NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LUIS EPINOZA,
Petitioner,

v.

TAMMY FOSS,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI

SIXTH DISTRICT APPELLATE PROGRAM
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APPENDIX A

NOT FOR PUBLICATION

FILED

DEC 19 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS ESPINOZA, Petitioner-Appellant, v. TAMMY FOSS, Warden, Respondent-Appellee.	No. 22-15373 D.C. No. 3:19-cv-04693-VC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Argued and Submitted November 17, 2022
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and SESSIONS,** District Judge.

Luis Espinoza appeals the district court's order denying his 28 U.S.C. § 2254 petition for habeas relief. The district court issued a certificate of appealability only as to Espinoza's claim that certain evidentiary procedures in his trial violated his rights under the Sixth and Fourteenth Amendments. We have

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

jurisdiction pursuant to 28 U.S.C. § 2253. We affirm.

We review de novo the district court's denial of a habeas petition. *Andrews v. Davis*, 944 F.3d 1092, 1107 (9th Cir. 2019). Espinoza's petition is "subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which forecloses habeas relief for 'any claim that was adjudicated on the merits in State court' unless the state court's decision was (1) 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;' or (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Carter v. Davis*, 946 F.3d 489, 501 (9th Cir. 2019) (quoting 28 U.S.C. § 2254(d)). Under the first prong, a state court decision violates clearly established Supreme Court precedent only when there can be no "fairminded disagreement" about the rule's application to the present circumstances. *White v. Woodall*, 572 U.S. 415, 427 (2014).

1. *Confrontation Clause*. Espinoza argues that his Sixth Amendment right to confrontation was violated when the prosecutor at his trial was permitted first to ask substantive, incriminating questions of a witness in front of the jury despite the witness's refusal to testify, and then to argue in closing that the jury could infer that the witness was "protecting" Espinoza by refusing to testify. Espinoza's argument requires analogizing the procedure in his case to the constitutionally

impermissible procedure in *Douglas v. Alabama*, 380 U.S. 415, 416–17 (1964). Unlike in *Douglas*, however, in Espinoza's case, the prosecutor did not claim that the witness had previously made any out-of-court statements and the prosecutor's questions were not so detailed as to require an assumption that the questions reflected the uncooperative witness's prior statements. Further, the jury was instructed not to consider the witness's testimony or the prosecutor's questions. Under the circumstances, the jury could reasonably infer that the witness was protecting Espinoza without assuming he would have answered the prosecutor's questions in the affirmative. Thus, *Douglas* did not clearly establish a constitutional rule that every fair-minded jurist would have applied to Espinoza's case. *See White*, 572 U.S. at 427.

2. *Due Process*. Espinoza argues that the prosecutor committed misconduct by calling the witness despite the witness's prior refusal to testify, asking the witness whether he told Espinoza to kill the victim, and arguing to the jury that it could infer Espinoza's guilt from the witness's refusal to testify. Prosecutorial misconduct violates a defendant's constitutional right to due process when it renders a trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Although, as the district court noted, the prosecutor asked questions that he likely should not have been permitted to ask, the inappropriate questioning was mitigated by the trial court's instructions to the jury, and Espinoza has not

identified Supreme Court precedent that clearly proscribes drawing a negative inference from a witness's refusal to testify. The prosecutor's argument that the jury could infer that the witness refused to testify in order to protect Espinoza also was not irrational in light of evidence that the witness was not protecting himself, and evidence of the witness's relationship with Espinoza. *See Cnty. Court of Ulster Cnty. v. Allen*, 442 U.S. 140, 165–66 (1979) (holding that statutory presumption did not violate the due process clause where there was a rational connection between the facts proven and the facts presumed). Under these circumstances, the state court could reasonably conclude that the prosecutor's conduct did not render Espinoza's trial fundamentally unfair. *See Darden*, 477 U.S. at 181, 182; *see also Parker v. Matthews*, 567 U.S. 37, 47–48 (2012) (noting that "the *Darden* standard is a very general one" that allows broad leeway in case-by-case applications).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LUIS ESPINOZA, Plaintiff, v. TAMMY FOSS, Defendant.	Case No. 19-cv-04693-VC **ORDER DENYING HABEAS PETITION** Re: Dkt. No. 1

Espinoza's habeas petition is denied.

1. The only way the trial court's decision to admit gang expert testimony could be deemed a due process violation is if there were "*no* permissible inferences the jury may draw" from the testimony and it was "'of such quality as necessarily prevents a fair trial.'" *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (quoting *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986)). In this case—more so than most cases where gang expert testimony is admitted at trial—the evidence was probative. Aside from the gang expert testimony, the government introduced other evidence relating to the shooter's motive and identity—the prior relationship between Martinez and Espinoza, their conversation outside the convenience store, the fact that mere minutes passed between the fight and the shooting, and the shooter emerging from the apartment complex across the street. The gang expert's testimony bolstered this evidence. His testimony that gang members may retaliate on each other's behalf to preserve the gang's standing in the community provided the jury with a reason to identify Espinoza, rather than Martinez or some other person from the apartment complex, as the shooter. So the California Court of Appeal's decision to reject the due process claim relating to the gang expert

testimony was not objectively unreasonable.[1]

2. Espinoza also contends that his due process and confrontation rights were violated in connection with Martinez's refusal to testify. Martinez invoked the privilege against self-incrimination in front of the jury. His invocation was illegitimate, because the government had offered him immunity. Before holding him in contempt, the trial court permitted the prosecutor to ask him a few substantive questions, including whether he had told Espinoza to kill Pimental. The trial court ultimately struck Martinez's testimony, told the jury not to consider it, and gave a limiting instruction that counsel's questions were not evidence. During closing arguments, on rebuttal, the prosecutor urged the jury to consider why Martinez refused to testify and who he was protecting.

Espinoza's case lies somewhere between two Supreme Court decisions—one finding a constitutional violation and the other not. In *Douglas v. State of Alabama*, the Court found that the defendant's confrontation rights were violated when the prosecutor read the entirety of a witness's signed confession implicating the defendant to the jury, in the form of questions to the witness who repeatedly refused to testify. 380 U.S. 415, 416–17 (1965). By contrast, in *Frazier v. Cupp*, 394 U.S. 731 (1969), the Supreme Court did not find a constitutional violation when the prosecutor previewed a witness's testimony in his opening statement and the witness subsequently invoked his Fifth Amendment privilege and refused to testify in front of the jury. *Id.* at 733–34. The trial court's limiting instruction—that the opening statement was not evidence—and the relatively limited probative value of the witness's potential testimony were enough to alleviate any constitutional concerns. *Id.* at 735–36.

