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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. UBALDO CERVANTES et al., Defendants and Appellants.	B150919 (Los Angeles County Super. Ct. No. BA179633)

APPEAL from judgments of the Superior Court of Los Angeles County, Lance Ito, Judge. As to Cervantes and Martinez, modified and, as so modified, affirmed. As to Morales, affirmed.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant Ubaldo Cervantes.

Mark D. Lenenberg, under appointment by the Court of Appeal; Marilee Marshall & Associates, Marilee Marshall for Defendant and Appellant Jose Martinez.

Law Offices of Andrew Levy and Andrew Levy, under appointment by the Court of Appeal, for Defendant and Appellant Cesar R. Morales.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Discussion sections 2 through 14.

Ubaldo Cervantes, Jose Martinez and Cesar Morales appeal the judgments entered after conviction by jury of first-degree murder and attempted willful, deliberate and premeditated murder. (Pen. Code, §§ 187, 664/187.)[1] The jury that tried Morales and Cervantes, as well as the jury that tried Martinez, found the offenses had been committed for the benefit of a criminal street gang and that a principal personally discharged a firearm causing death as to the murder count, and a principal personally discharged a firearm causing great bodily injury as to the attempted murder count. (§§ 186.22, subd. (b)(1), 12022.53, subds. (d) & (e)(1).) The jury that tried Martinez found he personally discharged a firearm in the commission of both counts. (§ 12022.53, subd. (c).) The trial court sentenced Martinez to a term of 84 years to life in state prison and sentenced Cervantes and Morales to terms of 80 years to life in state prison.

In the published portion of the opinion, we reject the claim that evidence of a statement made by Morales to his neighbor regarding the underlying incident should not have been presented at trial as against nondeclarants Cervantes and Martinez. In the unpublished portion of the opinion, we reject various other claims but modify the judgment as to Martinez to strike a two-year enhancement imposed as to count II and modify the judgment as to Cervantes to reflect a term of life with the possibility of parole in count II. In all other respects, the judgments are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Prosecution's evidence.*

a. *The offenses.*

On January 2, 1999, at approximately 2:30 a.m., Schundra Estrada heard a car engine outside her residence on Loosmore Street in the Cypress Park area of Los Angeles. Estrada then heard footsteps of more than one person leaving the car, followed by approximately eight gunshots from around the corner on Pleasant View Avenue. Estrada next heard footsteps running to the car, car doors closing and more than one

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[1] Subsequent unspecified statutory references are to the Penal Code.

voice saying, "go, go, go, go." Estrada looked outside and saw a white Honda leave the scene. Estrada's boyfriend was on the telephone with the 911 operator as the Honda departed.

Police officers found Joey Valentino lying in a pool of blood on Pleasant View Avenue. Gustavo Alvarado was a few feet away. Both had been beaten about the face and shot in the head at a downward trajectory. Alvarado additionally had been shot in the back. One of Valentino's teeth had been knocked from his mouth. Valentino died as a result of the gunshot wound to the head. Alvarado lost an eye and remains paralyzed below the chest. Valentino and Alvarado were students at the time of the shooting, did not belong to a gang or carry weapons and Valentino was in the Army reserve.

Shortly after the shooting, Los Angeles police officers followed a white Honda that refused to yield. Two males ran from the passenger side of the Honda toward a Cal-Trans yard and evaded the officers. The driver, Juan Naranjo, remained seated in the Honda and was apprehended.[2] Martinez fled from the driver's side of the Honda. Shortly before the officers caught Martinez, he discarded a Glock 9 mm handgun. Martinez wore dark blue knit gloves and had a 30-round magazine clip for the Glock.

In a search of the Cal-Trans yard, officers found a Tec 9 handgun, a loaded magazine for that weapon, a 357 magnum handgun and a latex glove. Two blue gloves were found at the entrance of the yard. A blue knit cap and another pair of dark gloves were found near the yard.

A 9 mm Luger cartridge was found in the Honda. Cervantes's fingerprints were on the inside of the front passenger window of the Honda, which was registered to Morales. A hair fragment found on one of the knit caps shared 10 to 12 similarities, out of a possible 15, with Cervantes's hair. A blood stain on the razor wire on top of the fence around the Cal-Trans yard contained Morales's DNA.

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[2] Naranjo, a codefendant at trial, is not a party to this appeal.

Seven expended shell casings were found at the scene of the attack and five additional casings were found across the street. A criminalist testified the Glock had fired 10 of the 12 casings. The 11th casing could have been fired by the Glock but was not fired by the Tec 9. The 12th casing could have been fired from the Tec 9 but was not fired by the Glock.

b. *Statements by the defendants*.

(1) *Morales's statement to Dolores Ojeda*.

On January 2, 1999, at about 9:30 p.m., Dolores Ojeda, who worked as a surgical medical assistant, went across the street to the home of Morales. Ojeda had known Morales for approximately 12 years. Ojeda also knew Cervantes, Martinez and Naranjo. Ojeda's daughter dated Martinez for approximately 18 months. Ojeda spoke to Morales on the front porch of the residence. Morales had slashes and cuts on his hands which were swollen.

Morales told Ojeda he received the cuts "jumping fences." Morales said he had gone to a party the previous night in Cypress Park with Cervantes, Martinez and Naranjo to look for some males who had made advances toward Morales's girlfriend. Naranjo drove and stopped when they saw two males. Morales, Martinez and Cervantes questioned the two males about where they were from and asked them about a "girlfriend." The two males were held at gunpoint on their knees and said they did not know what Morales was talking about. Morales struck one of the males with his handgun and told Martinez to search the males for weapons. Martinez did not find a weapon but Morales said one of the males had a weapon. Morales shot one male because his "friend was lying." When the second male ran, Morales and Cervantes shot him. Morales, Cervantes and Martinez returned to the Honda and told Naranjo nothing had happened. Morales ran from the car after they were followed by the police and jumped a fence near a freeway. Morales also told Ojeda he thought the two males were the "wrong guys." Morales expressed fear he might lose his job as a security guard.

Ojeda telephoned the police on January 7, 1999, and reported what Morales had said to her. Ojeda knew Morales, Cervantes and Martinez were admitted gang members. Ojeda was afraid to testify in this case.

