No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICKY MENDOZA, *Petitioner*,

v.

WILLIAM SULLIVAN, Warden, *Respondent*.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICKY MENDOZA, Petitioner-Appellant, v. WILLIAM SULLIVAN, Warden, Respondent-Appellee.	No. 22-15933 D.C. No. 3:18-cv-07160-SI MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted March 11, 2024
San Francisco, California

Before: S.R. THOMAS, McKEOWN, and CHRISTEN, Circuit Judges.

Petitioner Ricky Mendoza appeals the district court's order denying his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for first-degree murder. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253, and we affirm.

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

The court reviews *de novo* the denial of a petition for writ of habeas corpus. *Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which governs this appeal, we cannot grant habeas relief unless the state court proceedings resulted in a decision that 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." 28 U.S.C § 2254(d).

1. Mendoza argues the California Court of Appeal unreasonably erred by concluding there was sufficient evidence to convict him of first-degree murder because no rational trier of fact could credit the testimony of purported accomplices Martin and Hellums. Evidence is sufficient under the Due Process Clause when, upon "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

"[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995). The court "must presume" that the jury resolved conflicting inferences "in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. The California Court of Appeal reasonably concluded, based on the testimony of

Hellums and Martin and other corroborating evidence, that the jury could have found Mendoza guilty beyond a reasonable doubt.

Mendoza nevertheless insists that the testimony of Martin and Hellums was insufficient to convict him because it was uncorroborated and "incredible, insubstantial, and inherently implausible." For support, Mendoza relies on the Ninth Circuit's rule that uncorroborated accomplice testimony is insufficient to support a conviction if it is "incredible or insubstantial on its face," *Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000) (citation omitted), and the Supreme Court's statement in *Lilly v. Virginia* that accomplice confessions are "presumptively unreliable," 527 U.S. 116, 131 (1999) (citation omitted). But the Ninth Circuit precedent discussed in *Laboa* "does not constitute 'clearly established Federal law, as determined by the Supreme Court,'" and "therefore cannot form the basis for habeas relief under AEDPA." *See Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam) (quoting § 2254(d)(1)). And *Lilly* concerns the implications under the Confrontation Clause of introducing out-of-court confessions by accomplices, not the sufficiency of in-court testimony by accomplices. *See Lilly*, 527 U.S. at 131.

We conclude the California Court of Appeal's rejection of Mendoza's *Jackson* challenge was not "objectively unreasonable." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) (citation omitted).

2. Mendoza argues that Martin's testimony was insufficiently corroborated under California Penal Code § 1111.[1] Although this corroboration rule "is not required by the Constitution or federal law," Mendoza may show that he was deprived of his due process right to fundamental fairness if he establishes that the state court "*arbitrarily* deprive[d] [him] of a state law entitlement." *Laboa*, 224 F.3d at 979 (emphasis added) (citing *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)).

Mendoza was not arbitrarily deprived of a state law entitlement in violation of due process. The California Court of Appeal examined the record evidence and concluded that Martin's testimony was adequately corroborated under § 1111. In particular, the court recognized that Mendoza's presence at the party was corroborated by Hellums, who testified that Mendoza was with the Norteño group earlier in the day and entered the party with them. It also noted that the text messages between Mendoza and his girlfriend strongly indicated that Mendoza was present when Navarro was killed. Moreover, Martin's account was further corroborated by forensic evidence concerning where and how Navarro was shot, as well as expert ballistics testimony.

Although the California Court of Appeal did not expressly discuss federal

[1] California Penal Code § 1111 provides that a "conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense."

due process, we may presume it adjudicated Mendoza's due process claim on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011). By expressly addressing § 1111 and holding it was satisfied, the court could have reasonably determined that Mendoza received a fundamentally fair trial and was not arbitrarily deprived of a state law entitlement.

3. Mendoza argues he was deprived of due process and his rights under the Confrontation Clause because he was not permitted to cross-examine Martin sufficiently. "[T]rial judges retain wide latitude to impose reasonable limits" on cross-examination, and "[n]o Confrontation Clause violation occurs as long as the jury receives sufficient information to appraise the biases and motivations of the witness." *Fenenbock v. Dir. of Corr. for Cal.*, 692 F.3d 910, 919-20 (9th Cir. 2012) (citation omitted).

The California Court of Appeal reasonably concluded that Mendoza had an adequate opportunity to cross-examine Martin and probe his credibility and potential biases. For example, defense counsel elicited testimony on cross-examination that: (i) Martin was originally charged with murder and attempted murder in this case, and could have received a life sentence; (ii) after the first jury deadlocked, Martin agreed to plead guilty to an unspecified violent crime with a ten-year sentence and to testify in the retrial of Mendoza; and (iii) Martin had repeatedly lied to police when first questioned about the shooting. Further, the trial

court permitted defense counsel to read a stipulation that informed the jury that Martin had been identified as the shooter in a separate unrelated murder, and that he had been charged with that murder and several other serious crimes. Accordingly, we agree that the limits on Mendoza's cross-examination of Martin did not violate Mendoza's constitutional rights.[2]

4. Mendoza argues that he was deprived of due process because the trial court failed to correctly instruct the jury about accomplice testimony. "[An] erroneous jury instruction can rise to the level of constitutional error if it 'so infected the entire trial that the resulting conviction violates due process.'" *Brewer v. Hall*, 378 F.3d 952, 956 (9th Cir. 2004) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). "[T]he fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle*, 502 U.S. at 71-72.