The conduct of the trial court and the prosecutor in this case are more troubling from a constitutional standpoint than the events in *Frazier*. The prosecutor asked Martinez substantive questions in front of the jury that he likely should not have been allowed to ask. But the trial

[1] Although the decision to admit the YouTube videos of Espinoza rapping is head-scratching, it was not prejudicial in light of the other evidence presented against him at trial (including but not limited to the gang expert testimony).

court also took actions that were more protective than the limiting instructions in *Frazier*. And although the trial court allowed the prosecutor to make a limited argument at closing about Martinez's refusal to testify, that decision was not unreasonable. Under these circumstances, it arguably would have been unfair to the prosecution to prevent the jury from drawing reasonable inferences from Martinez's improper refusal to testify.

Although Espinoza's trial was somewhat more troubling than *Frazier*'s, it was far less constitutionally troubling than *Douglas*'s. Asking a few substantive questions of a witness who improperly invoked the Fifth Amendment privilege is nothing like reading a signed confession implicating the defendant under the guise of asking questions to a witness who refuses to testify. Overall, on habeas review, the Court cannot say that it was an unreasonable application of or contrary to clearly established Supreme Court precedent for the California Court of Appeal to reject this claim.[2]

* * * *

A certificate of appealability will issue only on the issues discussed in Section 2 of this ruling, because only for those issues would reasonable jurists "find the district court's assessment of the constitutional claims debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see* 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

Dated: March 1, 2022

VINCE CHHABRIA
United States District Judge

[2] At the hearing, Espinoza identified *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Namet v. United States*, 373 U.S. 179 (1963), as his strongest cases to overcome the AEDPA bar. But *County Court* and *Darden* are far too general to make it "obvious that a clearly established rule applies" in this case. *White v. Woodall*, 572 U.S. 415, 427 (2014). And *Namet* is not a constitutional precedent; it addresses non-constitutional evidentiary violations, which are not cognizable in federal habeas. 373 U.S. at 185; *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).

APPENDIX C

Court of Appeal, Sixth Appellate District - No. H043052

S248328

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

LUIS ESPINOZA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

F

APPENDIX D

Filed 3/20/18 P. v. Espinoza CA6

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. LUIS ESPINOZA, Defendant and Appellant.	H043052 (Monterey County Super. Ct. No. SS140801)

I. INTRODUCTION

A jury convicted defendant Luis Espinoza of first degree murder (Pen. Code, § 187, subd. (a))[1] and found that, in the commission of the murder, defendant personally and intentionally discharged a firearm, causing death (§ 12022.53, subd. (d)). The trial court imposed consecutive terms of 25 years to life for both the murder and the firearm allegation, for a total prison term of 50 years to life.

On appeal, defendant contends the trial court erred by allowing the prosecution to: (1) present gang expert testimony to prove motive and identity; (2) present YouTube videos showing defendant performing gang-related rap songs; (3) call Rene Martinez as a witness, since Martinez had indicated he would refuse to testify. Defendant also contends the prosecutor committed misconduct by (1) asking Martinez whether he had

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

ordered defendant to shoot the victim and (2) arguing that Martinez was "protecting someone" by refusing to testify. Defendant additionally contends the cumulative effect of the trial court errors and prosecutorial misconduct requires reversal. Finally, defendant contends a remand for resentencing is required because he is entitled to the benefits of a recent amendment to section 12022.53.

Although we find no merit to defendant's evidentiary claims or claims of prosecutorial misconduct, we will reverse the judgment and remand the matter to allow the trial court to consider whether the section 12022.53, subdivision (d) enhancement allegation should be stricken.

II. BACKGROUND

On September 12, 2012, 22-year-old Richard Pimentel died after being shot in the back of his neck while he was walking down North Main Street in Salinas. About three minutes earlier, Pimentel had assaulted defendant's friend Rene Martinez in front of the Chin Brothers Market. Defendant had gone to the market with Martinez, a fellow member of defendant's gang, and defendant had been inside the market at the time Martinez was assaulted by Pimentel. Pimentel was not a gang member, but he had a history with Martinez.[2]

A. The Shooting

At the time of the shooting, Martinez was on parole and was wearing a GPS ankle bracelet. Martinez was dating Kayla Pena, and defendant was dating Pena's sister. Pena's aunt lived in "The Pit," an apartment complex located on Rossi Street across from Chin Brothers Market.

[2] Pimentel and Martinez had been good friends in the past, but they had a falling out when Pimentel was about 14 or 15 years old. Pimentel told his sister that Martinez had given him "some marijuana laced with something" that caused Pimentel to go "in and out of mental hospitals."

At about 5:50 p.m., defendant, Martinez, and Pena's younger brother D. drove up to Chin Brothers Market in Pena's Jeep. They spent some time in the market and made purchases. Martinez left the market at about 5:56 p.m. While defendant and D. were still inside the market, Martinez was attacked by Pimentel. Defendant and the store clerk ran outside. The store clerk carried a bar or pipe, which appeared to scare off Pimentel, who walked up Main Street towards the freeway.

D. thought that defendant said something to Martinez or that Martinez said something to defendant.[3] Surveillance video from the Chin Brothers Market appears to show defendant and Martinez briefly talking as Martinez and D. got back into the Jeep. Defendant then ran across the street back to "The Pit" apartment complex, while Martinez and D. returned to the apartment complex in the Jeep. The Jeep left the Chin Brothers Market parking lot at 5:57 p.m.

After defendant ran back to "The Pit" apartment complex, someone in that area screamed, "No, don't do it, don't do it." About a minute later, Pena (Martinez's girlfriend) ran from the apartment complex over to the market. Pena asked what had happened and watched the market's surveillance video of the fight.

Surveillance video from several businesses in the area of the shooting showed Pimentel walking north on Main Street just before 5:58 p.m.[4] Seven seconds later, someone ran out of "The Pit" apartment complex. The person ran north on Bridge Street and began following Pimentel. At 5:59 p.m., someone reported the shooting.

