No. 18 - _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO HERNANDEZ-DELGADO

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO ERNESTO HERNANDEZ-DELGADO, Defendant and Appellant.	H043755 (Monterey County Super. Ct. No. SS140200A)

I. INTRODUCTION

Defendant Alejandro Ernesto Hernandez-Delgado appeals after a jury convicted him of first degree murder (Pen. Code, § 187, subd. (a))[1] and found true gang and firearm allegations (§§ 186.22, subd. (b)(1)(C), 12022.53, subd. (d)). The trial court sentenced defendant to an indeterminate prison term of 50 years to life.

On appeal, defendant challenges the sufficiency of the evidence supporting the gang allegation, and he contends the trial court erred by: (1) admitting evidence from Facebook; (2) improperly instructing the jury regarding the gang allegation; (3) permitting further argument about accomplice testimony during jury deliberations; (4) refusing a juror's request to be discharged; and (5) denying defendant's motion for a

[1] All further unspecified section referhences are to the Penal Code.

new trial, which was based on an allegation of jury misconduct. Defendant also contends the cumulative effect of the errors warrants reversal of the judgment, and that his case should be remanded for resentencing so the trial court can exercise its discretion to strike the firearm enhancement.

For reasons that we will explain, we will affirm the judgment.

II. BACKGROUND

The charges against defendant stemmed from a shooting on the night of October 20, 2012, following a beach party in Sand City. The shooting victim, Antonio Garcia, was a Norteño gang member. Defendant was a Sureño gang member and a member of a subset called PVL.

The prosecution presented testimony from defendant's two companions on the night of the shooting: Jason Avendano and Omar Ruiz, both of whom were admitted Sureño gang members or associates. Another Sureño gang member or associate, Christian Cruz, testified about admissions defendant made after the shooting.

A. The Shooting

Most people at the Sand City beach party, including victim Garcia, were Norteños. Oligario Reyes (known as Ole), was also at the party. At some point, Garcia and Ole left together. Garcia appeared to be intoxicated.

About five minutes later, two other party-goers left the beach. They heard a bang and then came upon Garcia's body lying on the path. Other party-goers heard loud bangs after leaving the beach. They turned towards the sounds and saw three people running away. Meanwhile, Ole returned to the party and said that Garcia had been shot by "some scraps."

Police responded and found Garcia. Garcia was airlifted to the hospital, where he later died. Garcia had been shot in the lower back by a shotgun. His blood alcohol level was 0.15 percent.

B. Testimony of Fellow Gang Members

1. Avendano

Avendano testified under a grant of immunity, meaning he could not be prosecuted for any crime based on his testimony.[2] Avendano admitted being a Sureño gang affiliate. He hung around with Sureño gang members but had not been jumped in to the gang. Defendant and his brother both claimed to be Sureño gang members.

Avendano drove defendant and Ruiz to the beach on the night of the shooting. They smoked marijuana in the car and then went out for a walk. They encountered Ole. Defendant fought with Ole and then chased him with a shotgun, which defendant had been keeping in his pants.

Garcia then appeared. Defendant pointed the gun at Garcia and shot him. Avendano, Ruiz, and defendant all ran back to the car. Defendant made statements about shooting Garcia. Defendant also said he had a problem with Garcia that was related to the Norteño-Sureño rivalry.

2. Ruiz

Ruiz testified under an agreement with the prosecution, under which he would receive a maximum nine-year prison term, rather than a term of 15 years to life, if he testified truthfully. Ruiz was a Sureño gang member who decided to come clean to his probation officer in hopes of getting protection from rival gang members who were trying to kill him.

According to Ruiz, defendant said they were going to go to a Norteño party. As they walked towards the bonfire, defendant noticed some people walking to the parking lot. Defendant whistled, and Ole approached. Defendant pulled out a shotgun. Ole pushed the shotgun away and ran back towards the beach. Garcia then approached.

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[2] Avendano admitted he had been diagnosed as psychotic and schizophrenic, and that he was taking Abilify at the time of trial. Avendano also acknowledged that defendant had previously beat him up.

Defendant responded by pointing the shotgun at Garcia. Garcia turned around, and defendant shot him.

After the shooting, Ruiz heard defendant tell someone else "that [defendant] was the one that pulled the trigger." According to Ruiz, killing a rival gang member means "a lot" and increases a gang member's "rank."

Around the time of the shooting, Ruiz and defendant sometimes communicated via Facebook. They used Facebook to arrange meetings, and defendant would show up as expected.

3. Cruz

Cruz also testified pursuant to an agreement with the prosecution, under which he faced a maximum nine-year prison term if he testified truthfully, rather than a life term. His agreement concerned charges stemming from his involvement in a separate gang murder.[3] Cruz acknowledged having been a Sureño gang member or associate.

At some point after the shooting at the beach, Cruz was hanging out with defendant, Avendano, Ruiz, and defendant's brother. Someone asked Avendano, "How do you know about P.V.L.?" Avendano smirked, laughed, and responded, "Ask [Garcia]."

Cruz asked Avendano what he meant. Defendant and Avendano told Cruz what had happened on the night of the shooting. They explained that some Norteños had been having a bonfire at the beach and that defendant, Avendano, and Ruiz had traveled to the beach in a rented car, "looking for trouble." Defendant had a shotgun with him. Defendant had a confrontation with Ole, during which Ole pushed defendant's gun down and then ran away, passing Garcia, who was listening to music through headphones.

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[3] Cruz testified that he had been "riding around in a car" with several other Sureño gang members. As they drove through Seaside, they saw an individual they knew as a Northerner. One of the other Sureño gang members got out of the car and shot the person.

Defendant approached Garcia and put the barrel of the shotgun against Garcia's chest. Garcia turned and walked away. Defendant then shot him.

When defendant told Cruz about the shooting, Cruz felt that defendant "was bragging." Defendant indicated that no one else had done anything for their friend who had been killed. Defendant also indicated that the shooting was "putting in work" and helping to "establish the neighborhood in Seaside."

C. Defendant's Statements

The police learned that defendant was working at the Rio Grill, a restaurant in Carmel. They arranged to have Avendano pose as a worker and talk to defendant, while officers listened to their conversation. Avendano told defendant that someone was saying that defendant shot Garcia. Defendant did not deny the statement. Avendano asked defendant where he had put the gun. Defendant responded, "It's not in California." Avendano asked defendant if he had been scared when he shot Garcia. Defendant replied, "No." Defendant indicated he thought Avendano should not be working with him, and he told Avendano, "Don't talk to anybody about this."

D. Gang Evidence

In 2013 or 2014, Lieutenant William Clark was researching social media sites as part of his investigation into the PVL gang. Lieutenant Clark located photographs of defendant on Facebook that depicted defendant holding three fingers in front of his body. Through a search warrant, the police obtained additional records from Facebook, which showed defendant had two separate accounts, one of which had been created on the date of the shooting. The records obtained included posted photographs that appeared to be "selfie photographs."

Investigator Rick Gamble testified as the prosecution's gang expert. He described how southern California was originally considered Sureño territory while northern California was originally considered Norteño territory. The feud between Sureños and Norteños began in the prisons, between La Eme (the Mexican Mafia) and Nuestra

Familia. He testified that many Sureños and Norteños divide themselves up into smaller groups based on neighborhoods, called "subsets." Investigator Gamble described how Sureño neighborhood subsets must "ultimately" answer to La Eme in prison.

Given a hypothetical situation that reflected the facts of this case, Investigator Gamble opined that the shooter would intend to benefit, further, or promote the Sureño gang. The shooting of a Norteño gang member would promote the reputation of the Sureño gang as "more violent."

According to Investigator Gamble, the Sureño gang and its subsets use the color blue, the number 13, the letter M, the word "Sur," and the number 3 or three dots to identify themselves as Sureño.

Investigator Gamble opined that the primary activities of "the criminal street gangs" was "the commission of certain crimes." He then discussed a number of prior cases. The first case involved two Sureño gang members who were convicted of attempted homicide after shooting a Norteño gang member in Marina. Another case involved four Sureño gang members who were convicted of attempted murder after shooting two Hispanic juveniles. A third case involved two Sureño gang members who stole a vehicle in Salinas and were convicted of auto theft and possession of stolen property. A fourth case involved two Sureño gang members who were convicted of murder after shooting a Norteño gang member in Salinas.

Investigator Gamble opined that PVL met the definition of a criminal street gang and that defendant was an active PVL and active Sureño gang member in 2012.

Investigator Gamble identified a number of images downloaded from defendant's Facebook page as gang-related. Exhibit No. 47 was a blue-hued photograph of three people whose faces were painted "in a clown or theater-type paint." The title of the photo was "D Sur 13 like." Exhibits 48 and 49 were also blue-hued; they showed a large number 13 with the words "South Side" across the number. The title of the photo was "South Side Homies," and the comments under one of the photos included one attributed

to Jose Samano that read, "Sur 13, homey, P.V.L. for life." Exhibit 50 was a "selfie" of defendant "throwing" the PVL gang sign, apparently in front of a mirror. Exhibit 51 was another "selfie" of defendant in front of a mirror. Exhibit 52 was a photo of defendant throwing a "hand sign of the [number] three" while making a "P" with one finger. Exhibit 53 was an image of the California bear, with "831" in blue and "PVL 13" on top of the bear. Exhibit 54 was an image of a blue heart with the number 13 superimposed on it, with the title "Sur x3." Exhibit 55 was an image of a Sureño rapper named Baby Aztec, which had the number 13 "shadowed in." Exhibit 56 was a blue and black image that contained the phrase "Mi vida loca," which means "My crazy life" and is part of the gang culture. The image was titled, "Pomona Sur 13." Exhibit 58 was an image with clown or theatrical faces and an Aztec warrior, with the title "Sureños 13."

Cristal Sanchez translated some of the statements contained in the Facebook evidence. A comment attributed to defendant underneath Exhibit 48 was translated to "Yeah, yeah, yeah, until death." Exhibit 57 contained Facebook posts and messages. One was a birthday greeting sent to defendant on February 9, 2014.[4] Just below that, a comment read, "Where are the pussy Norteños?" Another message attributed to defendant stated, "Sur 13 for life. The gang life lasts until death comes." A comment from another user below that stated, "Sur 13 for life, loco." Other comments attributed to defendant were similar. One of defendant's comments read, "Yes, with my gun, I'm going to disembowel fucking chapetes." Other comments attributed to defendant included "Nor shit 13, Nor fags 13, bunch of fags" and "Yeah, fuck bitch Norteños." A comment by another person referred to Norteños as "pussies" who would "run like a bitch" and "fuck[] each other through the asses."

The Facebook records also contained messages between defendant and Ruiz. In some of the messages, defendant and Ruiz arranged to get together on different

[4] The parties stipulated that defendant's date of birth is February 9, 1991.

occasions. The Facebook records also contained messages between defendant and someone identified as "Smiley Locs." One of the messages referenced going to "shoot." Another message referred to "weed," and another one used the term "Fag."