(2) *Martinez's statement to Detective Teague.*

On January 4, 1999, Martinez waived his rights per *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694], and gave Los Angeles Police Detective Andrew Teague a statement that Teague reduced to writing and Martinez signed. Only the jury that tried Martinez heard evidence of this statement. Martinez told Teague he had been a gang member for about one year. Martinez finished work at approximately 1:00 a.m. on January 2, 1999, and went driving with Morales and Cervantes into the territory of another gang in Cypress Park. Morales had a Glock handgun in his waistband and produced a Tec 9 from under the driver's seat and gave it to Martinez. Cervantes had a 357 revolver. As they exited the freeway, Morales said they were "going to get some fools from Cypress" and that it was "personal." Morales drove directly to the scene of the assault and said, "They will be there. They always kick it there." When they stopped, Morales exited the car and told Naranjo to drive. Morales, Cervantes and Martinez, armed with the Glock, the 357 and the Tec 9, respectively, crossed the street and waited until they saw three males exit a car, which then drove off. One of the males entered a house. Morales and Cervantes crept toward the two remaining males while Martinez acted as a lookout. Morales confronted the males and questioned them about a female. One of the males denied involvement with the female. Morales struck the two males. Martinez heard gunshots and, when Morales and Cervantes retreated to Martinez's location, Martinez fired three or four rounds into the air to dissuade anyone from chasing them. In the Honda, Morales traded guns with Martinez.

Teague testified as an expert on gangs that appellants drove "to the heart of a . . . rival's territory," armed with a "high-powered weapons." These facts, combined with Morales's statement they were going to "get some fools," in Teague's opinion, meant "they are going to shoot somebody. And when you shoot somebody in a gang, you . . . are shooting to kill."

c. *Other evidence.*

When he was arrested on January 4, 1999, Morales had two lacerations on the palm of his right hand and the knuckles of his left hand were swollen and bruised. That same day, Officer Jose Carrillo observed a long cut across Cervantes's chest and several small cuts on his arms.

In June 1998, Morales told Los Angeles Police Officer Jose Vasques that he used a 9 mm Glock handgun in his work as a security guard.

Ana Barraza testified that at the time of the shooting, she was dating Morales and that she had been threatened by the father of her child, Adrian Flores, a member of a Cypress Park gang. Approximately five months after the shooting in this case, Flores abducted Barraza from a residence on Pleasant View Avenue.

d. *Gang expert testimony.*

Officer Gustavo Camacho testified Martinez, Cervantes and Morales each had admitted membership in their gang, the gang claimed territory in the Hollenbeck area near East Los Angeles, it had about 40 members at the time of this offense and members identified themselves with the initials of the gang's name. The primary activities of the gang are narcotics sales, vandalism, assaults, carjackings and robberies. Gang members earn respect within the gang by participating in these activities. Appellants' gang and Flores's gang were not traditional rivals. Camacho opined that when gang members exit a car with loaded firearms in the territory of another gang, it is reasonably foreseeable that someone is going to be shot. Shootings committed in the territory of another gang would benefit appellants' gang by earning the gang respect.

2. *Defense evidence.*

Cervantes presented evidence indicating he lived next door to Morales and that he had been a passenger in Morales's Honda on numerous occasions, the last being two or three months before January 2, 1999.

3. *Sentencing considerations.*

The trial court sentenced Morales and Cervantes each to a term of 25 years to life, plus a 20-year enhancement pursuant to section 12022.53, subdivisions (c) and (e)(1), for discharge of a firearm by a principal causing death as to count I and a consecutive term of 15 years to life in state prison, plus a 20-year enhancement pursuant to section 12022.53, subdivisions (c) and (e)(1), for discharge of a firearm by a principal causing great bodily injury as to count II for a total term a term of 80 years to life in state prison. The trial court sentenced Martinez to the same terms but enhanced each count by a consecutive two-year term for the criminal street gang enhancement pursuant to section 186.22, subdivision (b)(1), for a total term of 84 years to life in state prison.

CONTENTIONS

Cervantes and Martinez contend Morales's statement to Ojeda should have been excluded from evidence, the statement was insufficiently corroborated, and the trial court committed numerous instances of instructional and sentencing error. All three appellants contend the trial court erroneously failed to modify CALJIC No. 2.20 to include immunized testimony.

Morales and Cervantes contend the criminal street gang enhancement must be set aside because it was not charged in the information. Cervantes contends the evidence was insufficient to support the criminal street gang enhancement and the cumulative effect of the trial court's errors requires reversal. Morales contends the evidence is insufficient to support the convictions.[3]

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[3] Morales also raises other claims that plainly are inapplicable to this case. In the interest of brevity, we omit further reference to these contentions. If Morales believes any of his claims erroneously have been overlooked, he may seek rehearing.

Martinez contends the term imposed constitutes cruel and unusual punishment, and the trial court erroneously refused to permit impeachment of Detective Teague with a prior instance of official misconduct. Martinez asks this court to review the trial court's in camera rulings on a pretrial discovery motion.

Each appellant joins in any issue raised by a coappellant that might accrue to appellant's benefit.

DISCUSSION

1. *The trial court properly admitted evidence of Morales's statement to Ojeda.*

a. *Ojeda's statement; the trial court's ruling.*

The initial statement Ojeda recounted to the police differed from her testimony at trial. Ojeda initially told the police that Morales said Cervantes shot the first male and Morales and Cervantes shot the second male who ran. In other respects, Ojeda's statement to the police conformed to her trial testimony.

In a written pretrial ruling, relying upon *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*), the trial court found Ojeda's testimony admissible as against Morales's penal interest and found "sufficient indicia of trustworthiness and reliability to overcome the [Confrontation Clause] objections."

The trial court wrote: "Morales actively sought out his neighbor Dolores Ojeda for medical treatment outside the normal avenues, in all likelihood due to the manner in which the injuries were suffered. There is no indication Ojeda had any connection with any law enforcement agency or that she was operating as an agent for any law enforcement agency. Ojeda's simple question of what happened was relevant to the medical treatment she rendered and it was more than natural in the course of human nature. Ojeda's curiosity is even more understandable in light of the fact she was also acquainted with the other participants. [¶] One major concern in *Greenb[e]rger* statements [*Greenberger, supra,* 58 Cal.App.4th 298] like this is that the declarant seeks to minimize his or her participation or seeks to shift the blame to another. Morales does identify two of his co-defendants as the persons who actually discharged firearms at the

victims, thereby allocating for himself a lesser role; however, his statement that, 'We shot at the guy . . .' is an acknowledgement of his equal level of culpability."

