Filed 12/10/03 P. v. Acosta CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E032178
v.	(Super.Ct.No. RIF89270)
LARRY ACOSTA et al.,	OPINION
Defendants and Appellants.	

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge. Affirmed with directions.

Law Offices of Isaac E. Guillen and Isaac E. Guillen for Defendant and Appellant Larry Acosta.

Law Offices of Isaac E. Guillen and Robert P. Ramirez for Defendant and Appellant Gabriel Avila.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Jeffrey J. Koch, Deputy Senior Assistant Attorney General, for Plaintiff and Respondent.

A jury convicted Larry Acosta and Gabriel Avila of second degree murder (Pen. Code, § 187),[1] during which a principal discharged a firearm proximately causing death (§ 12022.53, subd. (d)) and which was committed for the benefit of a gang (§ 186.22, subd. (b)(1)), and assault (§ 240). The jury also convicted Acosta of being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1)) and being a gang member in possession of a gun (§ 12031, subd. (a)(2)(C)). In bifurcated proceedings, the trial court found true an allegation that he had suffered a prior conviction for which he served a prison term. (§ 667.5, subd. (b).) Both defendants were sentenced to prison for 25 years to life, plus 15 years to life. They appeal, contending the trial court erred in (1) denying their mid-trial motion for a continuance, (2) striking Avila's testimony, (3) handling problems with the jury, and (4) denying their motion for a new trial. We reject their contentions and affirm, while directing the trial court to correct errors appearing in the minutes of the sentencing hearings and abstracts of judgments.

FACTS

The victim's girlfriend testified that the victim had been with her cousin, Danny, a member of the Vagabundo gang, on December 9, 1999, when the latter had been murdered. At Danny's funeral, Acosta held onto Danny's casket and would not let anyone pass by it. Avila was also present at the funeral.

The girlfriend said that at the time Danny had been murdered, the victim had taken

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

the former's gun and given it to her. A Vagabundo gang member had been told by the aunt of the victim's girlfriend that the gun was at the latter's house. The member had come to the house, wanting the gun. However, the victim's girlfriend had put it away until New Year's Eve.

The victim's girlfriend testified that one week after Danny's murder, Avila had come to her house looking for the victim. Avila had led the victim to believe that the two were friends, and the victim had gone to Avila's house. During this visit, Avila had asked the victim what had happened when Danny died, but the victim had told him nothing.

The victim's girlfriend said that on New Year's Eve, she took Danny's gun out and she, the victim and the latter's friend, Rodriguez, fired it into the air to celebrate the coming of 2000, leaving no bullets in it. The victim's girlfriend later gave the victim the gun, but it had no bullets or magazine in it and its bottom was missing. The victim placed it in his back pocket.

At some point that evening, according to the victim's girlfriend, the victim and Rodriguez had burglarized the home of her neighbor. They had brought the spoils of the crime to the girlfriend's house.

The girlfriend testified that around 10:00 p.m., Acosta and Avila were told that the victim would be at her house after midnight.[2]

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[2] The victim split his time between his family's home and his girlfriend's.

According to the victim's girlfriend, around 2:30 a.m. the following morning, she, a woman who had dated Danny, and the victim, who appeared to her to be inebriated, went to the spot where Danny had been fatally shot to light candles and write on the sidewalk and walls as a tribute to the deceased. The victim had Danny's empty gun in his back pocket. Rodriguez was not with them. As they wrote on the sidewalk and walls, a vehicle drove back and forth by them. Alarmed, they left and hid at a nearby church, then walked to the victim's girlfriend's house. As they approached the house, they saw Acosta, Avila and a companion coming out of the victim's girlfriend's front gate. One of the three pointed a gun at them and fired twice. The woman who had dated Danny ran away. The victim ran into the street towards the men to find out what they were doing. Brief words were exchanged between the victim and the men, then Acosta and one of the latter began hitting and kicking the former. During this, Avila told the other two to kill the victim because he had left Danny, whom Avila referred to as his "homeboy," to die. Avila told the victim's girlfriend that the victim would have to die because he had left Danny to die. Acosta told the victim's girlfriend to leave. When she refused, he put the handgun he had been holding behind his back to her forehead and told her to get out of there, that he could not hurt her,[3] and they had to do what they had to do. The victim, who had Danny's empty gun in his hand, placed himself partially between Acosta and his

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[3] A witness for Avila testified that she told a defense investigator that the victim's girlfriend had told her that one of the three assailants suggested that she be shot, but another said they could not out of respect for Danny.

girlfriend. The victim yelled at Acosta to get away from his girlfriend.[4] At some point, Rodriguez had appeared on the scene and was also hit by the victim's assailants. Acosta took his gun away from the forehead of the victim's girlfriend and shot the victim in the head from a distance of six inches, and the victim immediately fell to the ground. Despite this, Acosta continued to fire at the victim while the latter lay on the ground, then moved closer to the victim and fired two more shots. When Acosta had begun shooting, Avila, the defendants' companion, and Rodriguez ran away.