E. Defense Argument

Defendant did not testify or present evidence at trial. His trial counsel argued that there was no evidence of premeditation and deliberation, in that there was no evidence of a plan to "go kill somebody." She argued that if there had been such a plan, Avendano and Ruiz would be accomplices. She further argued that Avendano and Ruiz were not credible, since they were "arguably accomplices" who were getting a benefit for their testimony. Defendant's trial counsel also argued that Cruz was biased because he was Ruiz's cousin. She pointed out that defendant had no prior criminal record.

F. Convictions, Verdicts, and Sentence

Defendant was charged with willful, deliberate, and premeditated first degree murder (§ 187, subd. (a)). As amended, the information alleged that defendant committed the murder for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subds. (b)(5) & (b)(1)(C)) and that defendant personally and intentionally discharged a firearm in the commission of the murder, causing death (§ 12022.53, subd. (d)).

The jury retired to deliberate at 11:00 a.m. on March 3, 2016. After a lunch recess, the jury sent three notes requesting readback of testimony. The jury deliberated until 4:00 p.m. that day.

Jury deliberations resumed at 8:30 a.m. the following day, March 4, 2016. After a morning break and a lunch recess, the jury requested clarification of CALCRIM No. 334, the instruction on accomplice testimony. The trial court reread CALCRIM No. 334 to the jury, permitted argument to be presented by the prosecution and defense, and then provided further instruction to the jury. The jury resumed deliberations, but shortly

thereafter reported that the jurors were unable to agree upon a verdict. The trial court ordered the jury to deliberate further.

On March 7, 2016, what would have been the third day of deliberations, Juror No. 6 (who had previously indicated he could not serve on that date) was replaced by an alternate juror. Also on that date, the trial court decided not to discharge Juror No. 12, who had missed a number of medical appointments during the trial. After replacing Juror No. 6, the trial court instructed the jury to "set aside and disregard all past deliberations and begin your deliberations all over again."

Jury deliberations continued on March 8, 2016. The jury reached its verdicts that morning, finding defendant guilty of first degree murder and finding the gang and firearm allegations true.

Defendant filed a motion for a new trial after the verdicts were returned, based on information obtained from Juror No. 4. At the sentencing hearing, the trial court denied defendant's motion for a new trial and imposed consecutive terms of 25 years to life for the murder and the section 12022.53 firearm use allegation. The trial court originally imposed a consecutive 10-year term for the gang allegation but subsequently struck that punishment "pursuant to statutory law."[5]

III. DISCUSSION

A. Facebook Evidence

Defendant challenges the trial court's ruling allowing the prosecution to present the Facebook evidence (i.e., the posts, comments, and messages). Defendant argues that the prosecution did not lay a proper foundation for the evidence. He alternatively argues that the Facebook evidence should have been excluded as violating Evidence Code

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[5] Section 186.22, subdivision (b)(1)(C) provides for a 10-year enhancement when the underlying offense is a violent felony, but when the underlying felony is "punishable by imprisonment in the state prison for life," section 186.22, subdivision (b)(5) specifies an alternate penalty provision: a minimum parole eligibility term of 15 years. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 (*Lopez*).)

section 352 and his rights to confrontation and due process. The Attorney General contends the trial court's ruling was not an abuse of discretion.

1. Standard of Review

"We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citations.] Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).)

2. Proceedings Below

In his trial brief, defendant objected to the introduction of the Facebook evidence, asserting that there was "no reliable basis" upon which to find that defendant actually controlled or maintained the Facebook accounts that were in his name. Defendant also argued that the Facebook evidence was hearsay and "highly prejudicial."

In their trial brief, the People sought to admit the Facebook evidence, indicating they would authenticate the evidence at a pretrial hearing. (See Evid. Code, § 403, subd. (a)(3).) The People asserted that they would show defendant was the author of some of the messages and thus that those messages were admissible as admissions. The People asserted that messages posted by other people were admissible as adoptive admissions, as circumstantial evidence, or under the judicially-created hearsay exception for implied assertions recognized in *People v. Morgan* (2005) 125 Cal.App.4th 935.

The trial court held a hearing on the admissibility of the Facebook evidence, which included testimony from the deputy who obtained a search warrant for the Facebook records; Sanchez, who provided Spanish-to-English translation of some of the Facebook messages; Lieutenant Clark, who originally found defendant's Facebook page; and Omar Venegas, who had used Facebook to communicate with defendant.

Evidence at the hearing showed that a Facebook page attributed to defendant included photos of defendant, at least one of which appeared to be a "selfie." The

messages in the Facebook account included a "Happy birthday" message to defendant on defendant's birthday. There was also a message authored by defendant and addressed to Ruiz.

Defendant's trial counsel argued that "anybody can put a Facebook page up" and pointed out that none of the People's witnesses actually knew whether defendant himself created any of the posts or messages.

The trial court ruled it would admit the Facebook evidence. The trial court indicated that the Facebook evidence carried "sufficient indicia of reliability such that a reasonable jury could rely upon it," and that it was "the jury's job, as trier of fact, to determine if, in fact, the document is authentic."

The trial court later considered some of the individual Facebook posts and messages. In addition to her previous arguments, defendant's trial counsel asserted that the evidence would be prejudicial because it would paint defendant as a gang member and because the posts and messages contained "shocking" and offensive language. Defendant's trial counsel also argued that admission of some of the messages would violate defendant's confrontation rights because he could not cross-examine the people who wrote the messages. The trial court ruled that the evidence could be introduced.

During trial, a further hearing was held on the Facebook evidence that the prosecution intended to introduce. Defendant's trial counsel objected to each post as inflammatory because the posts would be used to imply that defendant was a gang member. The trial court went through each of the proposed exhibits. The court excluded one photograph as prejudicial but admitted a comment under the photograph and the remaining exhibits, finding them "more probative than prejudicial."

3. Foundation/Authentication

Defendant contends the prosecution failed to properly authenticate the Facebook evidence—that is, show that the Facebook posts and messages were created by defendant himself. (See Evid. Code, § 1401; *Goldsmith*, *supra*, 59 Cal.4th at p. 266.)

"Authentication of a writing, including a photograph, is required before it may be admitted in evidence. [Citations.] Authentication is to be determined by the trial court as a preliminary fact [citation] and is statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law" [citation]." (*Goldsmith, supra,* 59 Cal.4th at p. 266.)

When seeking to establish authentication, "what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*Goldsmith, supra,* 59 Cal.4th at p. 267.) The requisite authentication of photographic evidence need not be provided by the person taking the photograph. Rather, sufficient foundation may be provided by "other witness testimony, circumstantial evidence, content and location. [Citations.]" (*Id.* at p. 268.)

Defendant contends his case is similar to *People v. Beckley* (2010) 185 Cal.App.4th 509 (*Beckley*), a case decided prior to *Goldsmith.* The *Beckley* court held that a photograph downloaded from Beckley's MySpace page had not been properly authenticated. The photograph had been downloaded by a detective, and it showed Beckley's girlfriend flashing a gang sign. The appellate court found that the detective's testimony was insufficient to sustain a finding that the photograph was accurate, since the detective had no personal knowledge that the photograph truthfully portrayed Beckley's girlfriend flashing the gang sign and there was no expert testimony that the photograph had not been faked. (*Beckley, supra,* at p. 515.)[6]

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[6] Defendant asserts that *Goldsmith* "apparently endorsed" the reasoning of *Beckley.* In *Goldsmith*, the court found *Beckley* "distinguishable" because the issue in *Goldsmith* was authentication of red light camera evidence. (*Goldsmith, supra,* 59 Cal.4th at p. 272, fn. 8.) The *Goldsmith* court also observed that *Beckley* and other cases "serve to demonstrate the need to carefully assess the specific nature of the photographic

Beckley was distinguished by the court in *People v. Valdez* (2011) 201 Cal.App.4th 1429 (*Valdez*), where the challenged evidence was print-outs from Valdez's MySpace page. An investigator had acknowledged that "he did not know who uploaded the photographs or messages on Valdez's page, who created the page, or how many people had a password to post content on the page." (*Id.* at p. 1434.) However, there was evidence showing that the MySpace page belonged to Valdez, including: a photograph of Valdez's face in the area identifying the page owner, greetings addressed to Valdez by name in the comment section, and personal details associated with Valdez. (*Id.* at p. 1435.) There was no evidence that any of the postings were "planted or false." (*Id.* at p. 1436.) The appellate court upheld the trial court's admission of the MySpace print-outs, finding that "the prosecution met its initial burden to support its claim the MySpace site belonged to Valdez, and that the photographs and other content at the page were not falsified, but accurately depicted what they purported to show." (*Id.* at p. 1434.) In explaining why *Beckley* was dissimilar, the *Valdez* court focused on "the pervasive consistency of the content of [Valdez's] page, filled with personal photographs, communications, and other details tending together to identify and show owner-management of a page devoted to gang-related interests." (*Valdez, supra,* at p. 1436.)

Photographs taken from a cell phone were challenged as not properly authenticated in *In re K.B.* (2015) 238 Cal.App.4th 989 (*K.B.*), which criticized *Beckley* as inconsistent with *Goldsmith*. The *K.B.* court held that online photographs need not be authenticated by "the person who actually created and uploaded the image" nor by an expert witness. (*K.B., supra,* at p. 997.) The photographs at issue in *K.B.* showed the defendant with a firearm. Officers had downloaded the photographs from a cellphone

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image being offered into evidence and the purpose for which it is being offered in determining whether the necessary foundation for admission has been met." (*Goldsmith, supra,* at p. 272, fn. 8.) The *Goldsmith* court did not, however, endorse the specific reasoning of, nor the result reached, in *Beckley.*

that belonged to K.B.'s associate. Officers had also viewed identical photographs on K.B.'s Instagram—a social media platform that lets users create accounts and share photographs. When the defendant was arrested, he was wearing the same clothing as in the photographs, and he was associating with people in some of the photographs. The *K.B.* court noted that "these factors point to the authenticity and genuineness of the photographs" and that there was no evidence indicating the photographs were inaccurate. (*Id.* at p. 998.) Thus, the trial court had reasonably found "the prosecution sufficiently authenticated the incriminating photographs." (*Ibid.*)

Defendant cites to opinions from other jurisdictions, claiming they are "in accord with . . . *Beckley*." But we are required to follow precedent set by our Supreme Court. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) Under the authentication rules set forth in *Goldsmith,* the trial court here did not abuse its discretion by finding the Facebook evidence had been properly authenticated. The prosecution was not required to establish authentication through the testimony of the person who took the photographs or made the Facebook posts or comments, and expert testimony was not required. (*Goldsmith, supra,* 59 Cal.4th at p. 267.) The circumstantial evidence and witness testimony here was sufficient. That evidence included: several of the photographs on the Facebook page were "selfies" of defendant, messages were exchanged between defendant and his known associates, and a happy birthday message was posted on defendant's actual birthday. There was no evidence that any of the postings were "planted or false." (See *Valdez, supra,* 201 Cal.App.4th at p. 1436.) As in *Valdez,* the content of defendant's Facebook page was consistent, in that it included "personal photographs, communications, and other details tending together to identify and show owner-management of a page devoted to gang-related interests." (*Id.* at p. 1436.) This evidence provided the requisite "prima facie case" of authenticity. (*Goldsmith, supra,* at p. 267.)