The trial court found, based on the totality of the circumstances, Ojeda's testimony was admissible as against Morales's penal interest and found the statement also had "sufficient indicia of trustworthiness and reliability to overcome [appellants'] objections."

b. *Appellants' contention*.

Cervantes and Martinez contend admission of Ojeda's testimony violated their right to confront and cross-examine Morales. Cervantes and Martinez claim Morales's statement was inherently untrustworthy and presumptively unreliable because Morales tried to place the majority of the blame on Cervantes, especially in the first version of the statement. Cervantes argues the change in Ojeda's testimony suggests the statement lacked reliability and the circumstances under which the statement was made refute the trial court's finding of trustworthiness.

Appellants note Morales knew he was in "deep trouble" when he made the statement because Martinez and Naranjo had been arrested and Morales's Honda had been seized. Morales tried to shift blame by indicating Martinez searched the victims and Cervantes shot the second victim. Cervantes argues Morales increased the likelihood Ojeda would repeat the statement to the police by telling her that Martinez, the boyfriend of Ojeda's daughter, was a reluctant participant who did not shoot either victim. The statement also attempts to place Morales in a more sympathetic light by suggesting the shooting was a mistake or justified because the victims had weapons. All of these factors indicate lack of trustworthiness.

Appellants also argue Ojeda's testimony should have been limited to statements specifically disserving only to Morales. (*People v. Duarte* (2000) 24 Cal.4th 603, 612.) Appellants claim admission of accomplice hearsay that implicates a codefendant does not fall within any "firmly rooted" exception to the hearsay rule and lacks trustworthiness. (*Lilly v. Virginia* (1999) 527 U.S. 116, 134 [144 L.Ed.2d 117].) Cervantes and Martinez

also contend the statement should have been redacted, pursuant to *Aranda/Bruton* (*People v. Aranda* (1965) 63 Cal.2d 518, 529-530; *Bruton v. United States* (1968) 391 U.S. 123, 126-137 [20 L.Ed.2d 476]), to eliminate reference to them.

Cervantes claims the error was especially prejudicial to him because Morales's statement was the only evidence connecting Cervantes to the shooting.

Martinez asserts prejudice because Martinez admitted to Teague only that he acted as a lookout whereas Morales told Ojeda that Martinez searched the victims immediately before they were shot. Martinez concludes Morales's statement must have contributed to the jury's finding with respect to the degree of the murder and the finding of premeditation on the attempted murder count. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 295-296, 302 [113 L.Ed.2d 302].)

c. *Applicable law*.

In *Crawford v. Washington* (2004) 541 U.S. ---- [124 S.Ct. 1354, 2004 D.A.R. 2949] (*Crawford*), the United States Supreme Court established new rules for determining whether a criminal defendant's constitutional right to confront witnesses is violated.

Prior to *Crawford,* the admission of an unavailable witness's statement against a criminal defendant was governed by the well-settled rule of *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [65 L.Ed.2d 597]. *Roberts* held such statements could be admitted at trial only when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) the statements contain "particularized guarantees of trustworthiness" such that adversarial testing would add little to the statements' reliability. (*Ibid.*)[4]

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[4] The "firmly rooted" exceptions to the hearsay rule include (1) statements by a coconspirator during and in furtherance of the conspiracy, *Bourjaily v. United States* (1987) 483 U.S. 171, 183-84 [97 L.Ed.2d 144; (2) excited utterances, *White v. Illinois* (1992) 502 U.S. 346, 356-357 [116 L.Ed.2d 848]; and (3) statements made for purpose of obtaining medical treatment. (*Ibid*.)

Thereafter, *Lilly v. Virginia, supra,* 527 U.S. at p. 134 held "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."

Thus, prior to *Crawford*, the admissibility of an out of court statement by an unavailable witness as substantive evidence against a criminal defendant turned on whether the statement contained "particularized guarantees of trustworthiness" such that adversarial testing would add little to its reliability.

Crawford replaced this test with a new focus on the "testimonial or nontestimonial nature" of the out-of-court statement. *Crawford* held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at p. 1374].) Thus, out-of-court *testimonial* statements are admissible only when the witness is unavailable and there has been a prior opportunity for cross-examination of that witness.

Crawford declined to define the term "testimonial" (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at p. 1375]), but gave examples of testimonial statements. *Crawford* listed as testimonial: (1) plea allocutions showing the existence of a conspiracy; (2) grand jury testimony; (3) prior trial testimony; (4) *ex parte* testimony at a preliminary hearing; and (5) statements taken by police officers in the course of interrogations. (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at pp. 1364-1372]). Crawford observed these modern practices were close kin to the abuses at which the Confrontation Clause was directed. (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at p. 1364].)[5]

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[5] *Crawford* noted some statements admissible as exceptions to the hearsay rule were not testimonial in nature, such as business records or statements in furtherance of a conspiracy (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at p. 1369), and left open the question whether the Sixth Amendment incorporated an exception for testimonial dying declarations (*Id.* at p. ---- [124 S.Ct. at p. 1367, fn. 6).

Crawford also offered illustrations of statements that could be considered " 'testimonial' " drawn from the briefs submitted in the case. These included: (1) " 'ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [quoting] Brief for Petitioner [Crawford at page] 23; [and (2)] . . . 'statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [quoting] Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* [at page] 3." (*Crawford, supra,* 541 U.S. ---- [124 S.Ct. at p. 1364].)

Crawford recognized that if the statement in issue is nontestimonial, the rules of evidence, including hearsay rules, apply. *Crawford* stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at p. 1374.) Thus, state courts may consider "reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. [Citation.]" (*Id.* at p. ----[124 S.Ct. at p. 1368].)

With these principles in mind, we turn to the facts of this case.

d. *Morales's statement was not testimonial.*

Because *Crawford* applies only to "testimonial statements," we must first determine whether Morales's statement falls into that category. If the statements are testimonial, the only acceptable indicia of reliability is confrontation. If the statements were nontestimonial, then we may consider whether they can be admitted consistent with the hearsay rules of evidence. We necessarily address this issue de novo in that the testimonial/nontestimonial distinction was not a concern at the time of trial.