The victim's girlfriend testified that later that day, a person she thought was a member of the Vagabundos told her if she "rat[ted]," she was dead. He told her to say that a member[5] of a gang, which was a rival of the Vagabundos, had killed her boyfriend. The victim's girlfriend had been told by girlfriends of members of the Vagabundo gang that if she testified at trial, she and her family were dead.

The woman who had dated Danny corroborated at trial the testimony of the victim's girlfriend that a vehicle had passed by them while they were at Danny's murder site. She added that the male passenger of the vehicle had stared at them. She also corroborated the victim's girlfriend's testimony that Rodriguez had not been with them

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[4] The victim's girlfriend told the first police officer on the scene that after the victim pulled Danny's gun out of his pocket, he pointed it at one of the assailants to scare them into leaving her and her boyfriend alone. One of the three (she did not know Acosta's name at the time) then pulled out a gun and shot the victim. She had told this officer nothing about one of the assailants holding a gun to her forehead.

[5] This person was suspected by the Vagabundos to have murdered Danny.

when they approached the victim's girlfriend's house and encountered the three assailants. She agreed with the girlfriend that one of the three shot as they came out of the latter's gate. The victim ran towards them, saying he was going to see who they were. He pulled Danny's gun out. When the victim met up with the three, they hit and kicked him. One asked the victim what he was going to do now. The victim's girlfriend argued with them.[6]

The victim's mother testified that Danny's grandmother told her that a woman who was both cousin to the victim's girlfriend and to Avila, and who dated a Vagabundo, had called the defendants before the murder and told them that the victim was at his girlfriend's house and was planning to go to Danny's murder site.[7]

A prosecution gang expert opined that Danny, Acosta and Avila were hard-core Vagabundos and that the victim's murder was done to benefit that gang.

ISSUES AND DISCUSSION

1. *Denial of Midtrial Continuance*

After the People rested their case-in-chief, Acosta's trial attorney told the trial court that neither he, Avila's attorney, nor the prosecutor had been able to locate Rodriguez for a year and a half after the crimes. When Rodriguez did appear before trial,

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[6] This woman told one of the first officers at the scene that the victim approached the three men, they argued, then fought, and the victim was shot when one of the three pulled out a gun.

[7] Danny's grandmother testified for Avila, denying this.

a lineup was conducted in which he participated. Avila's trial attorney told the trial court that at the time of this lineup, Rodriguez had admitted to an investigator that there had been an altercation between him and Acosta, Avila and their companion before they arrived outside the victim's girlfriend's home and the three had followed Rodriguez to the house. Acosta's attorney had earlier told the trial court that its theory was that Rodriguez had been trying to burglarize Avila's home, which was a short distance from the victim's girlfriend's, and the defendants and their companion came to the site of the shooting because they had followed Rodriguez there. However, no representation was made at the time that Rodriguez was willing to testify in support of this theory. Nor was a representation made then that Rodriguez would testify in support of the defendants' theory as to how the victim had been shot.[8] Six to eight weeks before the People rested, Acosta's trial attorney had asked for a body attachment on Rodriguez, but did not renew the request. Rodriguez appeared in court two days before the People rested, pursuant to a subpoena,[9] and the trial court ordered him to reappear two days later. However, he did not and the trial court issued a no-bail warrant for him, ordering him to be brought to the

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[8] During the hearing on the new trial motion, it became apparent that Rodriguez had not actually witnessed the shooting. Certainly, he was not present when the defendants and their companions first encountered the victim.

[9] At that point, Avila asserted that Rodriguez was under his subpoena. However, at the hearing on the new trial motion, Acosta's attorney and the prosecutor each asserted that it was their subpoena to which Rodriguez had responded.

court immediately upon his arrest.[10] The trial court also denied the requests of both defendants to continue trial while they attempted to locate Rodriguez. The trial court pointed out that the jury had been time-qualified for only one more week, plus a day, of service, neither defendant had yet put on their case-in-chief, jury instructions had not yet been discussed, some evidentiary issues had not yet been resolved and, of course, the jury had not yet deliberated. The trial court also pointed out that there was no assurance that Rodriguez, on the advice of counsel, would be willing to admit even encountering the defendants and their companion, as to do so would place him in the same area as an unrelated earlier burglary.[11] Four days later, both defendants began presenting their defenses, with Avila concluding his one week later.[12] The defendants here contend that the denial of their requests for a continuance deprived them of a fair trial. We disagree.

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[10] Months later, during the hearing on the defendants' motion for a new trial, the trial court stated on the record that when it had issued the warrant, the prosecutor provided it with Rodriguez's contact information, which was, at that point, accessible to the defense. At the hearing, the prosecutor represented, and the trial court appeared to believe, that the prosecutor informed defense counsel that he had provided the trial court with Rodriguez's contact information.