4. Confrontation Clause

Defendant contends that even if the trial court did not err by finding that the Facebook evidence had been sufficiently authenticated, the Facebook evidence was testimonial hearsay and its admission violated the Confrontation Clause because Facebook provided the evidence in response to a search warrant. Defendant relies on *Bullcoming v. New Mexico* (2011) 564 U.S. 647 (*Bullcoming*), which held that "[a] document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial. [Citation.]" (*Id.* at p. 664.)

As the Attorney General points out, the Facebook posts and messages "existed before the search warrant was issued" and thus were *not* "created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation." (*Bullcoming, supra,* 564 U.S. at p. 664.) The Facebook posts and messages were merely printed out for trial. (Cf. *People v. Lopez* (2012) 55 Cal.4th 569, 583 ["Because, unlike a person, a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts . . . did not implicate the Sixth Amendment's right to confrontation."].) Thus, that evidence did not constitute testimonial hearsay and its admission did not violate the Confrontation Clause.

5. Evidence Code section 352/Due Process

Defendant contends the trial court abused its discretion by admitting the Facebook evidence because its "probative value was far exceeded by [its] prejudicial nature." (See Evid. Code, § 352.) Defendant further argues that the admission of the Facebook evidence violated his due process rights under the federal constitution.

The Attorney General contends that the Facebook evidence had a high probative value because it demonstrated defendant's "extreme animosity toward rival Norteño gang members," which helped show his motive, premeditation, deliberation, and intent to kill. Defendant acknowledges this evidentiary purpose but argues that the Facebook evidence

also included statements that contained homophobic slurs, statements about marijuana, and statements that referenced violent acts.

Under Evidence Code section 352, evidence is substantially more prejudicial than probative "if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) Having reviewed the Facebook evidence, we determine that the trial court's decision to admit that evidence was not an abuse of discretion. The Facebook evidence had probative value in showing defendant's dedication to the Sureño gang, which was "central to the case to explain a motive" for the shooting. (See *Valdez, supra,* 201 Cal.App.4th at p. 1437.) None of the posts or comments was so inflammatory as to "rise to the level of evoking an emotional bias against the defendant as an individual apart from what the facts proved." (See *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35.)

Regarding defendant's due process claim, we note that "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.) On this record, even if we had found error under state law, we would find no due process violation. The evidence of defendant's guilt was strong, as it included testimony from two of his companions and evidence of defendant's subsequent admissions to the crime. Significantly, the People's case against defendant "was based primarily on evidence *other* than" the Facebook evidence. (See *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 20.) And none of the Facebook evidence was "so 'uniquely inflammatory' as to render the trial fundamentally unfair. [Citation.]" (*Id.* at p. 21.)

B. Gang Allegation

Relying on *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), defendant argues that the jury instruction on the gang allegation was "deficient" because it failed to inform the

jury that there had to be "an associational relationship between the PVL and the Sureños." Also in reliance on *Prunty,* defendant argues that there was insufficient evidence to support the gang allegation.

The Attorney General argues that the instructional and sufficiency issues are both moot because the trial court struck the punishment for the gang allegation. Alternatively, the Attorney General argues the instruction was properly given and that sufficient evidence supports the gang allegation.

1. Mootness

As noted above, defendant initially was sentenced to a 10-year determinate term for the gang allegation, but the trial court later struck that punishment. As the trial court recognized, imposition of a determinate term for the gang allegation was improper since defendant's underlying felony was one punishable by a life term. (See § 186.22, subd. (b)(5); *Lopez, supra,* 34 Cal.4th at p. 1004.) Under section 186.22, subdivision (b)(5), the proper sentencing consequence for the gang allegation was a 15-year minimum parole term for the underlying felony.

In this case, defendant was already required to serve at least 25 years because the underlying felony was first degree murder. (§ 190, subds. (a), (e).) Thus, the gang allegation's 15-year minimum parole term had no practical effect on defendant's sentence. Nevertheless, the gang allegation finding remains relevant. As our Supreme Court has explained, the gang allegation finding is " 'a factor that may be considered by the Board of Prison Terms when determining a defendant's release date, even if it does not extend the minimum parole date per se.' " (*Lopez, supra,* 34 Cal.4th at p. 1009.) The true finding on the gang allegation may also have legal effect in a future case. (Cf. *In re Varnell* (2003) 30 Cal.4th 1132, 1137-1138.)

Here, the trial court expressly stated it was striking "[j]ust the punishment," not the true finding on the gang allegation. Accordingly, we will consider the merits of defendant's claims regarding the gang allegation.

2. The STEP Act and *Prunty*

The STEP Act provides for a sentencing enhancement on individuals who commit felonies "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . ." (§ 186.22, subd. (b)(1).)

The phrase " 'criminal street gang' " is defined in section 186.22, subdivision (f) as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity."

"A gang engages in a pattern of criminal gang activity' when its members participate in 'two or more' specified criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.' " (*People v. Loeun* (1997) 17 Cal.4th 1, 4, quoting § 186.22, subd. (e).)

In *Prunty*, the California Supreme Court observed that the STEP Act requires the evidence to "show that it is the *same 'group'* that meets the definition of section 186.22(f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under section 186.22(b)." (*Prunty, supra*, 62 Cal.4th at p. 72, italics added, fn. omitted; see also *id.* at p. 81 ["This 'sameness' requirement means that the prosecution must show that the group the defendant acted to benefit, the group that committed the predicate offenses, and the group whose primary activities are introduced, is one and the same."].) For this reason, the court held that "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the

commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67-68.)

In *Prunty*, the defendant was a Norteño gang member and a member of the Detroit Boulevard Norteño subset. The prosecution's theory was that Prunty committed an assault with the intent to benefit the Norteños, which had " 'a lot of subsets' " in the Sacramento area. (*Prunty, supra,* 62 Cal.4th at p. 69.) The prosecution presented evidence of two predicate offenses involving two other Norteño gang subsets, the Varrio Gardenland Norteños and the Del Paso Heights Norteños. (*Ibid*.) However, "the prosecution did not introduce specific evidence showing these subsets identified with a larger Norteño group" and did not show that those Norteño subsets "shared a connection with each other, or with any other Norteño-identified subset." (*Ibid.*) Thus, the prosecution failed to show that all the evidence satisfying the elements of section 186.22 related to the same gang, and the evidence was insufficient to support the true finding on the gang allegation.

3. Jury Instruction Given

Pursuant to CALCRIM No. 1401, the jury was instructed: "If you find the defendant guilty of murder, you must then decide whether the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. [¶] To prove this allegation, the People must prove that: [¶] One, the defendant committed the crime for the benefit of, at the direction of or in association with a criminal street gang; [¶] And two, the defendant intended to assist, further or promote criminal conduct by gang members.

"A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal. [¶] One, that has a common name or common identifying sign or symbol; [¶] Two, that has, as one or more of its primary activities, the commission of the theft of or unlawful taking of a vehicle or unlawful

homicide; [¶] And three, whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.

"[¶] . . . [¶]

"The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

4. Jury Instruction – Arguments and Analysis

Defendant contends that the gang-allegation instruction was deficient under *Prunty* because it did not "inform the jury of the requirement that they [*sic*] find an associational relationship between the PVL and the Sureños."

A criminal defendant has a right to accurate instructions on the elements of a charged crime or allegation. (*People v. Mil* (2012) 53 Cal.4th 400, 409.) We review de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

The trial court's instruction on the meaning of "criminal street gang" tracked the language of section 186.22, subdivision (f), and defendant failed to request clarifying language to alleviate the concerns he now expresses. "The language of a statute . . . is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language." (*People v. Poggi* (1988) 45 Cal.3d 306, 327.)

In this case, the gang expert opined that a hypothetical shooting like the one committed in this case would benefit or promote the Sureño gang. The gang expert discussed the symbols and signs common to the Sureño gang. The gang expert provided evidence of predicate offenses committed by members of the Sureño gang. The gang expert appeared to be referring to the Sureño gang when he testified about the primary activities of criminal street gangs. Thus, unlike in *Prunty,* there was no evidence that

different subsets committed the predicate offenses. Rather the evidence presented showed that the same group—the Sureños—committed the predicate offenses, engaged in criminal primary activities, and was the gang that defendant sought to benefit or acted in association with. Under these circumstances, the jury would have had no difficulty understanding the statutory language without guidance. As *Prunty* made clear, "[t]he STEP Act does not require prosecutors to prove that an 'umbrella' gang exists." (*Prunty, supra*, 62 Cal.4 at p. 71, fn. 2.) For these reasons, there was no instructional error.

5. Sufficiency of the Evidence

" 'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) The same standard applies to our review of evidence to support a gang allegation finding. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

Defendant contends the evidence introduced to prove the gang allegation was deficient because the prosecution failed to establish either (1) the requisite relationship between PVL and the Sureños, or (2) that the PVL itself qualified as a criminal street gang. Defendant focuses primarily on the fact that the predicate offenses introduced to show a pattern of criminal gang activity (§ 186.22, subds. (a), (e)) involved gang members identified as Sureños, not members of PVL.

Defendant's argument is based on the premise that the prosecution sought to prove, and the jury found, that defendant committed the murder for the benefit of or in association with the PVL gang. But the record shows that the prosecution sought to prove, and the jury apparently found, that defendant committed the murder for the benefit of or in association with the Sureño gang. As noted above, the gang expert's testimony focused on how the Sureño gang qualified as a criminal street gang, and he opined that a

hypothetical shooting like the one committed in this case would benefit or promote the Sureño gang.

The Supreme Court in *Prunty* declined to rule out the possibility that an umbrella organization such as the Sureños could qualify as a criminal street gang under the statute. (*Prunty, supra,* 62 Cal.4th at p. 85.) And this court found *Prunty* not applicable in *People v. Pettie* (2017) 16 Cal.App.5th 23, in which "[t]he prosecution's theory was that the Norteño gang was the criminal street gang at issue for purposes of section 186.22." (*Id.* at p. 48.)

Here, a reasonable jury could have found that defendant committed the murder "for the benefit of, at the direction of, or in association with" the Sureños, "with the specific intent to promote, further, or assist in any criminal conduct by [Sureño] gang members . . . ." (§ 186.22, subd. (b)(1).) A reasonable jury could have found that the Sureños were an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the [enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (*Id.,* subd. (f).) Thus, substantial evidence supports the jury's true finding on the gang allegation.