Initially, it appears clear that Morales's statement is not similar to the primary examples of testimonial statements given in *Crawford*, namely, grand jury testimony, prior trial testimony, *ex parte* testimony at a preliminary hearing, or statements taken by police officers in the course of interrogations. (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at p. 1364].)

Morales's statement was testimonial, if at all, only under the definition quoted from the amici brief filed by the National Association of Criminal Defense Lawyers et al., which asserted testimonial statements include those " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .' " (*Crawford, supra,* 541 U.S. at p. ---- [124 S.Ct. at p. 1364].) Under this definition, Morales's statement is testimonial if a reasonable person in Morales's position would believe the statement would be available for use at a trial.

Martinez and Cervantes argue Morales made the statement to Ojeda knowing she would repeat it to the police, as she eventually did.[6] However, we do not find this view of the evidence reasonable. Rather, we subscribe to the view that Morales sought medical assistance from a friend of long standing who had come to visit his home. Morales's statement appears to have been made without any reasonable expectation it would be used at a later trial. Rather, it seems far more likely Morales expected Ojeda would not repeat anything he told her to the police. Indeed, Ojeda admitted she knew appellants were gang members and indicated she was afraid to testify in this case.

We find Morales did not reasonably anticipate the statement would be used at trial. Therefore, Morales's statement was not "testimonial" within the meaning of *Crawford*

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[6] Although appellants did not have the benefit of *Crawford* prior to submission of this case for decision, their argument that Morales's statement was not reliable under *Roberts* directly addresses the factors to be considered in determining whether Morales's statement to Ojeda was testimonial in nature. Because the briefs submitted by the parties argue relevantly to the testimonial issue, we declined to invite further briefing from the parties.

and indicia of reliability other than the opportunity for cross-examination, such as those the trial court applied here, are constitutionally permissible.

e. *The trial court properly admitted Morales's statement as against Cervantes and Martinez.*

Having found Morales's statement is not testimonial in nature, we now apply the rules governing admissibility of nontestimonial statements to determine whether the statement falls within a well-settled hearsay exception or bears sufficient indicia of trustworthiness so as to render it admissible as against Cervantes and Martinez. At this juncture, the *Greenberger* analysis employed by the trial court again becomes applicable.

Before turning to the case at hand, we note there is some disagreement as to whether the trial court's ruling on this issue should be reviewed for an abuse of discretion or de novo. Although *Greenberger* applied an abuse of discretion standard in determining whether the trustworthiness test is satisfied, we conclude it is appropriate to conduct a de novo review of the totality of the circumstances that surround the making of the statement. (See *Lilly v. Virginia, supra,* 527 U.S. at pp. 136-137; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 856; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445-446; but see *People v. Brown* (2003) 31 Cal.4th 518, 535-536), which reviewed a statutory trustworthiness finding for abuse of discretion.

Greenberger summarized the law to be applied as follows: "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]" (*Greenberger, supra,* 58 Cal.App.4th at p. 334.)

Greenberger noted: "Clearly the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. '[O]nce partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.' (*Lee v. Illinois* [(1986)] 476 U.S.[530,] 544.) However, the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures. [Citations.]" (*Greenberger, supra,* 58 Cal.App.4th at p. 335.)

The evidence here showed Morales made the statement within 24 hours of the shooting to a lifelong friend from whom he sought medical treatment for injuries sustained in the commission of the offenses. Further, it is likely Morales wanted to have his wounds treated without going to the hospital. Regarding the content of the statement, Morales did attribute blame to Cervantes and Martinez but accepted for himself an active role in the crimes and described how he had directed the activities of Martinez. Thus, Morales's statement specifically was disserving of his penal interest because it subjected him to the risk of criminal liability to such an extent that a reasonable person in his position would not have made the statement unless he believed it to be true.

We also disagree with appellants' assertion the statement attempts to place Morales in a sympathetic light by suggesting the shooting was a mistake or justified because the victims had weapons. The fact appellants shot innocent victims, rather than the gang members they sought, does not render them more sympathetic. In either case, appellants were lying in wait for the victims to arrive, ambushed them, ordered them to their knees, searched and pistol-whipped them, then shot them. Nothing about the shooting as recounted by Morales suggested he should be considered a sympathetic figure or that he acted in self-defense.

Cervantes makes much of the fact that at the time the trial court made its ruling, it was under the impression Ojeda would testify Morales said Cervantes shot the first male. Cervantes argues this statement is much less incriminating than the version Ojeda related at trial. Cervantes suggests this court should review the trial court's ruling based on the evidence as it was known at the time of the ruling.

We normally review a trial court's ruling based on the facts known to the trial court at the time of the ruling. (See *People v. Box* (2000) 23 Cal.4th 1153, 1195.) However, where we conduct de novo review, it is appropriate to consider all relevant facts, including those adduced at trial. However, even taking the discrepancies in the statement into account, we conclude the statement was trustworthy.

Ojeda consistently reported that Morales admitted shooting at the second male with Cervantes. The statement Cervantes shot the first male, as well as the statement Morales shot at the second male, both incriminated Morales because Morales was acting in concert with Cervantes at all relevant times. Thus, the discrepancies in the statement as repeated by Ojeda do not preclude a finding the statement was trustworthy.

Regarding the claim the statement should have been redacted to exclude reference to the nondeclarants, *Greenberger* specifically held this is not required where the statement admitted into evidence is disserving to the interests of the declarant. We agree with *Greenberger's* analysis on this point.

Greenberger observed: "*Bruton* does not stand for the proposition that all statements of one defendant that implicate another may not be introduced against all defendants in a joint trial. The *Bruton* opinion itself stated that the offending hearsay statement in that case was clearly inadmissible against the nondeclarant under traditional rules of evidence, and that there was no recognized exception to the hearsay rule for its admission." (*Greenberger, supra,* 58 Cal.App.4th at p. 332.)