[11] The trial court had even appointed and had present in court a conflict panel attorney to represent Rodriguez in anticipation of the latter's expected appearance. The conflict panel attorney was present to advise Rodriguez about his Fifth Amendment rights regarding any question defense attorneys might ask him about his participation in any burglary.

[12] At the hearing on the defendants' motion for a new trial, the trial court said, "[W]hen I denied the request [for a continuance] . . . , my . . . feeling was that at that time the defense had at least four days to begin making an effort to try to locate [Rodriguez], and that if that was unsuccessful and the defense still wanted to call [him] as a witness,

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The defendants state in their opening brief, ". . . [I]n . . . *Owens [v. Superior Court*] (1980) 28 Cal.3d 238, 250, the California Supreme Court set forth the standard that a trial court must use in determining whether good cause exists for a continuance to secure the attendance of a material witness, and held that the party requesting the continuance must show (1) that the movant has exercised due diligence in an attempt to secure the attendance of the witness at trial by legal means; (2) that the expected testimony is material; (3) that the expected testimony is not merely cumulative; (4) that the witness will be available within a reasonable time; and (5) that the facts to which the witness will testify cannot be otherwise proven." None of these criteria were met here.

In asserting that they exercised due diligence in securing the attendance of Rodriguez, the only citations in the defendants' opening brief to the record concerning any effort on their part to contact Rodriguez are to portions of the record that occurred months after trial was concluded.[13] There was no assertion made at the time that the defendants sought their continuance that the prosecutor had somehow impeded their ability to contact Rodriguez. Nor did they state what steps they had taken to contact him.

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they could later on, during the course of the trial, renew their request."

[13] Additionally, some of these references are not in the record before this court, specifically the declarations of trial counsel for Acosta and the deputy district attorney attached to documents concerning the defendants' motion for a new trial. Had appellate counsel for Acosta and Avila requested augmentation of the record for these documents, which would have been entirely appropriate in this case, they would have been readily available to this court. Appellate counsel's failure in this regard has resulted in these appeals being unnecessarily delayed.

In short, there was no showing at the time of the motion for a continuance that *either* defendant had exercised any diligence whatsoever in obtaining Rodriguez's presence in court.

As to the materiality of Rodriguez's testimony, again, the assertions made by the defendants at the time the request for a continuance was made do not pass muster. Acosta's defense[14] was that the confrontation between the defendants and the victim began when the former went to the victim's girlfriend's house and asked the victim why he had abandoned Danny. The victim became angry, pulled out a gun, pointed it at the defendants and threatened to shoot them. Acosta responded to the life-threatening situation by pulling out his gun and unloading it into the victim. This defense was contradictory to any testimony Rodriguez *might have given*[15] that the defendants and their companion followed him to the victim's girlfriend's home. Avila similarly presented evidence that there was an argument, concerning Danny,[16] outside the victim's home that escalated to a fistfight, during which Rodriguez left. The victim was later shot when he ran towards, threatened and pointed his gun at the defendants or their companion. *If* Rodriguez had testified that the defendants and their companion had come

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[14] Since opening statements by the attorneys were not transcribed, we are relying on the evidence each presented at trial.

[15] See footnote 34, *post*.

[16] However, his gang expert suggested that he was not a member of the Vagabundos.

to the victim's girlfriend's house not because they were looking for the victim to kill him, but because they were merely following Rodriguez there, the shooting would have appeared to have been less premeditated. However, it must be remembered that the defendants were convicted of second degree murder. The real issue in this case was the intent of the defendants seconds before the fatal shots were fired: Was the victim killed because he pulled a gun on them and they feared he was about to shoot them or because they hated him for abandoning Danny? How the defendants came to be outside the victim's girlfriend's house was not that critical a matter.

The defendants also cannot show that evidence of the confrontation outside Avila's house could not have been presented in another way. They could have called their companion to testify about it. However, Avila refused to even identify this person during his testimony, triggering the sanction that all his testimony was stricken and the jury was instructed to disregard it.[17] The defendants assert that Rodriguez's anticipated testimony suggested that they did not fire two shots before the fatal confrontation with the victim. However, there was other testimony that a number of shots had been fired that night (New Year's Eve), that none had been fired near the victim's girlfriend's house, and that the victim's girlfriend had not told them that shots had been fired before the fatal ones.

The defendants failed to show at the time of their requests for a continuance that

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[17] No doubt this made a huge impact on the jury in its determination that this was

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Rodriguez could have been located within a reasonable period. In fact, he did not surface until three months after the verdicts had been rendered.

2. *Striking of Avila's Trial Testimony*

As stated before, when, during cross-examination by the prosecutor, Avila refused to reveal the identity of the companion who was with him and Acosta when the victim was killed, his entire testimony was stricken by the trial court. In contending the trial court abused its discretion in so doing (*People v. Reynolds* (1984) 152 Cal.App.3d 42), the defendants assert that this person's identity was not essential to the prosecution's case because the latter "was not in the immediate vicinity of the shooting when it occurred, and thus, he or she[18] could not possibly have given any additional relevant information regarding the shooting . . . ." There is no support in the record for such an assertion. Avila was the only person who, in his stricken testimony, placed this person outside the victim's *immediate* presence when the latter was shot. All the other eyewitnesses placed this person with the defendants at the time of the shooting. Even if Avila's stricken testimony is accepted as gospel, it placed this person in the same area as the victim at the time of the shooting. We have no way of knowing from Avila's stricken testimony that this person did not actually witness the shooting.