C. Further Argument Regarding CALCRIM No. 334

Defendant contends the trial court abused its discretion by permitting the trial attorneys to present further argument about accomplice testimony during the jury deliberations. The Attorney General contends the trial court properly determined that further argument would assist the jury.

1. Proceedings Below

Pursuant to CALCRIM No. 334, the jury was instructed: "Before you may consider the statement or testimony of Omar Ruiz and Jason Avendano as evidence against the defendant, you must decide whether Omar Ruiz or Jason Avendano was an

accomplice. . . ." The instruction explained how to determine whether Ruiz and Avendano were accomplices and specified that if the jurors found that either Ruiz or Avendano was an accomplice, they could "not convict the defendant of murder based on his or her statement or testimony alone." The instruction also informed the jury that "[a]ny statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution."

On the first day of deliberations, the jury submitted three requests for readback of testimony, which the trial court provided the next morning. After the lunch recess, the jury requested clarification of CALCRIM No. 334, the instruction on accomplice testimony. The jury also informed the bailiff that it would be helpful to hear further argument from counsel on that topic.

Over an objection from defendant, the trial court permitted further argument. The trial court brought the jury back and explained that counsel would be presenting "brief supplemental closing arguments" to assist the jury with its deliberations, based on the question about CALCRIM No. 334. Before the arguments, the trial court reread CALCRIM No. 334 to the jury.

The prosecutor reminded the jury that it was defendant's burden to show that Avendano and Ruiz were accomplices, but he acknowledged that Avendano and Ruiz would have to have done more than give defendant a ride home, be present at the scene, or know about defendant's intent to commit a crime. The prosecutor argued that if the jury did find that Avendano and Ruiz were accomplices, there was corroboration of their statements and independent evidence connecting defendant to the crime.

Defendant's trial counsel argued that both Avendano and Ruiz were accomplices because they "knew the purpose" of going to the beach party and intended to facilitate the commission of the crime. She noted that neither Avendano and Ruiz offered aid to the victim and that both fled, showing a consciousness of guilt.

The trial court then gave the jury an instruction based on CALCRIM No. 3551, which reminded the jurors to reach a fair and impartial verdict based on the evidence presented, to carefully consider the evidence, and to listen and consider the views of other jurors.

2. Analysis

Defendant acknowledges there is authority for permitting further argument during jury deliberations, but he claims that the trial court must first be informed that the jury is deadlocked.

California Rules of Court, rule 2.1036,[7] entitled "Assisting the jury at impasse," provides that "[a]fter a jury reports that it has reached an impasse in its deliberations," the trial judge "should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict." Rule 2.1036 further specifies that "[i]f the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures."

Additional argument was permitted in *People v. Young* (2007) 156 Cal.App.4th 1165 (*Young*) after the jury announced it was deadlocked. (*Id.* at p. 1170.) On appeal, the defendant argued that there was no authority for permitting additional argument " 'as a means of overcoming jury deadlock.' " (*Id.* at p. 1171.) The appellate court found that permitting additional argument was proper in light of both the reported deadlock and the trial court's responsibility to provide help "when faced with questions from the jury." (*Ibid.*) The *Young* court also found no abuse of discretion since the court made no remarks that could have been viewed as coercive and used a neutral procedure. (*Id.* at p. 1172.)

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[7] All further rule references are to the California Rules of Court.

An argument similar to defendant's was rejected in *People v. Salazar* (2014) 227 Cal.App.4th 1078 (*Salazar*). In that case, the jury requested readbacks and then reported that it was " ' having a problem coming to a verdict' " on one of the two counts. (*Id.* at p. 1083.) The trial court told the jury of various options that might assist the jury, including the option of further closing arguments. The jury informed the trial court that further argument on a particular subject would be helpful, and the trial court allowed further argument. (*Id.* at p. 1084.) The appellate court rejected the defendant's claim that "an impasse must exist" before the jury may be informed of the options specified in rule 2.1036. (*Salazar, supra,* at p. 1088.) The court found that "nothing in rule 2.1036 prohibits the trial court from informing a jury of the available options to resolve an impasse before the jury has specifically declared an impasse" and that the trial court had "acted well within its right to control the trial proceedings when it informed the jury of these options in the event an impasse existed. [Citation.]" (*Ibid.*)

In this case, the trial court could reasonably determine that, as in *Salazar,* the jury was having difficulty reaching a verdict, based on the time the jury had spent deliberating, the jury's requests for readbacks, the jury's request for clarification of CALCRIM No. 334, and—most importantly—the jury's indication that further argument would be helpful. The trial court was not required to determine whether the jury was actually deadlocked before providing the jury with one of the options specified in rule 2.1036. (See *Salazar, supra,* 227 Cal.App.4th at p. 1088.) Rather, the trial court had discretion to permit further argument "in the event an impasse existed. [Citation.]" (*Ibid.*)

D. Refusal to Discharge Juror No. 12

Defendant contends the trial court abused its discretion by not discharging Juror No. 12 during deliberations. Defendant asserts that Juror No. 12 "was unable to perform the functions of a juror as a result of his health problems." The Attorney General

contends defendant forfeited this claim by failing to object and that the trial court did not abuse its discretion.

1. Proceedings Below – Second Day of Deliberations

At the end of the second day of deliberations, which was apparently a Friday, the jury informed the trial court that it was deadlocked. The foreperson explained that the jury had voted twice, and that on the second ballot the split was nine to three. The trial court noted that the deliberations had lasted for a total of about five hours at that point, and it declined to find that the jury was "hopelessly deadlocked." The trial court gave the jury the option of continuing to deliberate that afternoon or returning the following Monday to continue deliberations.

Th jury indicated it would prefer to resume deliberations after the weekend. In addition, Juror No. 12 informed a deputy that he had "missed four appointments regarding the rehabilitation of his knee" and that he would miss another appointment if he had to return to court the following Monday.

Juror No. 12 provided further information to the court. Juror No. 12 explained that he had not previously attempted to be excused due to his medical issue because he decided he could miss two appointments, which were apparently scheduled for the first week of trial. He had then missed two more appointments during the second week of trial. He had also missed the opportunity to have some dental work done. He was out of work on disability and he was worried that without the appointments, his return to work would be further delayed.

The trial court ordered Juror No. 12 to return for deliberations the following Monday and suggested Juror No. 12 try to schedule a medical appointment for the following Tuesday or Wednesday. The trial court also indicated it would "address the issue on Monday again and see where we're at." Juror No. 12 noted that he would not have time to schedule an appointment and suggested that he be excused since

deliberations were going to "start over from scratch Monday" due to the planned excusal of Juror No. 6. The trial court ordered Juror No. 12 to return on Monday.

Defendant's trial counsel had no comment, but the prosecutor asked the trial court to consider excusing Juror No. 12 based on a concern that Juror No. 12 would "have no patience for deliberation" and was not "in the right frame of mind to be an objective juror for either side." The prosecutor noted that Juror No. 12 "seemed very angry."

The trial court noted that all of the jurors were "probably feeling very frustrated right now" but that on Monday morning, Juror No. 12 might be feeling differently. The trial court indicated that the issue would be revisited Monday.

2. Proceedings Below – Third Day of Deliberations

The following Monday, the trial court noted that it had to replace Juror No. 6, who had previously indicated he or she would not be able to continue serving if the trial extended to that day. The trial court also spoke with Juror No. 12, asking if he had been able to get a doctor's appointment. Juror No. 12 clarified that the appointments he had been missing were for physical therapy and that he "didn't have time to make an appointment."

The trial court asked if anything about Juror No. 12's health was affecting him during the deliberations. Juror No. 12 responded, "It's in the back of my mind." He explained that he was "living on Tylenol and Advil," and that he was not taking a stronger pain reliever because he would not be able to drive. Juror No. 12 further explained that the pain was mainly in his knee. When asked if the pain was so distracting as to interfere with his deliberations, Juror No. 12 responded, "I would say no."

The trial court asked Juror No. 12: "Do you feel that with what's going on with you you're still able to give the time and energy needed to fully consider the evidence and fully deliberate as a juror?" Juror No. 12 responded, "Yes." The trial court then asked if Juror No. 12 would feel "resentful" by continuing to participate in deliberations, but Juror No. 12 responded, "No, ma'am. I'm more resentful with lack of healing."

The trial court instructed Juror No. 12 to remain as a juror and brought the rest of the jury in to explain that Juror No. 6 had been replaced with an alternate. The trial court instructed the jury that it should not consider the substitution "for any purpose" and that the jury had to begin its deliberations "again from the beginning," setting aside and disregarding all prior deliberations.

The jury retired to deliberate and returned its verdicts the following day.

3. Forfeiture

The Attorney General asserts that defendant forfeited the juror discharge issue by failing to object in the trial court. Defendant disputes that forfeiture is warranted in light of the prosecutor's objection, Juror No. 12's own suggestion that he be excused, and the proceedings held in the trial court.

"The purpose of the waiver [or forfeiture] doctrine is to encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors and provide the defendant with a fair trial. [Citation.]" (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.)

Here, the prosecutor asked that Juror No. 12 be discharged and Juror No. 12 himself suggested he be excused, thereby raising the issue in the trial court. The parties engaged in substantive discussions about whether to discharge the juror. Under the circumstances, the principles behind the waiver/forfeiture doctrine do not apply, and we will proceed to the merits of defendant's claim.

4. Legal Standards For Discharge of a Juror

Section 1089 governs discharge of a juror: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged . . . ."

" 'A juror's inability to perform his or her functions . . . must appear in the record as a "demonstrable reality" and bias may not be presumed.' [Citations.]" (*People v. Beeler* (1995) 9 Cal.4th 953, 975 (*Beeler*), abrogated on another ground as stated in *People v. Pearson* (2013) 56 Cal.4th 393, 462.)

We review the trial court's decision whether to discharge a juror for good cause under section 1089 under the abuse of discretion standard. (*Beeler, supra,* 9 Cal.4th at p. 989.)

5. Analysis

Defendant contrasts this case with *Beeler,* in which a juror's father died during the jury's penalty phase deliberations. (See *Beeler, supra,* 9 Cal.4th at p. 986.) The juror had informed the court that he would be flying out of state later that day and would return six days later. Rather than discharging the juror, the trial court had the juror continue deliberating that day, indicating it would excuse the jury early and order the jury back the following week. Before the trial court could excuse the jury, a verdict was reached. (*Id.* at p. 988.) On appeal, the California Supreme Court found no error because there was no evidence that the juror "was so distracted by his father's death that he felt compelled to return a speedy verdict or that other jurors were aware of the situation and were somehow affected by it." (*Id.* at p. 989.) The Supreme Court emphasized that the juror himself had not requested to be discharged and that the trial court had accommodated the juror by offering to excuse the jury early. (*Id.* at pp. 989-990.)