Greenberger continued: "Since declarations against interest may be admitted in evidence without doing violence to the confrontation clause, we see no reason why such declarations, when made by a codefendant, should not also be admissible. This is not to say that all statements which incriminate the declarant and implicate the codefendant are admissible. Any such statement must satisfy the statutory definition of a declaration against interest and likewise satisfy the constitutional requirement of trustworthiness. This necessarily requires a 'fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved; . . .' (*Williamson v. United States* [(1994)] 512 U.S. [594,] 604.) There is nothing in *Bruton* which prohibits introduction of such evidence." (*Greenberger, supra,* 58 Cal.App.4th at p. 332.)

Greenberger concluded "that a declaration against interest may be admitted in a joint trial so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness." (*Greenberger, supra,* 58 Cal.App.4th at p. 334.) Because we find Morales's statement qualified as a declaration against interest and satisfied the constitutional standard of trustworthiness, the trial court did not err in admitting evidence of the statement at appellants' trial.

We also reject appellants' suggestion *Greenberger* wrongly removed a limitation that previously had been placed on declarations against interest. *Greenberger* noted several prior cases had held that even where a declaration qualifies as one against the declarant's penal interest, it must be excluded if it goes to the heart of the case or it is crucial or devastating to the defense. (See *People v. Coble* (1976) 65 Cal.App.3d 187, 195.) *Greenberger* disagreed with this line of cases.

Given the absence of any mention of *Coble's* rationale in the recent decisions of the United States and California Supreme Courts in this area, we decline to revisit this aspect of *Greenberger* and reject appellants' claim.

In conclusion, independent review satisfies us that Morales's statement to Ojeda was "so trustworthy that adversarial testing would add little to its reliability . . . ." (*Idaho v. Wright* (1990) 497 U.S. 805, 821 [111 L.Ed.2d 638]; *People v. Duke* (1999) 74 Cal.App.4th 23, 29-30, citing *Lilly v. Virginia, supra,* 527 U.S. at pp. 124-125.) Thus, no violation of the Sixth Amendment right of confrontation appears.

[[Begin nonpublished portion.]]

2. *Morales's statement abundantly was corroborated.*

Cervantes and Martinez contend Ojeda's testimony constituted hearsay statements of an accomplice, which require corroboration. (§ 1111.)[7] Cervantes asserts the required corroboration must do more than create a suspicion of guilt (*People v. Szeto* (1981) 29 Cal.3d 20, 27; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543, and must be related to an act or fact that is an element of the crime; *People v. Zapien* (1993) 4 Cal.4th 929, 982). Cervantes claims there was insufficient corroboration as a matter of law and, absent Ojeda's testimony, the evidence was insufficient to convict.

There was abundant corroboration of Morales's statement in this case.

Corroborating evidence may be entirely circumstantial and entitled to little consideration when standing alone. (*People v. Lewis* (2001) 26 Cal.4th 334, 370.) The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. (*People v. McDermott* (2002) 28 Cal.4th 946, 985; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.)

Here, Cervantes's fingerprints were found on the passenger window of the Honda and the hair fragment found on a knit cap in the Cal-Trans yard was similar to Cervantes's hair in 10 to 12 characteristics. Cervantes belittles this evidence as

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[7] Section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such proper evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

insufficient to support a conviction standing alone. (See *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353, 356-361.) However, the corroborating evidence need only connect Cervantes to the commission of the offense. Thus, even though Cervantes may have had prior opportunities to place his fingerprints on the window of the Honda, the fingerprint evidence nonetheless corroborated Morales's statement. The statement is also corroborated by Morales's ownership of the same type of gun used in the attack and the cuts on the hands of both Cervantes and Morales. Finally, the shooting occurred as Morales described it to Ojeda and it appears Morales correctly concluded the victims were the "wrong guys" in that neither belonged to a gang.

In sum, Morales's statement did not lack corroboration.

3. *No prejudicial error in the failure to give accomplice instructions.*

During discussion of the jury instructions, the trial court indicated Morales was an accomplice as a matter of law and asked whether the jury should be instructed on accomplice testimony. (CALJIC Nos. 3.10, 3.11, 3.12, 3.13, 3.14, 3.15 and 3.16.) Counsel for Morales objected on the ground the instruction should be given only when the accomplice testifies at trial. Other defense counsel concurred with counsel for Morales. The trial court did not give the accomplice instructions and did not modify CALJIC No. 2.27, regarding the testimony of a single witness.[8]

Cervantes contends the trial court had a sua sponte obligation to instruct on accomplice testimony and to modify CALJIC No. 2.27 to account for the testimony of an accomplice. (*People v. Guiuan* (1998) 18 Cal.4th 558, 565; *People v. Williams* (1988) 45 Cal.3d 1268, 1314.) Cervantes argues the error lightened the prosecutor's burden of proof because the jury was unaware Morales's statement had to be corroborated and

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[8] CALJIC No. 2.27, as given by the trial court, states: "You should give the testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

should be viewed with caution. Cervantes also asserts defense counsel rendered ineffective assistance in not requesting the instructions. Cervantes concludes that, had Morales's statement been placed in its proper legal context, it is reasonably probable the result of the trial would have been more favorable to him.

This contention fails. A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) As noted in the foregoing Discussion section, there was a surfeit of evidence corroborating Morales's statement.

Additionally, it appears the jury that tried Cervantes and Morales did, in fact, view this evidence with caution in that it found allegations Morales and Cervantes personally discharged firearms in the commission of the offense *not true.* Based thereon, Cervantes's claim of a reasonable probability of a more favorable result absent the alleged error lacks support in the record.

4. *No prejudicial error in the failure to modify CALJIC No. 2.20 to address Ojeda's grant of immunity*.

Ojeda was impeached with evidence that she had committed bigamy. In this regard, Ojeda admitted she entered into a bigamous marriage in 1999 and again in 2000. Ojeda further admitted she signed the name of her purported spouse, who in each case was an inmate at the county jail, to affidavits filed in connection with these marriages, which were performed over the telephone. Ojeda testified under a grant of use immunity pursuant to which the People agreed not to prosecute Ojeda based on her testimony at appellants' trial.

Counsel for Morales asked the trial court to modify CALJIC No. 2.20, respecting credibility of witnesses, to instruct the jury it could consider whether a witness had received immunity. Counsel for Cervantes did not join in the request. The trial court declined to make the modification and indicated the standard instruction on "bias, interest or other motive" was sufficient to cover the issue.