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[3] When asked if defendant said anything after the fight, D. initially testified, "I don't really remember." He then testified, "I'm guessing so. I think so." The prosecutor tried to clarify, asking, "You think he said something, but you don't remember what it was?" D. responded, "No, I don't remember." The prosecutor later asked D. if he "still" did not remember "what it was that Rene Martinez said to [defendant] before he ran across the street," and D. again responded, "No, I do not remember."

[4] The time stamps on the various surveillance videos were later correlated with police dispatch time.

At 6:01 p.m., the apparent shooter returned to "The Pit" apartment complex. At 6:02 p.m., Pena ran from Chin Brothers Market back to the apartment complex. Pena's Jeep soon pulled out of the apartment complex, followed by defendant's red Dodge Durango.

B. Investigation

Pimentel's body was found on the sidewalk in front of the Salvation Army on North Main Street.

A witness heard a gunshot while she was across the street from the Salvation Army, and she saw a person running away through the Salvation Army parking lot. The person was wearing a polo shirt. When the witness viewed the surveillance video from Chin Brothers Market, she believed defendant was wearing the same shirt as the apparent shooter, although she had reported that the apparent shooter had been wearing a red shirt with white stripes, while the surveillance video showed defendant wearing a gray shirt with red stripes. The witness also recognized defendant's manner of running.

A family of three (J.C., his wife G.C., and their 11-year-old daughter D.C.) had seen the shooting while driving. All three described how the shooter came up from behind the victim and shot the victim in the back of the head.

J.C., who had been driving, did not get a good look at the shooter but believed the shooter was Hispanic, about five feet seven inches tall, slim, in his mid-20's, with short hair and a moustache, wearing a red or maroon shirt with grey stripes "or somethin' like that." J.C. was shown video from Chin Brothers Market and thought defendant's shirt was "pretty similar" to the shirt the shooter was wearing. He thought defendant's face "[s]omewhat" looked like the shooter's face. He could not say for sure that defendant was the shooter.

G.C. reported that the shooter was Hispanic, with a medium skin tone, in his mid-20's to mid-30's, somewhere between five feet six inches and five feet nine inches tall,

thin, with a moustache, wearing a long sleeved red and grey striped shirt. G.C. did not recognize the shooter when shown the surveillance video from Chin Brothers Market.

D.C. thought the shooter was Hispanic, in his 20's, not "that tall," and skinny. D.C. did not remember seeing a moustache, and she believed that the shooter had been wearing a dark green or brown shirt with white stripes. D.C. did not recognize the shooter when shown the surveillance video from Chin Brothers Market.

A teenager who had been riding a bike at the time of the shooting described the shooter as a Hispanic male in his 30's, with a moustache and short hair, wearing a dark red shirt. The teenager watched the surveillance video from Chin Brothers Market but did not make an identification. At trial, the teenager recalled that the shooter had been wearing a red short-sleeved t-shirt.

The market clerk reported that defendant, who had been a regular customer, were wearing a brown shirt. The clerk described how defendant had tried to break up the fight between Martinez and Pimentel, and how defendant had run across the street afterwards.

D. and Pena were both interviewed after the shooting, but neither of them ever provided defendant's name.

A Salvation Army employee saw someone running away from the scene of the shooting. The person jumped over a fence behind the Salvation Army. The employee described the person as a Hispanic male in his 30's, about five feet five inches tall, wearing a short-sleeved red polo shirt. The employee could not identify anyone from Chin Brothers Market's surveillance video.

C. Gang Evidence

Salinas Police Detective Jared Sivertson testified about the Salinas East Market (SEM) subset of the Norteño criminal street gang. Defendant had tattoos indicating he was a member of SEM, including a Huelga bird on his right leg, "SEM Street" on both legs, and "SEM Street" under his right eye. Such tattoos help promote the gang and

strike fear into the public, and they show a gang member's level of commitment to the gang.

Defendant had prior contacts with law enforcement that indicated his membership in the SEM gang. In July 2008, defendant was in a car with three other individuals, including Martinez. The individuals in the car were all Norteño gang members. They were wearing "clothing that was indicative" of Norteño gang membership and had gang tattoos. During that police contact, defendant admitted to hanging out with active Norteño gang members and said that he would never associate with Sureños. Following that contact, defendant and Martinez were arrested and taken to jail, where they were housed in a pod for Norteños who are in good standing with the gang. Defendant and Martinez spent three days in that pod.

In November 2009, defendant and Martinez were together again. Defendant admitted to being an SEM gang member. He had the SEM tattoo under his eye and was wearing a red flannel shirt.

In March 2007, defendant was a passenger in a car that was stopped by police. Defendant fled but was later located. He stated, "I'm a gang member and they aren't. I just got scared, and that's why I ran." Defendant also said, "I am a SEMster."

In 2006, defendant was in a car with three other Norteño gang members. Cocaine bindles were found in the car and may have been possessed for sale for the benefit of the gang.

While in jail for the current charges, defendant was held in a Norteño pod. The pod was specifically for "more sophisticated" Norteños.

Martinez also had SEM and Norteño tattoos. He had "Salas" across his chest and "M" (for "Marketa," a shorthand for SEM) behind his ear. Martinez had admitted his gang membership during police contacts. During one contact, he was found with a cell phone that had "X4" (representing the number 14) and a clown wearing a red bandanna on the screensaver.

Defendant had made two gang-related YouTube videos. One video, called, "It'll Never Get Old," was 54 seconds long. The video began with an image of a residence on Harvest Street, a known Norteño gang location. In that video, defendant sang, "SEM don't give a damn" and made references to alcohol and drugs. Defendant also sang, "This lifestyle it'll never get old to me." Defendant's back was shown with large letters "S-E-M." The video also included an image of a firearm. In addition, the video contained an image of fingers showing the letter "M" (again, for "Marketa"). Defendant was shown wearing red, and the video included a picture of the United States with the southwest shown in red, which was intended to show the reach of the Norteños. An image showed "187 on" with a reference to "VGS" (a Sureño gang in Salinas), meaning "homicide committed on his rival gang." Defendant was shown posing with a large red M&M candy character while displaying an "M" sign with his fingers. Defendant also rapped about "checking his '7' on his hip," which was a reference to keeping a firearm in his waistband area. Defendant indicated he was keeping the firearm "[i]n case these sucka[s] decide to trip," meaning he would be able to protect himself. He also sang, "Still leaving suckas dead where they stand and before they hit the pavement," which was "a very violent statement" that referred to committing a homicide by shooting someone "instantly before the person even has a chance to fall to the ground."