Defendant asserts that here, the trial court did nothing to accommodate Juror No. 12's medical problems. He points out that there was evidence of Juror No. 12's anger and that in contrast to the *Beeler* juror, Juror No. 12 asked to be discharged.

We find no abuse of discretion, as the record does not show Juror No. 12 was unable to perform his functions as a juror. (See *Beeler, supra,* 9 Cal.4th at p. 975.) Juror No. 12's initial concerns were with his ability to schedule physical therapy appointments. He confirmed that the pain of his injury was not so distracting as to interfere with his

deliberations, that he would be "able to give the time and energy needed to fully consider the evidence and fully deliberate as a juror," and that he would not feel "resentful" by continuing to participate in deliberations. As there is no indication that Juror No. 12's missed appointments, pain, or frustration "precluded his meaningful participation in deliberations," the trial court was within its discretion when it decided not to discharge him. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 446.)

E. Denial of Motion for a New Trial

Defendant contends the trial court erred by denying his motion for a new trial, which was based on statements made by Juror No. 4. He contends the trial court erroneously believed it could not consider any evidence relating to the mental processes and subjective reasoning of the jurors, because under *Pena-Rodriguez v. Colorado* (2017) __ U.S. __ [137 S.Ct. 855] (*Pena-Rodriguez*), evidence of a juror's racial bias is an exception to that rule. Defendant contends this court should remand the matter so the trial court can consider Juror No. 4's statements in light of *Pena-Rodriguez*.

The Attorney General contends the trial court properly denied the motion for a new trial because Juror No. 4 reported only "transitory comments," the jurors making those comments were immediately reminded to rely on the evidence, and the comment reflecting possible racial animus did not affect the verdict.

1. Proceedings Below

In his motion for a new trial, defendant provided a transcript of an interview with Juror No. 4, who told an investigator that she "still had doubts" when she "voted guilty." Juror No. 4 also reported on other jurors' initial statements at the beginning of deliberations, which included some comments that Juror No. 4 believed to be "prejudiced" but which were each "corrected."

According to Juror No. 4, one female Hispanic juror "mentioned that fact that [defendant] was from El Salvador," which "made her feel he was more guilty" because

"so many murderers come from El Salvador." However, "other people right away said, 'You can't use that.' "

Juror No. 4 also reported initial statements by a juror who remarked that defendant "must've done something" since he "was charged with a crime," and by a juror who commented that he thought defendant was guilty because defendant "didn't defend himself."

When asked if "anything other than the evidence" had helped convict defendant, Juror No. 4 replied, "No." Juror No. 4 explained that the jury had a long discussion about reasonable doubt and circumstantial evidence. She asserted that none of the jurors had pressured or intimidated the other jurors.

The prosecution filed opposition to the motion for a new trial. The prosecution argued that "the vast majority" of Juror No. 4's statements reflected "the mental processes of herself and the other jurors," which were inadmissible under Evidence Code section 1150.[8]

In his reply memorandum, defendant asserted that the El Salvador comment was "irrelevant to Evidence Code [section] 1150" and should not have been considered in jury deliberations.

At the hearing on the motion for a new trial, defendant's trial counsel again asserted that the El Salvador comment should not have been considered by the jury. The prosecutor noted that, according to Juror No. 4, all prejudicial statements had been

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[8] Evidence Code section 1150 provides: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

"immediately corrected by the group." Defendant's trial counsel asserted that Juror No. 4 could not "vouch for" whether other jurors had actually considered improper matters.

The trial court pointed out that the improper matters had not been discussed by the jury after jurors were reminded that they could not consider those matters. The trial court found it would be improper to "go into the mental processes of jurors to determine what they were thinking when they came to their verdict." The trial court denied the motion for a new trial.

2. Analysis

" 'When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible under Evidence Code section 1150, subdivision (a).' [Citation.] 'If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. [Citations.]' [Citation.]" (*People v. Engstrom* (2011) 201 Cal.App.4th 174, 182.) Juror misconduct " 'gives rise to a presumption of prejudice, which "may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." ' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 726 (*Avila*).)

"Evidence Code section 1150, while rendering evidence of the jurors' mental processes inadmissible, expressly permits, in the context of an inquiry into the validity of a verdict, the introduction of evidence of 'statements made . . . within . . . the jury room.' We have warned, however, that such evidence 'must be admitted with caution,' because '[s]tatements have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors.' [Citation.] But statements made by jurors during deliberations are admissible under Evidence Code section 1150 when 'the very making of the statement

sought to be admitted would itself constitute misconduct.' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 484.)

In *Pena-Rodriguez,* the court considered "whether the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt." (*Pena-Rodriguez, supra,* __ U.S. __ [137 S.Ct. at p. 867].) The court stated its holding as follows: "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." (*Id.*, 137 S.Ct. at p. 869.)

The *Pena-Rodriguez* court noted, however, that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." (*Pena-Rodriguez, supra,* __ U.S. __ [137 S.Ct. at p. 869].) The court set forth the following standard: "[T]here must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." (*Ibid.*)

The juror statements at issue in *Pena-Rodriguez* included the juror's stated belief that the defendant was guilty because, based on his experience in law enforcement, " 'Mexican men had a bravado that caused them to believe they could do whatever they wanted with women,' " and a statement that the juror believed Pena-Rodriguez was guilty " 'because he's Mexican and Mexican men take whatever they want.' " (*Pena-*

Rodriguez, supra, __ U.S. __ [137 S.Ct. at p. 862].) The juror had also indicated he found an alibi witness not credible because the witness was " ' "an illegal." ' " (*Ibid.*) The United States Supreme Court found these statements to be "egregious and unmistakable in their reliance on racial bias." (*Id.*, 137 S.Ct. at p. 870.) Moreover, the juror had not simply "deploy[ed] a dangerous racial stereotype to conclude [Pena-Rodriguez] was guilty . . . , but he also encouraged other jurors to join him in convicting on that basis." (*Ibid.*)

In contrast to the statements made in *Pena-Rodriguez*, the challenged statement here was made at the outset of deliberations, and the juror was immediately admonished about the statement. However, without determining whether the juror's statement met the *Pena-Rodriguez* standard of admissibility, we will assume that it was admissible under Evidence Code section 1150, and that it constituted misconduct, since the juror also referenced facts not in evidence when she told the other jurors "so many murderers come from El Salvador." (Cf. *People v. Johnson* (2013) 222 Cal.App.4th 486, 495 [when jurors discussed the defendant's failure to testify, it "was an overt act of misconduct and admissible as such under Evidence Code section 1150"].)

We next consider whether the presumption of prejudice was rebutted on this record. As noted above, the presumption of prejudice arising from juror misconduct is rebutted when the reviewing court determines, " ' "upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." ' [Citation.]" (*Avila, supra,* 46 Cal.4th at p. 726.)

The presumption of prejudice arising from juror misconduct was rebutted in *Avila,* where the misconduct was a juror's comments on the defendant's failure to testify. The court found it significant that the improper discussion "was not of any length or significance" and that the discussion ended after "the offending juror was immediately reminded he could not consider this factor." (*Avila, supra,* 46 Cal.4th at p. 727.)

The same is true in this case. While improper, the El Salvador comment was brief, and the juror was immediately reprimanded by other jurors, who said, " 'You can't use that.' " There was apparently no further discussion about the issue, and Juror No. 4 indicated that lengthy deliberations followed that focused on the legal concepts of reasonable doubt and circumstantial evidence. Having reviewed the entire record, we conclude " ' "there is no substantial likelihood that [defendant] suffered actual harm." ' [Citation.]" (*Avila, supra,* 46 Cal.4th at p. 726.)

F. Cumulative Prejudice

Defendant contends that even if none of the asserted errors, by themselves, was prejudicial, the cumulative effect of those asserted errors requires reversal. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 (*Hill*) ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].)

As we have not found multiple errors to cumulate, we conclude this trial was "one in which [defendant's] guilt or innocence was fairly adjudicated." (*Hill, supra,* 17 Cal.4th at p. 844.)

G. Firearm Enhancement

Defendant contends remand is required so the trial court can exercise its discretion to strike the firearm enhancement imposed pursuant to section 12022.53, subdivision (d). The Attorney General contends remand is unnecessary in this case.

1. Legal Background

At the time of the sentencing hearing in this case, former section 12022.53, subdivision (h) provided: "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Stats. 2010, ch. 711, § 5.)

Effective January 1, 2018, Senate Bill 620 amended section 12022.53, subdivision (h) to provide: "The court may, in the interest of justice pursuant to Section

1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. . . ." (Stats. 2017, ch. 682, § 2.)

Defendant and the People agree that the amendment to section 12022.53 should apply retroactively to cases not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 746; *People v. Francis* (1969) 71 Cal.2d 66, 75-76; *People v. Brown* (2012) 54 Cal.4th 314, 323.) A number of published appellate decisions have held Senate Bill 620 applies retroactively in cases where the judgment is not yet final. (E.g., *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.)

2. Remand Analysis

Defendant contends that the matter should be remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h) and section 1385. The Attorney General contends that a remand is unnecessary because "it is apparent that the trial court would not strike or dismiss the firearm enhancement."

Other appellate courts have addressed the question of what standard to apply in assessing whether to remand a case in light of Senate Bill 620. In *People v. McDaniels* (2018) 22 Cal.App.5th 420 (*McDaniels*), the court determined that a "remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*Id*. at p. 425.) Other appellate courts have agreed that the *McDaniels* case sets forth the appropriate standard. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

In determining whether remand is required under the *McDaniels* standard, the salient question is whether the trial court "express[ed] its intent to impose the maximum sentence permitted." (*McDaniels, supra,* 22 Cal.App.5th at p. 427.) "When such an expression is reflected in the appellate record, a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the

defendant's favor." (*Ibid*.) Thus, in *People v. McVey* (2018) 24 Cal.App.5th 405 (*McVey*), where the trial court made a "deliberate choice of the highest possible term for the firearm enhancement," the record showed "no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*Id.* at p. 419.)

In this case, the trial court noted that defendant's crime "falls under the indeterminate sentencing law" but that it did find three circumstances in aggravation and one circumstance in mitigation.[9] The trial court also remarked that defendant still had shown no remorse for the crime. The trial court imposed consecutive sentences for the murder, gang enhancement, and firearm enhancement, noting that the firearm enhancement was "a mandatory consecutive."

We conclude the record "clearly indicate[s]" the trial court would not have exercised discretion to strike the section 12022.53, subdivision (d) firearm use allegation had the court known it had that discretion. (See *McDaniels, supra,* 22 Cal.App.5th at p. 425.) The trial court initially imposed a consecutive 10-year term for the gang allegation, which it had discretion not to impose. (See § 186.22, subd. (g).) Because the initial sentence shows the trial court's "intent to impose the maximum sentence permitted," a remand for resentencing "would be an idle act." (*McDaniels, supra,* 22 Cal.App.5th at p. 427.) On this record, we conclude there is "no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the [firearm] enhancement altogether." (*McVey, supra,* 24 Cal.App.5th at p. 419.)