All three appellants contend the trial court should have modified the instruction as requested. Appellants note *People v. Echevarria* (1992) 11 Cal.App.4th 444, 449-450, cited in the Use Note to CALJIC No. 2.20, directs the trial court to modify the instruction, upon request, to include whether the witness is testifying under a grant of immunity as a factor in determining witness credibility. (See also *People v. Hunter* (1989) 49 Cal.3d 957, 977; *People v. Hampton* (1999) 73 Cal.App.4th 710, 721.) Appellants assert the standard "bias, interest or other motive" language of the instruction is insufficient to assist the jury to gauge the credibility of immunized testimony. Appellants conclude absence of the *Hunter-Echevarria* addendum compromised the defense and affected the result in this close case. Cervantes further claims defense counsel rendered ineffective assistance in failing to join in the request for modification.

The proper way to include immunized testimony in CALJIC No. 2.20 is to add " '[w]hether the witness is testifying under a grant of immunity' " as a factor in determining the believability of a witness. (*People v. Hampton*, *supra,* 73 Cal.App.4th at p. 721.) However, any error in the refusal to modify the instruction must be seen as harmless. As the trial court indicated, the "bias, interest or other motive" language of the instruction was sufficient to allow counsel to argue the immunity issue extensively. Although the argument of counsel cannot replace an omitted instruction, the jury was instructed it could consider bias, interest or other motive. This instruction was sufficiently broad to permit defense counsel to argue Ojeda's credibility. Thus, no different result would have obtained had the trial court modified CALJIC No. 2.20.

Given this conclusion, Cervantes cannot show prejudice arising from his counsel's failure to join in the request for modification of the instruction and the claim of ineffective assistance fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674]; *People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

5. *Sufficient evidence supports the criminal street gang enhancement.*

Cervantes contends the evidence was insufficient to support the jury's finding the offenses were committed for the benefit of a criminal street gang. He argues the victims

did not belong to a gang, there was no evidence of gang rivalry or motive and there were no gang related statements made at the time of the incident. Rather, Martinez told Detective Teague the attack had been motivated by "personal" reasons. (Cf. *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382-1383.) Cervantes claims this offense lacked indicia of a gang crime and the criminal street gang enhancement does not apply merely because gang members commit a crime. Cervantes also argues the only reason the attack took place in Cypress Park was because the intended victim, Flores, was a Cypress Park gang member who could logically be found only in Cypress Park. Cervantes notes the expert admitted there was no rivalry between Cypress Park and appellants' gang. Thus, the expert's testimony improperly suggested any crime committed by a gang member in another gang's territory is committed for the benefit of the gang. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 654.) Cervantes concludes the criminal street gang enhancement, and the section 12022.53 enhancements that depend upon it, should be stricken.[9]

Although the initial motive for the shooting may have been personal, when Morales enlisted the aid of fellow gang members Cervantes and Martinez, neither of whom had any personal motive in the attack, it became a gang-related crime. The evidence showed that all three appellants armed themselves with high-powered weapons and drove into the heart of the territory of another gang where they intended to confront a

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[9] Allegation of a criminal street gang enhancement extends liability for use of a firearm under section 12022.53, subdivision (e)(1), which provides: "The [firearm] enhancement specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved." A further connection between the two enhancements is found in section 12022.53, subdivision (e)(2), which provides: "An enhancement for participation in a criminal street gang pursuant to [section 186.22] shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

member of the gang. The enhancement does not depend on proof of a current or traditional rivalry between the two gangs.

Based on the facts and expert testimony presented, a reasonable jury could conclude appellants belonged to a criminal street gang and participated in the attack as part of a larger scheme to increase their personal stature within their gang as well as the stature of their gang among other gangs. Thus, the evidence shows appellants committed the charged offenses for the benefit of the gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

6. *The term imposed as to Cervantes for attempted murder must be modified.*

The trial court sentenced Cervantes to a term of 15 years to life for attempted murder based on section 664, subdivision (f). Cervantes claims this section applies only where the victim is a peace officer or a firefighter. Cervantes further claims the 15-year minimum parole eligibility of section 186.22, subdivision (b)(5), does not apply because the trial court imposed a 20-year enhancement for discharge of a firearm by a principal and, when such an enhancement is imposed, the trial court cannot also impose a criminal street gang enhancement unless the defendant personally used or discharged a firearm. (§ 12022.53, subd. (e)(2); *People v. Salas* (2001) 89 Cal.App.4th 1275, 1282.)

The People concede the correct term for attempted willful, deliberate and premeditated murder as to Cervantes is life with the possibility of parole plus 20 years for the firearm enhancement.

Based on the authority cited by Cervantes, the People's concession appears well taken. Accordingly, we shall order the judgment modified to the correct term on count II to life with the possibility of parole plus 20 years in state prison.

Cervantes also contends the firearm enhancement under section 12022.53, subd. (d) must be stricken because no defendant was found to have personally discharged a firearm. This argument overlooks the finding by Martinez's jury that Martinez personally discharged a firearm in the commission of the offenses. Thus, the

enhancements for the discharge of a firearm under section 12022.53, subdivision (d), need not be stricken. (See § 12022.53, subd. (e)(1).)

7. *The sentence imposed as to Martinez must be modified.*

For murder in count I, Martinez was sentenced to 25 years to life, plus 20 years for the firearm enhancement and two years for the gang enhancement. For attempted murder in count II, Martinez was sentenced to 15 years to life plus 20 years for the firearm enhancement and two years for the gang enhancement.

a. *The term imposed for murder in count I is correct.*

As to the murder count, Martinez contends the two-year enhancement must be stricken and the term must be modified to reflect a minimum 15-year term before parole eligibility for the criminal street gang enhancement. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.)

At the time of the charged offenses, section 186.22, subdivision (b)(1), gave rise to a determinate criminal street gang enhancement of one, two or three years, except as provided in subdivision (b)(4). Subdivision (b)(4) stated that "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." (Former § 186.22.) However, Martinez was sentenced to a term of 25 years to life for murder and, pursuant to section 190 subdivisions (a) and (e), a person serving such a term cannot be released on parole prior to serving the minimum 25-year term.

Because this provision was enacted by initiatives approved by the voters, the legislatively enacted 15-year minimum term for the criminal street gang enhancement cannot constitutionally be imposed. Where the 15-year minimum term cannot be imposed under section 186.22, subdivision (e), it is proper to impose the determinate term enhancement under section 186.22, subdivision (a), as the trial court did here. (*People v. Herrera* (2001) 88 Cal.App.4th 1353, 1364.)