The second video, called "Hell in My City," was one minute 24 seconds long. The initial images on the video were of marijuana. The lyrics included "It's hell in my city, lack remorse, show no pity," which meant that the gang lifestyle was "business oriented" and gang members "care about themselves and that's it." The lyric "slugs and stitches" referred to ammunition and a violent act that would cause someone to need stitches. Another lyric was, "I'll make your guts and your brains hang," which meant committing homicide or hurting someone. The lyric "droppers must die" meant that it would be okay for someone to kill a person who had left the gang lifestyle. In that video, defendant was

shown reaching down into his waistband for a gun. The video also showed defendant making gang signs, smoking, and drinking alcohol.

Detective Sivertson explained that Pimentel's attack on Martinez would have been "a big issue" for the reputation of SEM gang members, because it would have shown that the community did not fear them. Without "swift and immediate action" in retribution for the attack, Martinez and defendant could face punishment from their own gang. They would have been expected to do something of "equal or greater value" in response to the attack. It would not be unusual if the retaliation was a bullet to the head. Doing the retaliatory crime in public would benefit the gang because it would show "that they're not afraid." Since Martinez had an ankle monitor, it would have been easy for the police to determine that he had committed any retaliatory crime, which might have left "the obligation" to defendant.

D. Defense Evidence

The chain-link fence behind the Salvation Army was swabbed for DNA on September 20, 2012. Because the DNA collection occurred eight days after the shooting incident, other people could have deposited DNA on the fence, or the shooter's DNA could have been disturbed, lost, or degraded. Defendant's DNA did not match the DNA found on the fence.

E. Charges, Convictions, and Sentence

Defendant was charged with first degree murder (§ 187, subd. (a)) with a firearm allegation pursuant to section 12022.53, subdivisions (b), (c), (d), and (e). After a jury trial that began on September 28, 2015, the jury found defendant guilty and found true the allegation that defendant personally and intentionally discharged a firearm, causing death, pursuant to section 12022.53, subdivision (d).

At the sentencing hearing held on November 20, 2015, the trial court imposed consecutive terms of 25 years to life for both the murder and the section 12022.53, subdivision (d) firearm allegation, for a total prison term of 50 years to life.

III. DISCUSSION

A. Admission of Gang Expert Testimony

Defendant contends the trial court abused its discretion by allowing the prosecution to present gang expert testimony to prove motive and identity, since there was "an inadequate showing that the crime was gang-related" and the gang evidence was prejudicial. Defendant contends the admission of the gang evidence violated his Fourteenth Amendment due process rights.

1. Proceedings Below

The prosecution filed a motion in limine to introduce evidence of a gang motive for the murder. The prosecution asserted that defendant and Martinez were members of SEM, that the physical attack on Martinez in public would have been seen as "an insult to the gang and a massive sign of disrespect," and that defendant would have felt obliged to seek revenge. The prosecution argued that jurors would need a gang expert to help them understand how "a very mild fist fight" could lead to "a public execution." The prosecution asserted that gang evidence would thus be relevant to motive and identity.

Defendant filed a motion in limine to exclude "any and all" gang evidence on grounds of relevance and Evidence Code section 352. Defendant asserted there was no evidence that the crime was gang-related, noted that no gang enhancement had been alleged, and argued that gang expert testimony would "inflame the jury." Defendant later argued that the prosecution wanted to introduce gang evidence in "an attempt to salvage" its case because of weaknesses in the evidence showing defendant was the shooter. He objected that the admission of gang evidence would violate his confrontation, due process, and fair trial rights.

The trial court found that the gang evidence was admissible to prove motive and that the gang evidence also had "some relevance" to prove identity. The trial court found that presenting the gang evidence would not necessitate an undue consumption of time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury.

Rather, the gang evidence would "clarify the issues." The trial court would give a limiting instruction to inform the jury that evidence of defendant's gang membership was insufficient to prove his guilt.

Defendant later reiterated his objections to the admission of gang evidence, adding a reference to Evidence Code section 1101. The trial court reiterated that it found evidence of gang motive to be admissible and that some of the gang evidence was also relevant to identity.

After the gang expert testified, defendant moved for a mistrial. He argued that all of the gang expert's testimony about defendant had been based on hearsay and that the admission of that testimony prevented defendant from having a fair trial. The trial court again found that the gang evidence was relevant to motive and that it "also could go to identity."

The trial court gave the jury the following limiting instruction after the gang expert's testimony: "[E]vidence has been introduced that the defendant allegedly associates or is a member of a criminal street gang. Additional evidence was introduced regarding gang culture, philosophy and/or code of conduct of gang members. [¶] Any such evidence relating to criminal street gangs and/or the defendant's association or membership with a criminal street gang was admitted for a limited purpose, specifically as evidence of identity or motive."

The jury was later instructed: "The People presented evidence that the defendant previously and/or currently associates with or is a member of a criminal street gang. There was testimony about contacts with other alleged gang members and two You Tube videos were also introduced into evidence. Additional evidence was presented regarding criminal street gangs. [¶] You may consider any evidence relating to criminal street gangs for the limited purpose of deciding, one, identity, that the defendant was the person who committed the offense and the special allegation alleged in this case; and/or two, motive, that the defendant had a motive to commit the offense alleged in this case.

[¶] Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. None of the gang evidence is sufficient by itself to prove that the defendant is guilty of murder or that the special allegation has been proved. [¶] You cannot convict the defendant or find the special allegation true because you believe there is evidence that he's either a gang member or an associate with a criminal street gang. The People must still prove the charge and special allegation beyond a reasonable doubt."

After the jury returned its verdicts, defendant moved for a new trial. Defendant asserted that the evidence had shown a "personal quarrel" between Pimentel and Martinez, that the "horrendous litany of gang activities, testified to by the gang officer, was irrelevant and extremely inflammatory and prejudicial," and that much of the testimony had been inadmissible testimonial hearsay. The trial court denied defendant's motion for a new trial, finding that the gang evidence had been "clearly admissible for motive and identity." The trial court found, "The situation could not have been explained without allowing the People the ability to try their case in the manner that they did."

