherwise, any such grieving process has on memory. What is clear is that the prosecutor used a theretofore unmentioned theory to counter the defense expert's testimony about how memory works, without actually introducing any other evidence on the subject; for example, the prosecutor never called an expert witness to testify about the stages of grieving or asked Dr. Pezdek about such a grieving process and how it might impact memory. This was misconduct.[15] (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 828 [when a prosecutor argues facts not in evidence, she offers unsworn testimony not subject to cross-examination].)

This leads us to the next issue: was the misconduct prejudicial? We are well aware that this misconduct went to the heart of the case—Rincon's identifications. Nonetheless, although the argument about the four stages of grieving was improper, it did not constitute a pattern of egregious conduct that rendered the trial fundamentally unfair under the federal Constitution. (See *People v. Prieto* (2003) 30 Cal.4th 226, 260 [prosecutor's brief reference to an excluded witness did not constitute an egregious pattern of misconduct that infected the trial with unfairness]; *People v. Smithey* (1999) 20 Cal.4th 936, 961 [prosecutor's attempt to elicit inadmissible opinion evidence from an expert witness "did not amount to an egregious pattern of conduct that rendered the trial fundamentally unfair in denial of defendant's federal constitutional right to due process

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[15] Other than adopting the trial court's reasoning, the Attorney General has little to say why this was not misconduct.

of law"]; contrast *People v. Hill, supra,* 17 Cal.4th 800 [prosecutor engaged in sustained misconduct that included disparaging defense counsel, misstating the evidence, and arguing facts not in the record].)

The prosecutor's misconduct was also not prejudicial under state law because it is not reasonably probable that defendants would have obtained a more favorable verdict had the alleged misconduct not occurred. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of prejudice to state law claim of prosecutorial misconduct]; *People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Wagner* (1975) 13 Cal.3d 612, 621 [a miscarriage of justice occurs when the case is closely balanced and the acts of misconduct are such as to have contributed materially to the verdict].) The prosecutor's argument, while going to a central issue, was an isolated instance in an otherwise well-conducted trial. (*People v. Bonin* (1988) 46 Cal.3d 659, 690, disapproved on another ground in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.) Additionally, the trial court instructed the jury that "[e]vidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else that I told you to consider as evidence. **[¶]** Nothing that the attorneys say is evidence. In their opening statements and closing arguments the attorneys discuss the case but their remarks are not evidence." We presume the jury followed those instructions. (*People v. Pinholster, supra,* 1 Cal.4th at p. 925.)

VI. Cumulative error.

Cruz contends that the cumulative effect of the purported errors undermined the fundamental fairness of the trial. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.)

DISPOSITION

The matter is reversed and remanded so that the trial court can consider defendants' motions for a new trial in accord with *Porter*, *supra*, 47 Cal.4th 125. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.