The defendants contend that the identity of this person was not essential because

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a gang-related crime.

18 In his stricken testimony, Avila repeatedly refers to this person as a man.

there was no evidence that he forced them to commit the crimes or was more responsible than they were. This is beside the point. If this person had been a fellow gang member, that evidence would have been very relevant to the People's case. The fact that he was with them, and Avila sacrificed so much to protect his identity at trial, certainly supports such an inference.

The defendant's assertion that "Avila claim [*sic*] an alibi and deny [*sic*] that he was present . . . at the time the shooting occurred" mischaracterizes even his stricken testimony and is irrelevant to what this person might have seen and/or done during the shooting. Moreover, if, like Avila, this person was uninvolved in the shooting, why would Avila not reveal his identity?

Like in *Reynolds*, this person could have confirmed or denied Avila's claimed lack of involvement in the shooting. Therefore, like the trial court in *Reynolds*, this trial court did not abuse its discretion in refusing to strike all of Avila's testimony when he refused to reveal the identity of this person.

3. *Juror Misconduct*

A questionnaire given to all potential jurors stated, "Please describe your employment: [¶] a) If employed, what type of work do you do[?] [¶] b) If retired, last employer and type of work." In response to this, Juror No. 4 said he was a manager for the telephone company. He did not state that he was retired from the Air Force, where he had been, from 1972 to 1981, a security policeman. He explained to the trial court during deliberation that there were two types of security policemen -- those who provided

security and those who performed law enforcement functions. He elaborated that he guarded nuclear weapons and certain types of aircraft and buildings. He never arrested anyone and was available to help the law enforcement side of security if they were ever short of men, but was never called upon to do so.

In response to a question on the questionnaire whether he had any relatives, neighbors or close friends who are employed by any law enforcement agency or work in the legal profession, Juror No. 6 said, "Yes. I'm part of the Naval Reserves. And there's a lot of reserves that are in law enforcement. But they're not close friends." He did not disclose that he had been in the Marine Corps from 1992 to 1996 or that his duties since 1997 in the reserve had been shore patrol at North Island Navy Base, Coronado, one weekend per month and two weeks during the summer, where he had the power to arrest. He also did not disclose that he was majoring in criminal justice at college.

The foregoing described undisclosed information was provided by these jurors in response to questions by the trial court, when, during deliberations, a third juror[19] reported that both had failed to disclose relevant information during voir dire. Both questioned jurors said they could be fair and impartial in spite of this information. Juror No. 4 stated he had not disclosed the information about himself because he did not believe it was relevant.[20]

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[19] Ironically, this juror was married to a police officer.

[20] Specifically, the following colloquy occurred between the trial court and Juror

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Both defense attorneys asked that both jurors be removed for their failures to disclose this information. Both counsel asserted that they would have used peremptory challenges to remove these jurors had this information been disclosed during voir dire. Acosta's attorney explained that he routinely used peremptory challenges against potential jurors who had been in the military, particularly those who were in the military police.

The People pointed out that the same attorney representing Avila at the time this information came to light had not been the one who represented him during voir dire. The latter, the People noted, had brought a number of *Wheeler*[21] motions, challenging the prosecutor's use of peremptories against potential jurors who were members of minority groups. Because Juror No. 4 was African-American and Juror No. 6 was Hispanic, the prosecutor contradicted the representation of Avila's attorney that either of these jurors would have been challenged peremptorily on the defendants' behalf.[22]

[footnote continued from previous page]
No. 4:

"The court: Is there a reason you didn't bring it to our attention or tell us about this?

"Juror No. 4: No. There was no reason at all. I didn't know that that had any bearing on anything. I didn't know that my military career would . . . make me not eligible for jury duty.

"The court: It absolutely has no bearing upon your eligibility to be a juror, so you're right in that regard."

[21] *People* v. *Wheeler* (1978) 22 Cal.3d 258.

[22] During the hearing on the defendant's motion for a new trial, based partially on juror misconduct, the prosecutor pointed out that Acosta's attorney had joined in every

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The trial court concluded that neither juror had intentionally withheld information or been deceitful during voir dire and no good cause existed to excuse either. It added that both jurors had been asked on the questionnaire whether there existed any reason, from any source, as to why they could not serve on the jury and neither had indicated that there was. Therefore, it denied the defendants' requests to excuse both jurors for misconduct and their motions for a new trial based on juror misconduct. Both defendants here challenge the trial court's ruling.