2. Analysis

Defendant first contends that the gang expert's testimony was akin to evidence of prior acts introduced to show identity pursuant to Evidence Code section 1101, subdivision (b), and that therefore, the gang expert's testimony was admissible only if the trial court found that " '[t]he pattern and characteristics of the crimes [were] so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 (*Ewoldt*).) Defendant acknowledges that "the gang expert testimony was not evidence of other acts per se" and that he is making a novel argument in asserting that the gang expert testimony was subject to the " 'like a signature' " standard. (See *Ewoldt, supra,* at p. 403.) Defendant also acknowledges that he did not make this argument in the trial court.

We agree with the Attorney General that the " 'like a signature' " standard of *Ewoldt, supra,* 7 Cal.4th at page 403 does not apply to the a trial court's decision to admit evidence of gang culture and habits to show motive. The *Ewoldt* court considered whether evidence of a defendant's "uncharged criminal conduct" (*id.* at p. 386) was admissible pursuant to Evidence Code section 1101, subdivision (b), which pertains to "evidence that a person committed a crime, civil wrong, or other act." The gang expert testimony in this case was not admitted as evidence of uncharged criminal conduct. Rather, the gang expert testimony was admitted to show that defendant and Martinez were committed members of the SEM gang, and that because of gang culture, members of the SEM gang would have been expected to retaliate violently and publicly if a fellow SEM gang member was assaulted. As the California Supreme Court has stated, such evidence is admissible in a gang-related case "if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Defendant next contends that even if the " 'like a signature' test" of *Ewoldt, supra,* 7 Cal.4th at page 403 does not apply, the trial court "still abused its discretion" in admitting the gang expert testimony because it was speculative to conclude that the shooting was gang-related. (See *People v. Ward* (2005) 36 Cal.4th 186, 210 [trial court's decision to admit gang evidence is reviewed for abuse of discretion.].)

Defendant relies primarily on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), in which the appellate court found insufficient evidence to support the prosecution's theory that the defendant had committed a shooting "with the intent to gain respect" from his gang. (*Id.* at p. 227.) Two Hispanic males had fired guns at a house where a family birthday party was taking place. The shooters initially fled on foot, then attempted a carjacking. The defendant was identified from a photo lineup and charged with various crimes as well as a gang enhancement pursuant to section 186.22. (*Albarran, supra,* at p. 219.) At trial, evidence of the defendant's gang membership was

introduced, and a gang expert testified that gang members gain respect by committing crimes and intimidating people. The gang expert explained that a gang member who is attempting to gain respect will do something to make his gang identity known. (*Id.* at p. 221.) Although the jury found gang allegations true, the trial court granted a new trial motion and dismissed the gang allegations.

On appeal, the *Albarran* defendant argued that the gang evidence was "irrelevant and unduly prejudicial as to the underlying charges." (*Albarran, supra,* 149 Cal.App.4th at p. 223.) The appellate court agreed. The court explained that gang evidence has the potential to be highly inflammatory and thus should not be introduced "if it is only *tangentially* relevant to the charged offenses," if "its probative value is minimal," or if its only relevance is to " 'show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense.' [Citation.]" (*Ibid.*) In that case, "the motive for the underlying crimes . . . was not apparent from the circumstances of the crime." (*Id.* at p. 227.) The gang expert had testified that gang members commit crimes to gain respect and enhance their status within the gang, but that they gain such respect only if their identity (or the identity of the gang) becomes known, and in that case, "there was no evidence the shooters announced their presence or purpose—before, during or after the shooting." (*Ibid.*) The court concluded that "[i]n the final analysis, the only evidence to support the respect motive is the fact of Albarran's gang affiliation." (*Ibid.*)

The *Albarran* court also found that even if some of the gang evidence had been relevant to motive and intent, the trial court had erred by admitting "other extremely inflammatory gang evidence," such as evidence about crimes committed by other members of the defendant's gang, evidence that the defendant's gang had threatened to kill police officers, and evidence about the Mexican Mafia. (*Albarran, supra,* 149 Cal.App.4th at pp. 227-228.) That evidence "had little or no bearing on any other material issue relating to Albarran's guilt on the charged crimes." (*Id.* at p. 228.) Thus,

even though the trial court had given the jury a limiting instruction as to the gang evidence, some of that evidence had been "so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran's actual guilt," and it should not have been admitted. (*Ibid.*)

Defendant contends that the facts of the instant case are "remarkably similar" to the facts of *Albarran*. We disagree. Here, the motive for the Pimental shooting *was* apparent from the circumstances, since the shooting was committed only a few minutes after Martinez had been assaulted by Pimental. (*Albarran, supra,* 149 Cal.App.4th at p. 227.) Evidence that the shooting was committed in retaliation for Pimental's assault on Martinez included the fact that defendant ran to the apartment complex immediately after the assault and after Martinez said something to him, the fact that someone then yelled out "No, don't do it, don't do it" from the apartment complex, and the fact that Pena then ran from the apartment complex to the market to watch the surveillance video of the assault. That evidence, in conjunction with the evidence that both defendant and Martinez were SEM gang members, and the gang expert's testimony about how gang members are expected to react to an assault on a fellow gang member, was relevant to show the shooter's motive and identity. The evidence here stands in stark contrast to the evidence in *Albarran*, where the evidence did not match up with the gang expert's testimony about the types of acts that would show a gang motive. Further, in this case, there was no evidence about crimes committed by other members of defendant's gang, no evidence that defendant's gang had threatened to kill police officers, and no evidence about the Mexican Mafia. (Cf. *id.* at pp. 227-228.)

In sum, the trial court did not abuse its discretion by admitting the gang expert's testimony to show motive and identity.

B. Admission of YouTube Videos

Defendant contends the trial court abused its discretion under Evidence Code section 352 by allowing the prosecution to present the YouTube videos showing

defendant performing gang-related rap songs. Defendant asserts that the admission of the videos violated his Fourteenth Amendment due process rights.