Martinez's reliance *People v. Ortiz*, *supra,* 57 Cal.App.4th at pp. 485-486, is misplaced. The defendant in *Ortiz* was sentenced to a 15-year minimum term before parole eligibility and a three-year determinate term, both of which were based on a single criminal street gang enhancement. *Ortiz* concluded only the 15-year minimum term could be imposed and struck the determinate term. Here, Martinez was subjected only to a determinate term enhancement. Thus, *Ortiz* has no application with respect to count I.

Martinez also contends *Herrera* was wrongly decided. Martinez argues that under section 186.22 subdivision (b)(4), all life terms are exceptions to the determinate term found in subdivision (b)(1). Martinez asserts the Legislature envisioned a scheme in which determinate sentences were enhanced by a determinate term and determinate life terms were enhanced by a minimum term before parole eligibility. Martinez also asserts the reasoning of *Herrera* might lead to unintended results in cases of first degree murder committed for the benefit of a criminal street gang after March 8, 2000. Such a defendant might argue the minimum term before parole eligibility should be 15 years because proposition 21, enacted on March 8, 2000, reenacted section 186.22, subdivision (b)(4) which requires a minimum term of 15 years before parole eligibility. Because the gang enhancement has been enacted as an initiative after the murder statute, under *Herrera*, the later enacted criminal street gang enhancement would take precedence over the murder statute.

The key word in Martinez's argument is "unintended." Clearly, the voters who enacted Proposition 21 did not intend to reduce the penalty for murder. In sum, the two-year enhancement imposed as to count I need not be stricken.

b. *The term imposed for attempted murder in count II must be corrected*.

As to the attempted murder count, Martinez received a 15-year minimum term before parole eligibility and a two-year criminal street gang enhancement. Martinez contends that because the trial court imposed a 15-year minimum term before parole eligibility as to the attempted murder count, it cannot also impose a two-year enhancement.

The People concede the point and their concession appears well taken. (*People v. Ortiz, supra,* 57 Cal.App.4th at pp. 485-486.) The abstract of judgment will be ordered modified to eliminate the two-year criminal street gang enhancement on count II.

8. *Section 654 does not apply to the enhancements in this case.*

Martinez and Morales contend their crimes constituted a single indivisible course of conduct committed for the benefit of a criminal street gang thereby subjecting them to only one criminal street gang enhancement. Martinez argues a criminal street gang enhancement imposes punishment based on the status of the offender as a gang member and such enhancements may be imposed only once per incident. (*People v. Coronado* (1995) 12 Cal.4th 145, 158 [prior prison terms].) Appellants note *Coronado* did not decide whether section 654 applies to enhancements and appellate courts have disagreed on the issue.

Morales's claim fails because the only enhancements imposed on him were principal discharge of a firearm enhancements.

Martinez's claim fails because, contrary to his contention, criminal street gang enhancements relate to the circumstances surrounding the commission of the crime and not the status of the offender. Further, each count involved a separate victim. Thus, under well-settled rules related to the application of section 654, each count separately may be enhanced by a criminal street gang allegation. (See *People v. Akins* (1997) 56 Cal.App.4th 331, 340-341.)

9. *The amended information sufficiently alleged the criminal street gang enhancement.*

The amended information alleged a criminal street gang enhancement that referred only to the "foregoing count," which was count II. Nonetheless, the criminal street gang enhancement was submitted to the jury on count I and count II and the jury specifically found the enhancement true as to each count.

Cervantes and Morales contend the criminal street gang enhancement as to count I is precluded by application of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435], which held that any fact, other than a prior conviction, that increases the penalty for a crime must be charged in the indictment, submitted to the jury and proven beyond a reasonable doubt. Cervantes concludes the gang enhancement and the firearm use enhancement under section 12022.53, subdivision (c) and (e) as to count I must be set aside. Morales also claims ineffective assistance of counsel in allowing the allegation to go to the jury.

Appellants at all times were on notice they had to defend the gang enhancement and cannot show they were misled to their prejudice by the information. (*People v. Thomas* (1987) 43 Cal.3d 818, 830-831.) Further, the parties tried the case as though the gang enhancement was alleged as to both counts and counsel did not object when the gang allegation went to the jury on both counts. Thus, appellants impliedly consented to the allegation of the enhancement. (*People v. Toro* (1989) 47 Cal.3d 966, 976-977, disapproved on other grounds in *People v. Guiuan, supra,* 18 Cal.4th at p. 568, fn. 3.)

Because the parties tried the case as if the criminal street gang had been alleged as to both counts, an objection by defense counsel merely would have resulted in amendment of the information. Thus, appellants' related claim of ineffective assistance of counsel based on counsel's failure to object must be rejected for lack of prejudice. (*Strickland v. Washington*, *supra,* 466 U.S. at p. 694.)

10. *Morales's claim of insufficient evidence has not properly been raised*.

Without alleging any specific inadequacy, Morales contends the evidence is insufficient to support his convictions. We may decline to address claims on appeal that are not supported by argument. (*People v. Brown, supra,* 31 Cal.4th at p. 538, fn. 6.) Given the overwhelming evidence of Morales's guilt, this rule properly is applied in this case.

11. *No cumulative error appears.*

Cervantes contends the trial was fundamentally unfair because Morales's statement was admitted in violation of Cervantes's right to confront and cross-examine and the statement lacked corroboration. The error was exacerbated by the failure to instruct on accomplice testimony and the failure to modify CALJIC No. 2.27 and the failure to instruct on immunized testimony. Even though none of these errors, standing alone, may be sufficient to warrant reversal, their cumulative effect denied Cervantes a fair trial and requires reversal.

We disagree. None of the claims raised by Cervantes, either singly or in combination, requires reversal of his convictions.