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[9] The circumstances in aggravation were: the crime involved great violence, great bodily harm, and acts disclosing a high degree of cruelty, viciousness, and callousness (rule 4.421(a)(1)); the defendant was armed with and used a firearm in the commission of the crime (rule 4.421(a)(2)); and the defendant engaged in violent conduct that indicates a serious danger to society (rule 4.421(b)(1)). The circumstance in mitigation was that defendant had no prior record or an insignificant prior criminal record (rule 4.423(b)(1)).

IV. DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MIHARA, J.

People v. Hernandez-Delgado
H043755

File

Appendix B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
ALEJANDRO ERNESTO HERNANDEZ-DELGADO,
Defendant and Appellant.

H043755
Monterey County Super. Ct. No. SS140200

BY THE COURT*:

Appellant's petition for rehearing is denied.

Date: 01/09/2019 _____ Acting P.J.

*Before Elia, Acting P.J., Bamattre-Manoukian, J., and Mihara, J.

Appendix C

Court of Appeal, Sixth Appellate District - No. H043755

S253507

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ALEJANDRO ERNESTO HERNANDEZ-DELGADO, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix D

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ALEJANDRO HERNANDEZ DELGADO, Defendant.	CASE NUMBER:SS140200A

INTERVIEW WITH JUROR #4

DATE OF RECORDING:
MARCH 21, 2016

PERSONS RECORDED:

Gilbert Lopez: ("**LOPEZ**")

Juror #4, Jill Wachler: ("**MS. WACHLER**")

TRANSCRIPT PREPARED BY:	Ruffin Consulting, Inc. Litigation Support Services 2403 Wooten Blvd. SW, Suite G Wilson, NC 27893 (252) 243-9000 www.RuffinConsulting.com
DATE OF TRANSCRIPTION:	05/09/16

LOPEZ: Today is March 21st, 2016. The time right now is 1745 hours. I'm here at the residence of one of the jurors. Her name is ---

MS. WACHLER: Jill Wachler.

LOPEZ: Jill, what is your date of birth?

MS. WACHLER: February 19th, 1970.

LOPEZ: And your address, please?

MS. WACHLER: 1264 Del Monte Boulevard in Pacific Grove.

LOPEZ: Ms. Wachler, my name is, uh, Gil Lopez. As I mentioned, you do understand that I am the defense investigator for the defense assisting Monique Shana Hill on the case and representing Alejandro Delgado?

MS. WACHLER: Yes.

LOPEZ: I want to ask you some questions and, uh, some of your feelings of what took place and some of the issues that took place in the deliberation. Uh, the first question is I'm going to ask you is we noticed you were crying as you walked in with the others - jurors upon arriving at a verdict. Is that an accurate, uh, statement and you could you discuss that a little about why you were upset?

MS. WACHLER: Yes, I was crying. As we walked out of the jury room and we're waiting in the hallway, I think the enormity of the verdict hit me and I had doubt, I had,

um, it's hard to explain in words, but throughout this - the deliberations, the concept of reasonable doubt became quite, um, it's something we argued about as a jury, it's something that I struggled with personally and I had doubts. I - and I - by the end when it was 11 to 1, I felt that my - my doubts were being - I was being, um, intrusive. I was trying to figure out if I - I began to doubt my own credibility. I began to doubt why I was doubting. Um, so, I voted guilty thinking that the rest of the room, the State of California, reasonable doubt, I was wrong, but I still had doubts and, uh, and that it really - it was a terrible feeling.

00:02:31

LOPEZ: When you say doubts, whether, uh, he was guilty or not guilty, did you have more so doubt that he was guilty or that he was not guilty and why?

MS. WACHLER: I think I had doubts - I still have doubts about reasonable doubt. I still think this case was complicated. I don't believe there was enough evidence to say who pulled the trigger, but there was enough evidence to say Alex, sorry that's what I call him because I can't pronounce his name, um, I think he was there at the time - at the scene of the crime. There was the Facebook evidence. There was evidence to put him there with motive, but there was also two other people at the same place. I don't - I don't believe there was enough evidence to say who pulled the

trigger and I have doubts, um, about that, but then, I have doubts about what is reasonable doubt and that - it was very complicated in the jury room. It was hard to explain figuring that out, that other people thought that we had enough evidence.

LOPEZ: Uh, was anyone else crying, upset, or angry and how did it manifest itself?

MS. WACHLER: I didn't see anybody. I - I think I was in my own state at that. I didn't see anybody during the, uh, reading of the verdict. After the verdict, I went to lunch with two other jurors and we all were crying.

LOPEZ: Who are the other - the two other jurors that were crying?

MS. WACHLER: Uh, the mother, she was breastfeeding, I don't know her name, um, and then, the student who was waiting to get her - accepted into a PhD program. I also don't remember her name.

00:04:19

LOPEZ: Were people fighting or angry or emotional throughout the deliberation?

MS. WACHLER: I think for the most part, people tried to be respectful. There was, um, one woman, she works at MPS, actually that was a strange dynamic in the jury room. There was actually two people who work at MPS and I know the judge had asked them if that would, at all, effect their

decision making and I think they, of course, said no, but the one, she was Hawaiian. She took her shoes off a lot during the court, I don't know her name, um, anytime I talked would roll her eyes and would look - make eye contact with the other person, her coworker, so, I - I couldn't get a feeling were they, you know, in agreement together, but there was a lot of hostility from that particular woman.

LOPEZ: Okay.

MS. WACHLER: And I wouldn't say she was bias. I would say she was willfully ignorant throughout the process.

LOPEZ: She was a Hawaiian lady. Do you remember what, uh, jury [*sic*] number she was or where she was sitting?

MS. WACHLER: She was in front of me, um, I was four. She was in front of me during the trial, um, I can't remember - to the right a little bit because she was always taking off her shoes.

LOPEZ: Okay. Was everyone allowed to deliberate or did everyone contribute?

MS. WACHLER: I think for the most part, there was one woman who spoke almost no English or if she did, she was not comfortable and we tried to get her to speak, but I - she didn't say more than two words the whole time. Um, but other than that, I think everybody participated.

LOPEZ: Was anyone prevented from

contributing?

MS. WACHLER: No. And in fact, I mean, I do think - I know people are getting tired of me talking, but they allowed me and nobody, um, you know, stopped me from continuing to talk.

LOPEZ: Was any bias or privilege - I'm sorry. Was any bias or prejudiced expressed towards Alejandro that prevented anyone from deliberating?

00:06:29

MS. WACHLER: Not that prevented people from deliberating. There - when we first came into the deliberation room, everyone went around to just talk - after we had our foreman elected, everyone just went around to give their initial feelings and in my opinion, many prejudential [*sic*] prejudiced things were said, but in every case, they were corrected. So, for instance, the man from Israel said, as soon as - he was the first one to talk that he is able to look into people's hearts and minds and he didn't need to take notes because he knew, he could just tell that Alex was guilty and we all said that you couldn't - that you couldn't do that, that that was not allowed and I think he understood. I mean, we argued about that, he actually was a very nice man, but we argued a lot about that, but he just had his own kind of way of doing things. So, he did at the end use evidence, but that was a starting and also at the starting,

one of the Hispanic ladies mentioned that the fact that he was from El Salvador, um, it made her feel he was more guilty because that's - so many murderers come from El Salvador, but other people right away said, "You can't use that." We were pretty good about correcting people. Um, the older gentleman at the very end, and I forgot his name, he turned out to be a very nice guy, too. He said, and again, this was just initial statements, that he thought because, uh, the defendant didn't defend himself, and, you know, that he was guilty and, um, and someone else, I can't remember who said it, thought the fact that he was even there, he was charged with a crime, he must've done something and these were all things we were just told minutes before, 30 minutes before, that we couldn't do. So, while there was some of that initial feeling, I don't know - I don't know if it tempered the room other than I got right away I was - I was sort of amazed that initially coming out, the feeling around the table was 10-2.

00:08:34

LOPEZ: Uh-huh.

MS. WACHLER: And that I was in the minority because I thought, I had taken notes the whole case, I guess I thought every - I thought more people would've been thinking what I was thinking.

LOPEZ: Based only on the evidence and did

it apply to the standard to the DA of proof beyond a reasonable doubt?

MS. WACHLER: Um, so that's the tricky one, it's this whole reasonable doubt concept. So, the evidence, you know, just going by what we had, Facebook, I think the Christian Cruz (phonetic) evidence, bits and pieces because we fought over everything the accomplices said and using those rules and pieces of what, uh, the officer who was the translator said, you know, we had like five facts everyone was comfortable with; that they went there that night, they were smoking marijuana, they had a gun, somebody had the gun, I don't believe it was in his pants all night and nobody saw it, and they were going to make trouble and I don't know what kind of - there was, you know, it was really stupid, obviously, because what kind of - what kind of trouble is there going to be? Something bad is going to happen. So, I do - I think he was there. I think it was a bad idea and I think someone pulled the trigger. I don't feel that we know who, but it's the whole concept of reasonable doubt, you know, if it's - if I think he could've done it, but he might not have, is that enough? That's - that's where - you know, that I still get caught up with.

LOPEZ: Did you or anyone else assume that Alejandro was a gang member and didn't make the DA prove it?

MS. WACHLER: Um, I think the Facebook evidence

was enough for everyone to prove the gang. In fact, if that was his only charge, I think that would've been - even I would've said, "Yeah, that's guilty."

00:10:28

LOPEZ: Any other prejudice or bias? For example, what he looked like, his attorney, his investigator?

MS. WACHLER: I don't think - there was a couple - again, this woman, uh, I don't remember where she sat, younger, um, heavier woman, uh, she thought that he had a - he was smirking the whole time and I thought exactly the opposite. I thought he looked terrified, but I don't know that that was bias or prejudice and again, both - we were - we all said, you can't use what he looks like - I - look like on either way. I - they reminded me that I couldn't think of him, you know, innocently because of I thought that he looked so young and they couldn't think of him as guilty.

LOPEZ: Did anything other than the evidence convict Alejandro? For example, animosity, what he looked like, his heritage, his appearance, or anything else?

MS. WACHLER: No, I think it was more group think. I think it was the fact that the majority felt so strongly and - and the - the circumstantial evidence leaving all of this issue of doubt and then, I do - I think - losing the one juror, losing Andy created a huge dynamic shift in the jury room that, uuuh, it shifted, I think everyone's thinking,

including my own, and for me, it gave me, um, (sighs) I had problems then with my self-confidence and with even just - I guess I felt like I was just getting exhausted trying to unthink things that I had thought the week before and trying to be so careful that I wasn't being bias.