1. Proceedings Below

The prosecution's motions in limine included a motion to introduce the YouTube videos. The prosecution noted that the videos included defendant declaring his allegiance to the SEM gang and indicating his willingness to commit violence—including gun violence—on behalf of the gang. The prosecution argued that the videos would show defendant's motive for the shooting.

Defendant's motions in limine included a motion to exclude the YouTube videos on grounds of relevance, under Evidence Code section 352, and based on his right to a fair trial.

At a hearing on motions in limine, defendant argued that the videos had "no real probative value" in that they did not tend to show identity or motive. He argued that the videos were "highly prejudicial" because jurors might assume defendant was guilty based on the videos. The prosecutor argued that the videos were relevant because they showed defendant was serious about his identification with the gang and willing to "take up violent action on behalf of the honor of the gang."

The trial court found the videos were relevant to the prosecution's theory of the case—"that this [was] a gang motivated retaliation murder for the moment of disrespect in the parking lot"—and admissible. The trial court noted it had excluded evidence of defendant's prior possession of a firearm as unduly prejudicial, but that it did not "view these videos in the same way."

As noted above, the trial court gave the jury a limiting instruction with respect to the gang evidence, which specifically referenced the two You Tube videos. The instruction told the jury that the gang evidence was being admitted for the limited purposes of identity and motive, and that the jury should not use that evidence to find defendant had a bad character or was disposed to commit crime.

2. Analysis

Defendant contends that the YouTube videos "had minimal probative value," in that they were cumulative of other gang evidence, and that any probative value "was far outweighed by their prejudicial impact," such that the trial court abused its discretion under Evidence Code section 352 by allowing the videos to be introduced into evidence. Defendant points out that the videos contained references to "various drugs or intoxicants" but that there was no evidence of any drug use or intoxication during the shooting. He also points out that the references to gang violence were "largely directed towards rival gang members, specifically Surenos," but that there was no evidence Pimentel was a gang member. Thus, he claims the videos had no "specific relevance" to his case and served primarily to emphasize "the violent nature of criminal street gangs" and to suggest that defendant "had the disposition to commit murder."

Defendant acknowledges the admission of violent gang rap songs was upheld in *People v. Zepeda* (2008) 167 Cal.App.4th 25 (*Zepeda*), where the songs were relevant to the defendant's "state of mind and criminal intent, as well as his membership in a criminal gang and his loyalty to it." (*Id.* at p. 35.) The admission of violent gang-related rap lyrics was also upheld in *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*), because the rap lyrics demonstrated one defendant's membership in a particular gang as well as "his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the killing." (*Id.* at p. 1373 & fn. 3.) Defendant contends this case is not like *Zepeda*, in which the song lyrics indicated an intent or motive to kill Sureños *and* the charged crime involved defendant shooting two apparent Sureños. And he contends *Olguin* is distinguishable because only lyrics, not videos, were admitted in that case.

Having reviewed the videos as well as the entire record, we find no abuse of discretion by the trial court. The videos had obvious probative value. The videos demonstrated defendant's commitment to the SEM gang, as they depicted him throwing

gang signs and singing about how the gang lifestyle will "never get old" to him. The videos supported the prosecution's theory—that defendant felt obligated to commit a retaliatory act of violence following an assault on a fellow gang member. The videos and gang expert testimony about the videos did not consume a significant amount of time. The videos were short, and the gang expert's direct examination testimony about the videos took up only 20 pages of reporter's transcript. Although the videos were certainly "reflective of a generally violent attitude" (*Olguin, supra,* 31 Cal.App.4th at p. 1373), nothing in the videos was particularly inflammatory. Thus, the trial court reasonably determined that the probative value of the videos was not "substantially outweighed by the probability" that their admission would "(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

C. Contentions Related to Martinez Being Called to Testify

Defendant contends the trial court erred by allowing the prosecution to call Martinez as a witness, since Martinez had indicated he would refuse to testify. Defendant also contends the prosecutor committed misconduct by (1) asking Martinez whether he had ordered defendant to shoot the victim and (2) arguing that Martinez was "protecting someone" by refusing to testify.

1. Proceedings Below

During the initial hearing on motions in limine, the trial court noted that Martinez was planning to "take the Fifth Amendment" and that counsel had been appointed for Martinez. Martinez was subsequently granted use immunity for his testimony.

When the prosecutor called Martinez to the stand, Martinez's appointed counsel was present. The clerk administered the oath, but Martinez responded, "I refuse to testify." The trial court instructed Martinez to respond to the clerk, and Martinez said, "Yes." Defendant objected to "any questions being asked" of Martinez, but the trial court overruled the objection.

The prosecutor first asked Martinez how he knew defendant. Martinez responded, "I refuse to testify." The trial court ordered Martinez to answer the question and repeated the question, but Martinez responded, "I refuse to answer any questions." The prosecutor asked Martinez if he understood that he had been granted immunity so that he could not incriminate himself in any way. Martinez responded, "Yeah, but I didn't accept it." Martinez indicated that he would refuse to testify despite the trial court ordering him to do so.

Martinez refused to testify after being asked if he was currently on parole. He also refused to testify when the prosecutor asked, "Did you tell the defendant . . . to kill Richard Pimentel?" The trial court ordered Martinez to answer the question over defendant's objection, but Martinez again refused to testify.

The prosecutor asked Martinez why defendant ran across the street to the apartment complex, but Martinez refused to testify even after the trial court ordered him to "answer the question." Martinez indicated he was aware that refusing to testify could lead to him being held in contempt of court, found to be in violation of his parole, and sent back to prison. The trial court then ordered a recess.

Defendant orally moved for a mistrial based on the prosecutor's question, "Did you tell the defendant . . . to kill Richard Pimentel?" Defendant asserted that the prosecutor had no foundation for asking the question and argued that the question was prejudicial. The trial court responded by noting that "questions of the attorneys are not evidence" and that Martinez had not answered the question.

The trial court then addressed Martinez, asking if he understood that he had no privilege to refuse to testify, because the prosecution was providing him with immunity. Martinez indicated he understood that, but that he would still refuse to testify. The trial court asked if Martinez understood that his continued refusal would "result in imprisonment for contempt." Martinez indicated he understood. The trial court then

found Martinez in contempt of court and, over the objection of Martinez's attorney, remanded Martinez into custody.