The defendants begin their attack on the ruling by asserting that both jurors failed to reveal relevant information "even though they were asked specific and unambiguous questions about their employment and retirement status, as well as law enforcement relationships." While the questions may have been specific and unambiguous, they did not specifically and unambiguously call for disclosure of the information that was not given during voir dire.[23] That is why the trial court found that neither juror had intentionally withheld information nor had been deceitful. We cannot agree with the trial court's conclusion that these jurors should have known that the information they failed to disclose should have been given. The defendants cite no authority holding that the

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Wheeler motion made by Avila's attorney.

[23] As the prosecutor correctly pointed out, whether any of the potential jurors served in the military was never asked. Juror No. 6 volunteered the information in answering the question whether he had close friends who were in law enforcement and he explained that many of his fellow reservists were in law enforcement, but he was not close to them.

failure to disclose under these circumstances constitutes misconduct, triggering a presumption of prejudice. In fact, in *People v. McPeters* (1992) 2 Cal.4th 1148, 1175, the California Supreme Court held, "'[T]he proper test to be applied to unintentional 'concealment' is whether the juror is sufficiently biased to constitute good cause for the court to find . . . that he is unable to perform his duty." The trial court found no good cause and its finding is supported by the statements of both jurors.

We find it interesting that if, as they asserted below, defense counsel were so intent on using peremptories against potential jurors who had been in the military, why both failed to ask the potential jurors if any had been in the military.[24] Even more compelling is counsel's failure to use a peremptory against Juror No. 6 once he admitted to being in the navy reserves. We further note that despite this disclosure, neither counsel questioned Juror No. 6 about his military background, even though it is common for reservists to first have performed non-reserve service.

4. *Juror Tampering*

Three days after the aforementioned incident, Juror No. 5 reported to the trial court after she returned from lunch that during that recess, while she was on her way to a restaurant with Jurors No. 10 and 12, she retrieved the voice mail messages from her office telephone. On one of them, which had been left the previous evening, the caller

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[24] When addressing this issue during the hearing on the defendants' new trial motion, Acosta's attorney candidly admitted, "[M]aybe that's part of the fault of the defense in not inquiring as to [Juror No. 6] a little further."

said, "Your verdict is not guilty, do you understand?"[25] Initially assuming that it was a joke by coworkers provoked by the lengthiness of her jury service to that point,[26] she had the other two listen to the message. They, however, concluded it was not a joke and they urged her to "tell somebody" about it. After calling her telecommunications director at work and his being unable to determine the origin of the call, she called her husband and had him listen to it, hoping he could recognize the voice.[27] He said he could not and he informed her that the matter was "very serious."[28] He told her that he was going to report it to the Riverside County Sheriff's Department detective who was conducting a background check on him in connection with his application for a lateral transfer to the sheriff's department.[29] Juror No. 5 called her boss and asked him if he thought this was a practical joke by her coworkers. He said it was not and concurred with her husband's

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[25] In their reply brief, the defendants misquote the statement and, based on that, argue that it was obviously intended to be relayed to other members of the jury. Not so.

[26] The trial had already consumed six weeks.

[27] Contrary to the defendants' assertion, the record does not show that Juror No. 5 called her husband only at the urging of Jurors No. 10 and 12. She never said this. Juror No. 10 said the following, "We talked more [about the message]. And it was [Juror No. 5]'s feeling that it could have been a joke. And so she continued to call her husband, because we asked her to do that. We said -- if you think it's a joke and you think you know who did it, why don't you call that person and ask them directly. Because it's not funny. [¶] So then . . . what she did is she called her husband, and her husband I guess contacted that other person. That other person said no, it wasn't me." Juror No. 5 never corroborated the latter statement.

[28] He told the sheriff's department detective that the message was "threatening."

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conclusion that it was very serious. Although Juror No. 5 denied discussing the message further with Jurors No. 10 and 12, both of the latter told the trial court otherwise. Jurors No. 5 and 10 denied mentioning it to any of the jurors other than Juror No. 11. Indeed, the trial court had suspended deliberations immediately after the jury reassembled at the conclusion of the lunch recess. Juror No. 5 reported that the only thing the jury discussed after the lunch recess was a matter unrelated to the trial. Despite reporting that the message made her nervous,[30] Juror No. 5 stated that she could continue serving on the jury.

Juror No. 10 said she personally took the message as a threat; Juror No. 12 said she or he took it personally as a threat "[s]omewhat[, b]ut to a very small degree," adding that the message was serious rather than a joke. Both felt, however, that they could continue with their service despite it.

The trial court excused Juror No. 5, but allowed Jurors No. 10 and 12 to remain on the jury. Dismissal of them would have resulted in a mistrial, as there were only two alternate jurors available. The trial court explained that it viewed Juror No. 5 as being in a different position than the other two in that the tampering was directed at her and if she continued service, she would have to deal each day with her husband, who viewed the matter as very serious.

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[29] See footnote 19, *ante*.

[30] She said she got nervous when her husband told her it was very serious.