00:12:16

LOPEZ: Did the jury apply the legal standard of proof beyond a reasonable doubt?

MS. WACHLER: The jury deliberated reasonable doubt for a long time. I think, again, for 12 ordinary people, we got to a place where we - it was the legal standard. We read that out loud so many times and I think for other people and other cases, maybe it's easier to apply. I think it was really complicated in this case and, um, yeah, in fact, what made me eventually cave in and go with the group that I decided my thoughts about reasonable doubt were different than that definition, and so, I was going to go with the definition from the Court.

LOPEZ: Did they discuss it and understand the reasonable doubt?

MS. WACHLER: I - that they - I - I'd like to think I'm pretty smart, so they understood it as much as I did.

LOPEZ: What was the discussion about the proof beyond a reasonable doubt?

MS. WACHLER: Um, so, the discussion, you know, I think we all get that we can't be making up scenarios that were far-fetched, um, but for me, we were told this example about this boy in a pool and, you know, he's standing by the pool and he's dripping wet and there's footprints and I didn't feel like we had a dripping wet kid with footprints. You know, that would've been beyond a reasonable doubt, but other people looking at the same evidence felt very strongly that there was - that they had the dripping kid with the footprints and I think it - again, it was this ability of other jurors to feel so strongly, even if they had no facts. One example would be that I never heard and I took really good notes, when Alex was arrested. I don't believe we were ever told. And one of the jurors said, "Oh, yeah, he was arrested in 2012." And to me, that made a big difference because if Alex had had no record since 2012, and the other two did, that shows that his gang affiliation was very different, but if you hadn't - but if he'd been in jail that whole time, and even though I couldn't find those facts and none of us know - knew how to go and get this fact, um, and I - I don't think we can even use that fact because we don't have it in our book, these people were so sure of things that they didn't know, at least these two women. So, uh, it caused be to doubt myself more.

00:14:51

LOPEZ: What about the accomplice reliability, how did you feel about that?

MS. WACHLER: And that was another one. I, um, I right away through they were accomplices and wanted to hold them - we read through that quite a bit so that we could hold them to that higher standard of looking at their testimony, uh, but again, where it - the rule is complicated because you can believe all, some or nothing, you should think about the plea - the plea arrangements, but also, you can't convict based just on what an accomplice says and that for me was huge because without the accomp- if you take everything the accomplice says out - both accomplices out of the equation and by the way, you have to take out Christian Cruz, a lot of what he said, so then you can only take what Christian Cruz said Alex said because everything else is tied in with the accomplice thing, but, um, we fought on that. Other people didn't think that was - they still said, you can believe some all or none, um, again, it was - it was people looking at the same evidence very differently.

LOPEZ: Was any jury [*sic*] refusing to apply the jury instructions as written or ignoring the jury instructions?

MS. WACHLER: Nobody verbally said that.

LOPEZ: Did anyone take over the jury and apply pressure or intimidation?

MS. WACHLER: No, nobody did that. In fact, I would think if you'd interview other jurors, they would probably tell you that I was the most - talked the most.

LOPEZ: Did any of the Spanish speaking jurors ignore the interpreter's translation and apply it to their own?

00:16:22

MS. WACHLER: No, and we didn't even have anything to translate. We had a couple of Spanglish things in Facebook, but, um, those things were not provided translation to.

LOPEZ: Did anyone discuss punishment or desire to see Alejandro suffer punishment?

MS. WACHLER: No one said suffer. If anyone brought up punishment, it was me and my concern that we should not convict someone to life in prison unless we could be sure he pulled the trigger.

LOPEZ: And is it accurate to say that you didn't really get factual information or any information that Alejandro Delgado pulled the trigger?

MS. WACHLER: I don't think we have that information.

LOPEZ: Did the three not guiltys get treated respectfully?

MS. WACHLER: I think for the most part, yes. I

think people - and that's again, if we could've ended - if we could've ended the trial on Friday with the - with the hung jury that we had asked the judge for, I think I would feel better. I would sleep at night because I could've voted at that - you know, what I felt was my conscience, um, but that didn't happen and we were ordered back and when we lost Andy, um, it really became just me, um, in the minority. I had some people who agreed with some of the parts, but, you know, by - by the end of Monday, it was me against 11 people and I really began to doubt all of my own reasoning abilities and wondered if I wasn't bringing some sort of agenda to the proceedings and I was - and so, I tried really hard to compensate the other way.

LOPEZ: Did people assume ---

MS. WACHLER: Did people what?

LOPEZ: I'm trying to ---

MS. WACHLER: Oh.

LOPEZ: --- did people assume immediately whether they were guilty or innocent or refuse to deliberate?

MS. WACHLER: No, I think people gave their initial reaction, but everybody deliberated even if they didn't change their minds.

00:18:33

LOPEZ: Now, you mentioned, uh, prior to the interview that, uh, you'd been having trouble sleeping and

eating. Is that an accurate statement?

MS. WACHLER: That's correct.

LOPEZ: And you also mentioned that you're seeking counseling, uh, in the result of this, uh, jury that had taken place in Salinas Court.

MS. WACHLER: That's correct.

LOPEZ: Uh, is it an accurate statement that, uh, you had made contact with the defense investigator - defense attorney, Monique Shana Hill on your own?

MS. WACHLER: Yes.

LOPEZ: And why did you do that?

MS. WACHLER: Um, she had given me her card after the trial, both lawyers did and said that she - jury feedback could help her in the future, you know, when she is, uh, as a defense attorney, she likes to know what happens in the deliberation room and any insights that, um, you know, I could offer.

LOPEZ: Now, in a statement that you had written to me prior to this interview, uh, you made a comment on two - regarding two Hispanic ladies, uh, do you want to tell me a little bit about that?

MS. WACHLER: Um, that - well, the two Hispanic women in the jury room, one, um, her English was - I don't know what her English was, maybe she understood more, but she didn't participate really at all, um, and I - we tried to get

her to participate, but I think it was lack of competence in her English, but the other woman and I think I mentioned that at the beginning, had made a comment about El Salvadorians and that, um, people from El Salvador, that's where the gangs start and that's where - the kind of scarier people originate from.

00:20:23

LOPEZ: And, uh, also just to go back to, I know you mentioned it, but, uh, talk a little bit about the Jewish individual that made a comment in the jury deliberating room.

MS. WACHLER: Yeah. And both these people, just I - because I want to be a hundred percent fair, um, did deliberate, did participate and I think they really did, you know, do their civic duties. So, the man from Israel, again had made the comment initially about being able to see into people's hearts and minds and I don't know if that's a bad translation because his English is obviously his second language and he was difficult to understand, but in both cases I know it wasn't just me, I believe it was the foreman of the jury and other people corrected them and said, "You can't use that." So, whether or no, you know, they just - they did participate in the other parts of the - just the facts.

LOPEZ: Okay. Just, uh, getting ready to

close this interview, but just to reiterate, uh, you had called Monique Shana Hill, the defense attorney, to speak to her regarding, uh, how you were feeling on your own. Is that an accurate statement?

MS. WACHLER: Yes.

LOPEZ: Okay. Uh, the time right now is 1805, uh, I am concluded this interview with Ms. Wachler. Is there anything else you would like to add to this interview before I close?

MS. WACHLER: No. Just, I think in the future if there, you know, with circumstantial evidence cases that I do think the de- even though the burden of proof is on the prosecution and I don't know if it's just our mindset in - where Americans are right now, I think the defense should present more and again, I'm not a lawyer, I know nothing about the law, whatever - if there had been anything else on his behalf, you know, that could've helped to make his more innocent, I think that would've been really helpful.

LOPEZ: Okay. Thank you very much, Ms. Wachler.

[END OF RECORDING]

[END OF TRANSCRIPT]

CERTIFICATE

I, Bonnie T. Ruffin, do hereby certify that said hearing, pages 1 through 17 inclusive, is a true, correct and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

Bonnie T. Ruffin, NCCP
Ruffin Consulting, Inc.

Appendix E

DISTRICT COURT OF APPEAL, THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
vs.	)
ALEJANDRO HERNANDEZ-DELGADO,	)
Defendant and Appellant.	)

APPEAL FROM A JUDGMENT ENTERED

BEFORE THE HONORABLE CARRIE M. PANETTA

Monterey County Superior Court No. SS140200A

Hearing Date: May 26, 2016
Volume XV
Pages 4201 to 4224-4500

APPEARANCES:

For the Respondent: DEPARTMENT OF JUSTICE
Office of the Attorney General
State of California
455 Golden Gate Avenue
San Francisco, CA

For the Appellant: SIXTH DISTRICT APPELLATE PROGRAM
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COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MONTEREY

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ALEJANDRO HERNANDEZ-DELGADO, Defendant.	Case No. SS140200A MOTION HEARING SENTENCING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

May 26, 2016

BEFORE THE HONORABLE CARRIE M. PANETTA

APPEARANCES:

For the People: DEAN D. FLIPPO, DISTRICT ATTORNEY of the County of Monterey
By: DAVID GROSS
Deputy District Attorney

For the Defendant: LAW OFFICE OF MONIQUE SHANA HILL
By: MONIQUE SHANA HILL
Attorney at Law

Reported by: LORLEIN CARTER, CSR, RMR
Official Court Reporter
CSR 12953

P R O C E E D I N G S

THE COURT: We can go ahead and call the Hernandez-Delgado matter at this time, Docket SS140200. Mr. Hernandez-Delgado's present in custody, utilizing the services of Ms. Jaime, the Court certified Spanish interpreter. He's with his attorney, Ms. Hill. Mr. Gross is appearing for the People.

Matter's on for a motion for new trial, and if that's denied, on for sentencing as well. And I have received numerous documents from both sides. I've reviewed all of them. The most recently being the defense's -- I think it was called a reply -- let's see. That came in yesterday. Reply to People's Opposition and Brief. There was the moving papers. The People filed an opposition, and then a supplemental opposition, and then two declarations, I believe.

MR. GROSS: That's correct.

THE COURT: Declarations both from John Coletti, and then the other documents filed by the defense was the reply I just indicated that came in yesterday. So has everyone had an opportunity to review all of those papers?

MR. GROSS: Yes.

MS. HILL: Yes.

THE COURT: Okay. And as I've indicated, I've read them, and I've done research on the issue. But since you're the moving party, if you wish to add anything on to what's already been submitted, Ms. Hill, I'll give you the opportunity to do that at this time.

MS. HILL: At this time, your Honor, I really think that the issues have been laid out in my moving papers. And the only thing that I wanted to make clear to the Court was that my argument was that Juror No. 4 was not doubting, is that she was merely describing observations, certainly not mental impressions. She was observing one individual not deliberating, and for argument purposes, for whatever reason, that would mean that only 11 jurors were actively deliberating.