After Martinez's refusal to testify, the trial court instructed the jury: "[A]s I read to you in the preinstructions and will read to you again . . . , I said to you the attorneys' questions are not evidence, and that applies to all witnesses. Only the witnesses' answers are evidence. The attorneys' questions are relevant only if they help you understand what the witnesses' answers are. [¶] I specifically direct your attention in giving this admonition, although it applies to all witnesses, to the testimony of Mr. Rene Martinez. Clearly he did not answer any questions. Any of the questions by either attorney was not evidence, and by any of you cannot be considered for any purpose."

Defendant filed a written motion for a mistrial based on the prosecution's decision to call Martinez to the stand and ask him questions in front of the jury, including the question about whether he told defendant to kill Pimentel.

At a hearing on the mistrial motion, the prosecutor explained that he thought Martinez would answer if he was pressed on whether he was "part of the conspiracy to kill Richard Pimentel." Asking the question gave Martinez the opportunity to deny any such conspiracy. The prosecutor asserted he had not asked the question in bad faith. He planned to argue that defendant and Martinez "discussed the fact that Pimentel had to be killed" and that defendant would have to be the one since Martinez could not (due to his ankle monitor).

The trial court denied the mistrial motion. The court noted that Martinez had been given immunity and thus had no privilege not to testify. The court found "nothing improper about what was done."

During jury instructions, the trial court told the jury, "[T]he entire testimony of Rene Martinez, the few questions he did answer, the entire testimony is stricken. You are not to consider it." The trial court then admonished the jury: "Rene Martinez was called as a witness, but failed to comply with the Court's instructions to answer questions. Any

comments made by Mr. Martinez were stricken and may not be considered by you in your deliberations. You may not speculate as to what Mr. Martinez would have said had he elected to answer questions. Mr. Martinez did not have the right to refuse to answer questions in this case."

When defendant's trial counsel argued to the jury, he noted that the prosecutor had "brought in Mr. Martinez," that Martinez had refused to testify, and that the trial court had stricken Martinez's testimony and told the jury not to consider it. Defendant's trial counsel also told the jury that there was "no evidence whatsoever . . . as to what Mr. Martinez may or may not have said" to defendant after the fight, and that the jury should not speculate about it.

During the prosecutor's closing argument to the jury, he reminded the jury that Martinez had been brought in to testify and given immunity, but that he had refused. The prosecutor argued that although the trial court had stricken Martinez's testimony, the jury could still consider "the fact that he refused to testify." The prosecutor argued that Martinez had refused to testify "because he's protecting someone."

In his motion for a new trial, defendant argued that the trial court should not have allowed the prosecutor to call Martinez to the stand in front of the jury, knowing that Martinez would refuse to testify. Defendant also argued that the prosecutor had no good faith basis to ask whether Martinez told defendant to kill Pimentel. In denying defendant's motion for a new trial, the trial court found that under case law, "it is not error to have someone who refuses to testify do that in front of the jury." The trial court also noted that it had stricken Martinez's entire testimony and admonished the jury not to "consider anything he said."

2. Analysis – Requiring Martinez to Testify in Front of the Jury

Defendant contends the trial court erred by requiring Martinez to testify before the jury, knowing that he would refuse to testify, because it permitted the jury to speculate that defendant was "potentially responsible for the refusal." Defendant asserts that

Martinez's refusal to testify was irrelevant, and that by allowing the jury to witness his refusal, defendant's rights to confrontation and due process (under the Sixth and Fourteenth Amendments) were violated.

As defendant acknowledges, California case law does not support his position. When a witness has a *valid* Fifth Amendment right not to testify, it is "improper to require him to invoke the privilege in front of a jury." (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554 (*Lopez*).) However, "where a witness has *no* constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony." (*Ibid.*; see also *People v. Morgain* (2009) 177 Cal.App.4th 454 (*Morgain*); *People v. Sisneros* (2009) 174 Cal.App.4th 142 (*Sisneros*).) Defendant urges this court not to follow those cases, asserting that "[t]he analysis underlying *Lopez* and *Sisneros* is flawed" and that *Morgain* was "wrongly decided."

Lopez was a case involving charges and gang allegations. The prosecution called a gang member named Miranda to describe a gang-related assault he had committed a month before the charged offense to establish a pattern of criminal gang activity for purposes of section 186.22, subdivision (e). (*Lopez, supra*, 71 Cal.App.4th at pp. 1552-1553.) Miranda had pleaded guilty and his time for appeal had elapsed, so he no longer had a Fifth Amendment privilege, but when he took the stand, he refused to answer questions. (*Id.* at p. 1553.) The Court of Appeal found that "the jury was entitled to consider Miranda's improper claim of privilege against him as evidence relevant to demonstrate exactly what the gang expert had opined: that gang members act as a unit to advance the cause of the gang and to protect their members." (*Id.* at pp. 1555-1556; see also *Sisneros, supra*, 174 Cal.App.4th at p. 152 [witness's refusal to testify had probative value in light of gang expert testimony that the defendant's gang often retaliated violently against those who cooperated with law enforcement]; *Morgain, supra*, 177 Cal.App.4th

at pp. 467-468 [in case where identity was at issue, no error in permitting prosecutor to argue that girlfriend of defendant refused to testify in order to protect him].)

We agree with the rationale of *Lopez,* which was followed in *Sisneros* and *Morgain.* In the instant case, Martinez had no valid Fifth Amendment right not to testify since he had received immunity. (See *Morgain, supra,* 177 Cal.App.4th at pp. 466-467.) Martinez's refusal to testify was relevant to show that he was protecting defendant because defendant had committed the shooting in retaliation for the assault on Martinez. (See *id.* at pp. 467-468.) As the jury was "*entitled* to draw a negative inference" from Martinez's refusal to testify (*Lopez, supra,* 71 Cal.App.4th at p. 1554), the trial court did not err by requiring Martinez to testify before the jury.

3. Analysis – Prosecutorial Misconduct Claims

Defendant next contends the prosecutor committed misconduct by asking Martinez whether he told defendant to kill Pimentel. He asserts that the prosecutor had no good faith belief in the existence of the underlying fact, and that the question violated his Sixth and Fourteenth Amendment rights. Defendant further contends the prosecutor committed misconduct and violated his Sixth Amendment rights when, during argument to the jury, the prosecutor asserted that Martinez was "protecting someone" by refusing to testify.