Both Jurors No. 10 and 12 assured the trial court that the removal of Juror No. 5 would not affect their service and they would follow the court's instruction to disregard the message, not to infer that the defendants were connected with it and not to discuss it further.

The defendants here contend that the trial court abused its discretion (*People v. Beeler* (1995) 9 Cal.4th 953, 989) in excusing Juror No. 5. We disagree. Although, as the defendants point out and we have already stated, Juror No. 5 initially thought the message was a joke, she determined that it was not a prank perpetrated by her coworkers, and both her husband and her boss told her it was very serious. The latter acted on his concern by reporting it to law enforcement. If after all this, Juror No. 5 continued to believe it was a joke, and "no big deal," as the defendants here assert, she would not have asked to speak to the trial court about it. She must have had some appreciation for the fact that someone had gone to the trouble of tracking down her place of employment[31] and leaving the message. It was entirely appropriate for the trial court to respond to this well-beyond-de minimus attempt to influence or intimidate this juror by excusing her.

The defendants also contend that the trial court abused its discretion in not excusing Jurors No. 10 and 12 when it excused Juror No. 5. Again, we disagree. Contrary to Juror No. 5, Juror No. 12 had heard the message only once. It was not directed at either of these jurors and their spouses and bosses did not react to it as Juror

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[31] The record suggests that she did not use the same name at her office as she did

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No. 5's did.[32] We agree with the trial court that good cause to excuse either did not appear as a demonstrable reality (*People v. Manriquez* (1976) 59 Cal.App.3d 426, 432), particularly when such action would have resulted in a mistrial.

5. *Denial of Defendants' Motion for a New Trial*[33]

Before addressing the specifics of the defendants' complaints concerning the denial of their new trial motion, we pause first to reiterate and elaborate upon a point we have already made in this opinion in connection with another issue. The defendants' present issues in regard to their motion for a new trial are both dependent on the materiality of any testimony Rodriguez might have offered at trial or was willing to offer at a retrial. We note that Rodriguez made conflicting statements about the subject the defendants anticipated he would ultimately testify to,[34] and he did not come forward until

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for her jury service.

[32] The defendants' assertion that because these jurors originally took the message more seriously than did Juror No. 5, they "had similar pressures to discuss such a threat with their own families or maybe other jurors in the case" is unfounded. Both jurors agreed to follow the trial court's instructions not to discuss the matter with their fellow jurors or anyone else.

[33] In their briefs, appellate counsel for Acosta and Avila refer to exhibits admitted at the hearing on the motion for a new trial. Had counsel complied with this court's directive to "**serve and file** with the clerk of this court **the enclosed form requesting early transmission of any exhibits mentioned in their briefs**," those exhibits would have been readily available to this court. Counsel's failure has caused an unnecessary delay in these appeals. (Original boldprint.)

[34] As the defendants candidly admit in their reply brief, "[W]e do not know for sure what . . . Rodriguez would have stated on the stand . . . ."

months after the verdicts had been rendered.[35] Both of these provided significant bases upon which to impeach any testimony he might give.[36] More importantly, even if Rodriguez testified that he was at Avila's house and had been chased from there to the victim's girlfriend's house, as we have stated before, how the defendants and their companion came to be at that house was not crucial. It was not so because the jury determined that the murder was not premeditated.[37] As far as the gang enhancement is concerned, while evidence that the defendants went to the victim's girlfriend's house in order to kill the victim would have helped to prove the allegation, the jury obviously rejected this scenario in convicting the defendants of second degree murder. The fact that the defendants may have inadvertently come upon the victim while chasing Rodriguez did not preclude a finding that the victim's death was for the benefit of or in association with a gang.

We also observe the following, which we gleaned from the defendants' documents supporting their new trial motion. According to Avila's trial attorney, a month before trial began, an investigator from the district attorney's office interviewed Rodriguez. The latter reported that at 2:00 a.m. on January 1, 2000, he was accosted by the defendants and their companion outside a home between Avila's house and the

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[35] Rodriguez also contradicted an account he had given Avila's attorney in preparation for the defendants' new trial motion.

[36] The trial court so found in denying the new trial motion.

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victim's girlfriend's. The three men "hit [Rodriguez] up" and asked him "where [he was] from." He said he was from Moreno Valley. They then chased him back to the victim's girlfriend's house, where he had been staying earlier. After they knocked him down, he went into the house, emerging after a few minutes to see them kicking the prone victim. There is nothing in the record before this court indicating that defense counsel did not receive discovery concerning this interview. In fact, in his papers in opposition to the defendants' motion for a new trial, the prosecutor stated that a copy of this report was provided to both defendants almost one month before trial began.