12. *The term imposed does not constitute cruel and unusual punishment.*

Martinez contends the length of the term imposed in this case, 84 years to life in state prison, is cruel and unusual, shocks the conscience and offends fundamental notions of human dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441, 476-489.)[10] Martinez asserts he was little more than a lookout for the shooters, he only fired randomly into the air after commission of the crime, there was no showing Martinez planned the crime or knew what was about to occur before he got out of the Honda and the defense evidence suggested Martinez was voluntarily intoxicated at the time of the incident. Martinez notes he was employed at a young age and this case appears to be an instance of aberrant behavior in that Martinez had no prior record of serious crime. Martinez asserts he should not be treated as harshly as Morales and Cervantes, both of whom fired shots at the victims. Martinez notes he was youthful, just under the age of 16 years at the time of the shooting. Although section 190.5 prohibits life without the possibility of parole for an offender of this age, the sentence imposed will

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[10] Morales also claims the term imposed as to him constituted cruel and unusual punishment. However, Morales supports this contention with argument and facts that relate to Martinez. Thus, we decline to address the merits of Morales's claim of cruel and unusual punishment.

have the same effect unless Martinez lives an exceptionally long life. Martinez concludes the term imposed is unconscionable considering the extent of his involvement in the current offense and his insignificant prior record.

This claim fails. Martinez accompanied Morales and Cervantes on an attack against a gang member who had made romantic advances toward Morales's girlfriend. Each had a firearm, thus, each knew violence was to be expected. Appellants forced the victims, two students with no gang affiliation, to their knees on the street and then brutally shot them in the head. When one tried to run, he was shot again leaving him paralyzed below the chest. Although it appears only Morales and Cervantes actually shot at the victims, Martinez acted as a lookout and fired warning shots into the air to dissuade pursuit and assist their escape. Even though two defense witnesses testified Martinez appeared "loaded" at about 12:30 a.m. on January 2, 1999, after smoking what smelled like marijuana and cocaine, Martinez did not mention to Detective Teague that he was under the influence of drugs at the time of the offense and the police officers who apprehended Martinez did not observe him to be intoxicated.

In sum, in light of the nature of the offenses and notwithstanding Martinez's youth, the sentence of 84 years to life in state prison does not shock the conscience or offend fundamental notions of human dignity.

13. *No abuse of discretion appears in the denial of the defense request to impeach Teague.*

a. *Background*.

In the middle of trial, the trial court conducted an evidentiary hearing pursuant to Evidence Code section 402 to investigate an incident involving Detective Teague that had been reported in the press involving an allegation of prior false testimony.

At the hearing, Teague testified he had been the subject of a Board of Rights hearing in a case involving three defendants, Moody, Floyd and Adams. In that case, with prior approval of a deputy district attorney, Teague used a ruse to attempt to elicit a statement from Floyd. Teague prepared fake photographic lineups and written statements

that indicated Moody and Adams had identified Floyd as the shooter. Teague placed these documents in the "murder book" so Teague could refer to them during interviews with Floyd.

However, Floyd spoke to Teague without Teague having to resort to these documents. Teague inadvertently left the documents in the murder book and, at a preliminary hearing held six months later, mistakenly testified that Moody and Adams had signed the documents, when, in fact, the documents were the fake documents Teague had placed in the file and forgotten. The prosecutor advised Teague of the mistake and Teague filed a follow-up report. The Board of Rights found Teague did not make false or misleading statements at a preliminary hearing but that he had failed properly to prepare for a preliminary hearing.

The trial court reviewed the preliminary hearing transcript in the Moody, Adams and Floyd case and the internal affairs report and then sustained the prosecutor's objection to cross-examination of Teague on the subject. The trial court observed Teague had sought prior approval of the investigative technique and immediately acknowledged his mistake. The trial court found the prior incident had no direct bearing on Teague's credibility and, under Evidence Code section 352, the probative value of the evidence was outweighed by its inflammatory nature, the undue prejudice to the prosecution and the amount of time the evidence would consume.

b. *Martinez's contention*.

Martinez contends the trial court should have permitted the impeachment because Teague employed a similar investigatory technique in this case. Martinez asserts that during his interview, Teague first had Martinez identify Morales and Cervantes in a photographic lineup and then wrote Martinez's statement on the photographic lineup card just as Teague had done with the "fake" confession. Martinez claims the impeachment value of this evidence was substantial and he had a constitutional right to introduce it at trial. Had the jury disbelieved Teague's testimony regarding Martinez's statement, there

is a reasonable likelihood the jury would have harbored a reasonable doubt, especially as to whether Martinez premeditated the crimes.

c. *Resolution*.

We find no abuse of the trial court's discretion in its finding the probative value of the evidence substantially was outweighed by the inflammatory nature of the allegation and the consumption of time required to explain complex prior events. (*People v. Snow* (2003) 30 Cal.4th 43, 89-90.)

Moreover, even had Teague's credibility been attacked with evidence of this prior mistaken testimony, no different result would have obtained. Martinez was captured after he ran from the white Honda that had been seen leaving the scene of the shooting. Martinez was wearing gloves and he had a magazine for the Glock handgun, found 15 feet from where he was arrested, which had fired almost all of the shell casings found at the scene. Morales's statement to Ojeda revealed Martinez was an active and armed participant in the offenses. Thus, even had Morales been permitted to impeach Teague with this evidence, we find no reasonable probability of an outcome more favorable to Morales.

14. *Review of the in camera discovery proceedings.*

Martinez requests this court to conduct an independent review of the trial court's in camera hearing on his discovery motion. (*People v. Mooc* (2001) 26 Cal.4th 1216.) Martinez further asserts that, under *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215], the prosecution was required to disclose evidence related to Teague's credibility.

We vacated submission of this matter and remanded it for further in camera proceedings. (See *People v. Mooc*, *supra,* 26 Cal.4th at p. 1231.) Those proceedings have been transcribed and filed under seal. Review of the sealed transcripts reveals no abuse of the trial court's discretion in its in camera rulings.

[[End nonpublished portion.]]

DISPOSITION

The judgment as to Cervantes is ordered modified with respect to count II to reflect a term of life with the possibility of parole. In all other respects, the judgment is affirmed.

The judgment as to Martinez is ordered modified with respect to count II to strike the two-year determinate term attributable to the criminal street gang enhancement and to reflect a minimum term before parole eligibility of 15 years. In all other respects, the judgment is affirmed.

The judgment as to Morales is affirmed.

As to Cervantes and Martinez, the clerk of the superior court shall prepare and forward to the Department of Corrections amended abstracts of judgment.

CERTIFIED FOR PARTIAL PUBLICATION

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.