"Under the federal Constitution, to be reversible, a prosecutor's improper comments must ' "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citations.] ' "But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citations.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000 (*Cunningham*).)

In claiming the prosecutor's question to Martinez was improper, defendant relies primarily on *People v. Perez* (1962) 58 Cal.2d 229 (*Perez*).[5] In *Perez*, the prosecutor asked an "extremely critical defense witness" whether he had been threatened. (*Id.* at p. 240.) The defendant claimed that the prosecutor's question effectively told the jury that the defendant " 'had controlled the testimony of the witness through fear.' " (*Ibid.*) Not only was there no evidence of such a threat, but the prosecutor made no attempt to prove that the witness had been threatened. The appellate court thus found the question "improper," since a prosecutor may not ask questions that suggest the existence of facts harmful to the defendant " 'in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied.' [Citations.]" (*Id.* at pp. 240-241, fn. omitted.)

Perez is distinguishable. Here, there was evidence that Martinez said something to defendant after Pimentel left and just before defendant ran across the street to "The Pit" apartment complex, and there was evidence that the shooter left "The Pit" apartment complex very soon after defendant arrived. The logical inference is that Martinez said something to defendant that motivated defendant to go shoot Pimentel. The prosecutor explained that this evidence was the basis for his question, "Did you tell the defendant . . . to kill Richard Pimentel?" Thus, although the prosecutor may not have had a good faith belief that Martinez would actually answer the question in the affirmative (since Martinez had refused to answer any questions), the prosecutor *did* have a good faith belief that the evidence supported the existence of the underlying fact. (Cf. *Perez, supra,* 58 Cal.2d at pp. 240-241; *United States v. Davenport* (9th Cir. 1985) 753 F.2d 1460, 1463 [prosecutor had no good faith basis for asking witness whether she had made a prior statement about defendant wanting her to help him rob a bank].) The question

[5] *Perez* was abrogated on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 32-33, which was abrogated by *People v. Martinez* (1999) 20 Cal.4th 225.

thus did not involve " ' " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury" ' " ' " nor " ' "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." ' " (*Cunningham, supra,* 25 Cal.4th at p. 1000.)

In claiming the prosecutor committed misconduct by asserting that Martinez was "protecting someone" by refusing to testify, defendant relies primarily on *People v. Kirkes* (1952) 39 Cal.2d 719, a murder case in which a witness saw the victim "enter and ride away in" the defendant's car on the night she went missing. (*Id.* at p. 721.) The witness had not come forward until after the defendant's indictment, however. During closing argument, the prosecutor told the jury, "You have the right to infer that this girl waited for her own safety until this Defendant was apprehended, until he was indicted by a Grand Jury of this County, until proceedings were had against him, to bring him to justice, before coming forward, because if she had come forward, with the knowledge that that man had of every portion of the evidence in this case, her life wouldn't be worth that." (*Id.* at p. 722.) The appellate court found that this constituted misconduct, since there was "no evidence whatever upon which to base that statement" and it was "entirely unjustified" to portray the defendant "as a murderer who would kill again to cover his crime and so bold that he had threatened those who might testify against him." (*Id.* at p. 724.)

Here, the prosecutor did not invite the jury to speculate as to why a particular witness failed to come forward in a timely manner, nor did the prosecutor assert that defendant would kill a witness who testified against him. As explained above, the jury was entitled to infer that Martinez refused to testify in order to protect defendant, a friend and fellow gang member. (See *Morgain, supra,* 177 Cal.App.4th at pp. 467-468.) Thus, the prosecutor did not commit misconduct by asserting that Martinez was "protecting someone" by refusing to testify.

D. Cumulative Prejudice

Defendant contends the cumulative effect of the trial court errors and prosecutorial misconduct requires reversal. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) However, we have found no errors by the trial court nor any prosecutorial misconduct. Therefore, there can be no cumulative prejudice.

E. Amendment to Section 12022.53

At the time of sentencing in this case, section 12022.53 contained a provision prohibiting a trial court from striking "an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h); see Stats. 2010, ch. 711, § 5.) However, section 12022.53 was amended effective January 1, 2018—while this appeal was pending. Section 12022.53, subdivision (h) now provides: "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. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Defendant requests this court remand the matter for resentencing to allow the trial court to exercise its discretion to strike the section 12022.53, subdivision (d) enhancement allegation pursuant to the amendment to section 12022.53 that became effective on January 1, 2018. Defendant asserts that he is entitled to the benefits of the amended version of section 12022.53 under the retroactivity principles of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*).

Estrada set forth an exception to the general rule that changes in the law apply prospectively: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a

lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Estrada, supra,* 63 Cal.2d at p. 745.) *Francis* determined that the same exception applied when a statutory amendment gave the trial court discretion to impose a lower sentence. In that case, the defendant was convicted of committing a felony drug offense. While his case was pending on appeal, the statute was amended to change the drug offense from a straight felony to a wobbler that could be charged as a felony or a misdemeanor. The *Francis* court determined that the amendment was retroactive under the principles of *Estrada*. (*Francis, supra,* 71 Cal.2d at pp. 75-78.) The court reasoned that while the amendment did not guarantee Francis a lower sentence, making the crime punishable as a misdemeanor showed a legislative intent that punishing the offense as a felony might be too severe in certain cases. (*Id.* at p. 76.)

The Attorney General agrees that "[t]he reasoning of *Francis* controls in this case," such that the amendment to section 12022.53, subdivision (h) applies retroactively to this case, which is not yet final. The Attorney General further agrees that a remand for is appropriate.

We find the Attorney General's concession appropriate. We will therefore remand the matter to allow the trial court to consider whether to strike the section 12022.53, subdivision (d) enhancement allegation under section 1385.

IV. DISPOSITION

The judgment is reversed and the matter is remanded for the purpose of allowing the trial court to consider whether to strike the Penal Code section 12022.53,

subdivision (d) enhancement allegation under section 1385. If the trial court strikes the Penal Code section 12022.53, subdivision (d) enhancement, it shall resentence defendant. If the trial court does not strike the Penal Code section 12022.53, subdivision (d) enhancement, it shall reinstate the sentence.

_____
Bamattre-Manoukian, J.

WE CONCUR:

_____
PREMO, ACTING P.J.

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GROVER, J.