Likewise, Acosta's trial attorney stated in a declaration attached to his supplemental motion for a new trial, "Upon reviewing the files [before trial began], I realized that . . . Rodriguez was a crucial witness and needed to be interviewed. *According to the police reports*, . . . Rodriguez was at the scene during the shooting and also, was chased from [the street where Avila lived] to . . . the location of the shooting . . . by the defendant's [*sic*] just seconds prior to the shooting of [the victim]." (Italics added.) It is apparent from Acosta's trial counsel's statement that he obtained discovery of the referenced police report. We assume that Avila's trial attorney received the same.[38]

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[37] The trial court so found in denying the new trial motion.

[38] Attached to the People's response to the defendants' motion are copies of police reports of Rodriguez's various interviews with law enforcement. The record before us does not show that these reports had not been given to defense counsel. In fact, as stated

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What these excerpts from documents authored by the defendants' trial attorneys show is that both were aware before trial began that Rodriguez claimed that the defendants and their companion went to the victim's girlfriend's house not to kill the victim but because they were chasing him.[39] Whether Rodriguez was chased from the house between Avila's and the victim's girlfriend's, or from Avila's, the result is the same; the defendants and their companions came upon the victim outside his girlfriend's house inadvertently. Therefore, this information was not new evidence. The only thing that was "new," if that adjective may be used at all, was Rodriguez's inability or unwillingness to show up at trial and testify.[40] Of course, by the time the new trial motion was heard, this was not new. With that said, we turn to the specific allegations made by the defendants in their briefs.

In their motion for a new trial, the defendants alleged that the prosecution interfered with their ability to present Rodriguez as their witness in two ways. The first

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in the body of this opinion, Acosta's attorney admitted in his declaration that police report*s* concerning Rodriguez's statement to the police had been given to him before trial. In his points and authorities opposing the new trial motion, the prosecutor asserted that both defense counsel had been given copies of all the reports and audiotapes of interviews with Rodriguez by law enforcement.

[39] The trial court so found in denying the new trial motion.

[40] In his declaration in support of the new trial motion, Acosta's trial attorney stated that he made no effort after Rodriguez failed to appear to locate him during the remainder of the trial. He explained that his previous attempts to locate Rodriguez had failed and he had been told by family members of the defendants that Rodriguez's family had told them that Rodriguez had gone to Mexico.

was the fact that at 4:20 a.m. on the day he had been ordered by the trial court to return, Rodriguez was arrested by a deputy sheriff for driving under the influence. At 6:30 a.m., he was booked into jail, "across the street from the courthouse" where he had been ordered to appear and cite/released about noon.[41] Rodriguez told an investigator from the prosecutor's office that while he was in custody, he told jail personnel that he needed to be taken to court, but they ignored him. The trial court found that jail personnel routinely keep DUI arrestees for four to five hours to allow them time to sober up.

As the trial court concluded, the defendants did not demonstrate below that the failure of jail personnel to notify it of Rodriguez's whereabouts the morning of the day he had been ordered to appear interfered with that appearance, which could have easily been made upon his release and during the following 12 days before the defense rested.[42] The defendants' present assertion that this failure somehow had the psychological effect of discouraging Rodriguez from appearing in court is based on pure speculation.

The defendants also assert that the prosecutor's action resulted in Rodriguez's failure to appear. In so doing, they accept assertions made by trial counsel for Acosta in his sworn declaration, and ignore contradictory assertions made by the prosecutor, his

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[41] In his sworn declaration in opposition to defendants' new trial motion, the prosecutor stated that he had no knowledge of this arrest until November 2001, when Rodriguez's attorney informed him of it at Rodriguez's contempt hearing.

[42] The trial court also found that there was no evidence the defense made any effort to locate Rodriguez during this period, a conclusion supported by the declarations submitted in connection with the new trial motion.

investigator, *Acosta's investigator*, and by Rodriguez himself in their sworn declarations. Otherwise, they fail to cite to the record in support of their assertions.

In their sworn declarations, the prosecutor's investigator and Acosta's investigator stated that several weeks before trial began, Rodriguez refused invitations by Avila's trial attorney and Acosta's investigator to be interviewed. In his moving papers, the prosecutor asserted that Rodriguez feared the defendants and did not want them to have his address. The prosecutor told defense counsel this many times and it was mentioned in a report they had a month before trial began. The prosecutor refused to disclose Rodriguez's address to defense counsel, but told them if they wanted it, they could get a court order through formal discovery procedures. They did not.

In his sworn declaration, the prosecutor stated that he told defense counsel that rather than have Rodriguez come to court on the day he did only to be ordered to return later, the prosecutor would let counsel serve Rodriguez with subpoenas at the district attorney's office, or the prosecutor would deliver to Rodriguez any subpoenas the defense had for him. Additionally, the prosecutor would see to it that Rodriguez appeared when defense counsel wanted him. The prosecutor explained to defense counsel that he feared if Rodriguez came to court, he would be intimidated by the presence of the defendants and would bolt. Both defense counsel declined his offer. He told them if they insisted on Rodriguez's coming to court and being ordered back at a later date, he would no longer accept responsibility for Rodriguez.