Moreover, arguments, statements by individuals in the jury room regarding the fact that they couldn't agree on, quote, "Who was the shooter? Who had the gun?" would mean that they failed to unanimously agree on the armed -- the personally armed allegation.

Furthermore, the issue about statements made about Mr. Delgado being violent simply because he's from El Salvador, one gentleman mentions straight off the bat that he can look into Mr. Delgado's eyes and heart that he is guilty. This is all information that is not admissible evidence.

And finally, the fact that characterizing Ms. -- well, Juror No. 4's opinions and others that were expressed, means they did not accurately apply the reasonable doubt instruction that they have an abiding conviction of the truth of the charges.

So that's the defense position. And I think all the law really is laid out and argued. I don't want to belabor the Court's time. I would just merely submit, and

also thank the Court for taking this much time to just consider this issue.

THE COURT: Thank you, Ms. Hill. Let me just ask you one thing. Only in your reply filed yesterday was the contention made that the jury did not unanimously agree on whether the defendant was the individual who used the firearm.

In looking at the statement, given the transcripts you provided of Juror No. 4's interview with your investigator, she simply says that she feels -- she says, quote, "I don't feel that we know who, but it's the whole concept of reasonable doubt." Is that what you're referring to?

MS. HILL: Yes.

THE COURT: Okay.

MS. HILL: I think she was. And, you know, we don't know until we put her on the stand, or we have a hearing, right, or we -- no, but the statement "we" I think that what this conveys is that we don't know, but we know somebody had it, so therefore that's how we applied this. And, you know, from the defense viewpoint, there is a separate allegation of personally armed with a firearm. So that's why the defense stated that.

THE COURT: Okay. Thank you.

MS. HILL: I'll defer to Mr. Gross at this time.

THE COURT: Anything you wish to add to your papers?

MR. GROSS: Yes.

THE COURT: Okay.

MR. GROSS: Your Honor, first off, I would say this, in fact in this case, no evidence has been submitted, and I mean that quite literally. I don't mean that to diminish the content. There is not a proper affidavit or declaration here.

THE COURT: Let me just say, both sides submitted hearsay. You did also from your investigator. I was assuming all hearsay objections were waived for the purpose of the hearing, but really both sides submitted hearsay. I'm willing to still consider it if there's no objection.

MR. GROSS: Well, I --

THE COURT: I mean, what I found was even if there's no objection to hearsay, the portions of the interview that has to do with the mental processes of the -- I say the declarant, although it wasn't an affidavit -- but Juror No. 4 as well as the other jurors would not be admissible --

MR. GROSS: Right.

THE COURT: -- under Evidence Code Section 1150. But other than that ground, just on basic hearsay grounds, I was assuming it was waived since then you responded to it, and the hearsay objection wasn't raised, we'd simply have to continue it.

MR. GROSS: What I would like to move on for now to the second part.

THE COURT: Okay.

MR. GROSS: And that is even if this was a

properly submitted document, that when you read the actual transcript, say on page 6, line 11, the juror says any statement that she deemed to be prejudicial was immediately corrected by the group. Page 7, line, 5, "We were very good at correcting people." In the "we.".

Page 10, she had her own concept of reasonable doubt, she being Juror No. 4, and she said she went with the definition of reasonable doubt supplied by the Court. Page 9, lines 17 through 20, she -- excuse me for sounding informal -- Juror No. 4 stated that "No one used prejudice or the defendant's appearance in reaching their verdict."

And on -- just a couple more -- on page 12, line 23, "Nobody refused to follow jury instructions." And on just one more quote I'd like to make, page 12 and 13, lines 1 through 3 going on to line -- excuse me -- line 24 and 25 on 12, and 1 through 3 on 13, there was, according to Juror No. 4, "No pressure or intimidation," and that Juror No. 4 did most of the talking.

So based on the merits alone, there's nothing that arises to any of the conditions for granting new trial under 118l, and nor is there any injustice here. I would ask the Court to deny the motion, or not proceed with further evidentiary hearing, and proceed to sentencing at this time.

THE COURT: Thank you, Mr. Gross. Last word, Ms. Hill.

MS. HILL: Yes, thank you, your Honor.

Only thing I would say is that certainly Juror No. 4 can speak for herself. She can speak for her

observations of what others said. But to say that something was said and then somehow she can vouch for their thinking that it was corrected, that is just completely illogical. We have no way of knowing. The individuals told the Court before they were sworn in that they would not consider any other information about Mr. Delgado when they got in the jury room except evidence; yet immediately statements were made when they got into the jury room. So clearly they didn't listen to the Court.

THE COURT: But when a statement was made that was improper, the jurors immediately said, it sounds like when we hear No. 4's statement to your investigator, that people said, oh, no, we can't consider that, and they moved along and wasn't discussed. So now you're asking me to go into the mental processes of jurors to determine what they were thinking when they came to their verdict, which the Court's really prohibited from doing.

MS. HILL: All I'm saying is that she can't say that their thinking changed. That's all I'm saying. I'm saying that's something she has no way of knowing. All we know is that it was said. And so with that I'll submit it.

THE COURT: Submitted by both sides?

MR. GROSS: Yes.

MS. HILL: Yes.

THE COURT: Okay. For purposes of making a record, I do want to make sure the Court understands. It appears to the Court the defendant's motion for a new trial is made on three grounds, one at least.

MR. GROSS: May I say one last thing? I'm very sorry.

THE COURT: Okay.

MR. GROSS: Thank you. Just when the Court considers this motion on its merits, I would ask it to not consider the declarations that I submitted.

THE COURT: To not consider those?

MR. GROSS: Yes. The declarations that I submitted.

THE COURT: Okay. Regarding what the foreperson said.

MR. GROSS: Yes.

THE COURT: Okay. I don't think there was any objection as to the hearsay.

MR. GROSS: Well, anyway --

THE COURT: Okay. I mean, I did consider the fact that the jurors did have a night to sleep on the verdict. That was based on the foreperson's statement to your investigator. I don't know that it's not crucial to the Court's ruling, it just -- well, I'll get to it.

MR. GROSS: All right. Okay.

THE COURT: Okay. So the motion for new trial made by the defense is really based on three grounds: One, that at least some of the jury members misapplied the law, specifically using the hypothetical given in the instruction on circumstantial evidence when they discussed the burden of proof, and also the Juror No. 4 is, at least after trial, confused about reasonable doubt. Number two, that one of

the jurors did not understand English sufficiently to deliberate. And number three, Juror No. 4 changed her mind about the verdict after the verdict was recorded.

So regarding the first ground, it is well-settled law, as we just discussed, that no evidence is admissible which relates solely to the mental processes and subjective reasoning of a juror. Evidence Code Section 1150 allows for an inquiry as to the validity of a verdict as to statements, conduct, conditions, or events of such character as is likely to have influenced the verdict improperly. Notably, that section provides that, quote, "No evidence is admissible to show the effect of such statement, conduct, condition, or events upon a juror either in influencing him to assent to or dissent from the verdict, or concerning the mental processes by which it was determined," end quote.

It was for that reason the Court indicated that it would be disregarding Juror No. 4's statements concerning her own and the other jurors' mental processes. That includes her understanding of the legal concept of reasonable doubt. So, although not admissible, I do want to say I didn't find in her statement the alleged discussion about circumstantial evidence to be a misapplication of reasonable doubt.

There is nothing in her interview to indicate that any jurors acquainted the two concepts simply because they discussed both concepts. But again, that would be discussing mental processes. But in her interview Juror No. 4 said that the jury read the reasonable doubt

instruction out loud many times, and deliberated reasonable doubt for a long time.

And as we've just mentioned, Juror No. 4 indicated in her interview that when a juror brought up a factor the jury had been admonished not to discuss, the other jurors stopped that juror from discussing the factor and let him know that was not a factor to be properly considered.

As to the second ground, Juror No. 4 indicates in her interview that one juror did not speak much, and she thinks it may have been because she, quote, "spoke almost no English, or if she did, she was not comfortable," end quote. Well, this is entirely speculation as to that juror's ability to speak or understand English.

I'm not sure which juror Juror No. 4 is referring to. But I did conduct a fairly thorough voir dire of the jurors, as did both counsel. If anyone had any questions about a juror's ability to understand or communicate in English, a cause challenge could have been made. The Court did excuse many potential jurors due to language concerns. In addition, both sides had at least one peremptory challenge left which could have been exercised to excuse any juror that anyone had a concern about. I find Juror No. 4's statement to be speculative and, again, may go to this juror -- and, again, I don't know which juror she was talking about -- but that juror's mental process.

In *People vs. Bento*, 1998 case, 65 Cal. App. 4, 179, the Court made clear that once a verdict has been confirmed in open court and is complete, jurors are no

longer empowered to dissent from the verdict. In *Bento*, after recording the verdict but before the jury had been discharged, a juror indicated that she was not absolutely sure about reasonable doubt. The juror stated that her mind had been going back and forth during the polling on the verdicts, and she thought the polling referred to another defendant. Because the verdicts had been properly recorded, the trial court refused to reconvene the jury for further deliberation based on this juror's dissent.

A trial court has discretion to grant an evidentiary hearing on a new trial motion based on allegations of jury misconduct, and to have jurors called to testify at that hearing. The Court cites to *People vs. Hedgecock* for that principle, 51 Cal. 3rd, 395. That case is from 1990. The Court finds that is unnecessary here.

The Court has considered the evidence submitted by both sides, and the statements made by Juror No. 4. I won't consider the foreperson's statements any longer, if that's People's request. But even without that, the evidence indicated that no duress or coercion was part of the deliberations. Juror No. 4 stated in her interview she had the opportunity to fully be heard and discuss her views during the deliberations, and that no one applied pressure or intimidation.

I indicated earlier that I consider the foreperson's statement that all the jurors slept on the verdict and came back Tuesday, and then she had them review it before she signed it. This was after they had reached

their decision Monday. But even without that, again, I won't consider that. The Court's ruling here remains the same.

The Court gave each side the opportunity to poll the jury after the verdict was read. I don't believe anyone chose to do so. Although, the Court had earlier asked the jurors if this was their true and correct verdict. The verdicts were then properly recovered. Like the *Bento*, Penal Code Sections 1163 and 1164 were fully complied with in this case. So the third ground on which the defendant moves for a new trial the Court finds is not allowed by law either because once the verdicts were recorded, Juror No. 4 no longer had the ability to dissent to those verdicts.

So for all these reasons, the defense motion for a new trail is denied.

And I do want to just add, if the Court had any questions about any juror's ability to deliberate in English the Court oftentimes on its own motion will excuse someone for cause, and the Court would have done so in this case. But the Court found that all of the jurors that were sworn in as a deliberating juror understood English and spoke English as indicated during voir dire when I had conversations with the jurors. So the Court had no concerns in that regard.

Given the denial of the motion for new trial, are we prepared to go forward with sentencing at this time?

MS. HILL: Yes, your Honor.

MR. GROSS: Yes.