In his sworn declaration, trial counsel for Acosta stated that on that day, as

Rodriguez was getting into an elevator at the courthouse after having been ordered to return, Rodriguez appeared as though he wanted to talk to counsel. However, the prosecutor's investigator, who had brought Rodriguez to court and was taking him home, cut off their conversation and hurried Rodriguez along, telling counsel he'd have to speak to Rodriguez at a later time. Later, Rodriguez told counsel that he had wanted to speak to him that day, but the prosecutor's investigator had told him not to. On the other hand, in his sworn declaration, the prosecutor's investigator denied ever telling Rodriguez not to speak to defense counsel or their investigators. He told Acosta's attorney that he did not care if counsel talked to Rodriguez, as Rodriguez was then a defense witness.[43] It was Rodriguez, and not the prosecutor's investigator, who refused to speak to defense counsel. In his sworn declaration, Rodriguez similarly denied being told by the prosecutor's investigator not to talk to defense counsel or their investigators. He stated that he told defense counsel he did not want to talk to him. He also denied telling Acosta's attorney that the prosecutor's investigator had told him not to speak to defense counsel.

Faced with these conflicting declarations, the trial court concluded that it was clear that Rodriguez did not want to speak to the defense pretrial, and this attitude persisted throughout trial, as evidenced by his failure to appear, despite the court order.

When Rodriguez failed to appear as ordered, the prosecutor, according to his

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[43] Formerly, the prosecutor had anticipated calling Rodriguez as a witness, but had

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sworn declaration, gave the trial court his address so it could issue a no-bail arrest warrant. The prosecutor told both defense attorneys that he had provided this information to the court and would no longer try to locate Rodriguez. Neither counsel asked the prosecutor for Rodriguez's address.

Acosta's attorney, in his sworn declaration, stated that he made no effort after Rodriguez failed to appear in court to locate him. In his sworn declaration, Acosta's investigator corroborated this and stated that neither before trial nor after Rodriguez failed to appear did Acosta's attorney ask him to set up an interview of Rodriguez at the district attorney's office.[44]

In his sworn declaration, Avila's attorney stated that his investigator found Rodriguez almost two months after the verdicts had been rendered. He stated that when his investigator attempted to speak to Rodriguez, the latter became combative. He added that his investigator found Rodriguez "without great effort" on the first day he undertook to locate him.[45]

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decided not to.

[44] In his points and authorities in opposition to the motion for a new trial, the prosecutor asserted that neither defense counsel had given him a specific date and time for such an interview, although he conveyed to them a willingness to have it.

[45] According to the prosecutor's assertion at the hearing on the motion for a new trial, Rodriguez had remained in the home he had been in when the prosecutor had given his address to the trial court. Acosta's attorney asserted at the hearing on the new trial motion that his investigator had gone to the address stated for Rodriguez on the police report and someone there had given him Rodriguez's current address.

There was no evidence presented at the hearing on the new trial motion that the prosecutor's actions either directly or indirectly rendered Rodriguez unavailable to the defense.

The defendants contend that the trial court erred in denying their new trial motion on the basis that the prosecution failed to disclose exculpatory evidence. However, here, they employ a theory different from that asserted below, claiming that the prosecutor withheld "the identity and location of . . . Rodriguez." The first assertion is simply untrue -- the defense knew Rodriguez's identity from the start. While Rodriguez's location was not *readily* available to the defense[46] until the day he failed to appear in court, the prosecutor had previously invited defense counsel to interview him at the district attorney's office, which they failed to do. What occurred after Rodriguez's failure to appear is nothing short of a complete lack of effort on the part of defense counsel, for which the prosecutor cannot be held responsible.

There was no error in the trial court's denial of the defendants' motion for a new trial and no deprivation of due and/or compulsory process and/or fair trial in the actions of the prosecutor or agents of the state.

DISPOSITION

The trial court is directed to amend the minutes of Acosta's sentencing hearing to omit reference to the two-year concurrent sentence for the gang enhancement on the

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[46] However, they might have obtained it had they brought a formal discovery

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second degree murder (count 1). Under the provisions of section 186.22, subdivision (b)(1) and (4), as it existed at the time this crime was committed, Acosta must serve a minimum of 15 years for the murder, rather than serve an additional term for the enhancement. (*People v. Harper* (2003) 109 Cal.App.4th 520, 527 [Div. 1 of this court]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 486.) The trial court is further directed to amend Acosta's abstract of judgment to reflect this fact, as well as the imposition of a concurrent term of one year for his prison prior pursuant to section 667.5, subdivision (b). In all other respects, Acosta's judgment is affirmed.

The trial court is directed to amend the minutes of Avila's sentencing hearing to omit its statement that the enhancement pursuant to section 186.22, subdivision (b)(1), was stricken. In fact, it was erroneously stayed by the trial court. The court is directed to amend the minutes of the sentencing hearing and the abstract to show that a minimum term of 15 years for the second degree murder is imposed pursuant to this enhancement,

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motion.

but no additional sentence under the authority cited above. In all other respects, Avila's judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.