Here, no such "infect[ion]" that violated due process occurred. *Id.* at 72. California's rules regarding accomplice testimony, including California Penal Code § 1111, are not required by the Constitution or any holding of the Supreme Court. *See Laboa*, 224 F.3d at 979. Accordingly, Mendoza is not entitled to relief. *See Estelle*, 502 U.S. at 71-72.

5. Because we conclude that no constitutional errors occurred, there is

[2] Because federal review of habeas relief under § 2254(d) is limited to the state court record, *Shoop v. Twyford*, 596 U.S. 811, 819 (2022), Petitioner's motion for judicial notice (Dkt. 44) is DENIED.

no cumulative prejudice. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.").

AFFIRMED.

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICKY MENDOZA,

Plaintiff,

v.

WILLIAM SULLIVAN,

Defendant.

Case No. 18-cv-07160-SI

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Re: Dkt. No. 21

Before the Court is petitioner Ricky Mendoza's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, challenging his state court conviction for first-degree murder with gang enhancements. Dkt. No. 21. Based on careful review of the state court record, the Court finds petitioner has not met his burden under section 2254(d) on Grounds 1, 2, 3, 4, 5, and 6. The Court thus **DENIES** the petition for writ of habeas corpus.

IBACKGROUND

A. Procedural History

On June 25, 2013, a California jury found petitioner guilty of first-degree murder with criminal street gang enhancements in the death of Martin Navarro. Dkt. No. 13-5 at 117-120. (summary of verdicts). The jury also found petitioner personally used and discharged a firearm and committed the murder "for criminal street gang purpose." *Id.* The trial court sentenced petitioner to a term of life without the possibility of parole plus twenty-five years to life. Dkt. No. 13-6 at

1643 (report and sentence).

The California Court of Appeal affirmed petitioner's conviction on May 22, 2017. Ex. 9. Dkt. No. 13-10 at 263 (Court of Appeal decision).[1] The California Supreme Court summarily denied review on August 30, 2017. Ex. 11, Dkt. No. 13-10 at 453 (denial). Petitioner filed the instant writ of habeas corpus in the Northern District of California on November 27, 2018. Dkt. Nos. 1 (initially unsigned); 21 (later signed by petitioner pursuant to Court's order).

B. The Crime

Per 28 U.S.C. § 2254(e)(1), the court presents and presumes as true the following recitation of facts from the California Court of Appeal opinion:

> **A. The Birthday Party**
>
> On the evening of August 20, 2011, twin brothers Erick and Edgar Tejeda celebrated their 18th birthday with a party in the garage of their Antioch home. The brothers hired a deejay and posted an invitation on Facebook. By about 9:30 or 10:00 p.m., about 30 young people were in the garage. There was music, dancing, and flashing colored lights. Erick's girlfriend, Janicett Villegas, was at the party. Her friend Martin Navarro was also there with his cousin Gregorio Navarro. Brothers Brian and Francisco Serrano were there too.
>
> At some point, the friends noticed a new group had arrived at the party. Brian Serrano immediately recognized one of the new arrivals, George Hellums, whom he knew from school, but he did not know the others. Neither Erick nor Edgar Tejeda knew the group. The newcomers arrived in three cars, and entered the party together. Jessica Juarez drove one of the cars, bringing three girlfriends, Cristina Boggiano, Breana Uriarte, and Guadalupe Sanchez. George Hellums drove another car, bringing Tony Martin, Chris Donaldson, and Jairo Bermudez Robinson. According to George Hellums and Tony Martin, defendants Ricky Mendoza and Leon Moreno arrived in a third car with their girlfriends, Amanda Blotzer and Melissa Vargas.[2]

[1] On October 26, 2018, the California Court of Appeal reaffirmed the conviction but ordered a limited remand to consider an issue which does not affect the present writ of habeas corpus. Ex. 12, Dkt. No. 13-10 at 455.

[2] Neither defendant offered evidence they were elsewhere at the time and video surveillance tape shown to the jury confirmed both had been with others in the group earlier the same day.

The young men in the group were members of the Norteño criminal street gang.[3] Jessica Juarez was the girlfriend of a Norteño member (Carlos Guzman). The group carried a gallon-size bottle of cognac and a bottle of coca cola that they had been sharing earlier in the day into the garage with them, where they continued drinking from both.

According to George Hellums, at some point Jessica Juarez pointed to someone in the back left corner of the garage, telling her group the person was a "Scrap," meaning a member of the rival criminal street gang, the Sureños, and had snitched on her boyfriend, a Norteño. The jury heard expert testimony that Norteños and Sureños were engaged in a turf war in Antioch at the time and their members were obligated, under gang rules, to attack each other on sight.

Guadalupe Sanchez was standing in the same general part of the garage as Juarez. She also remembered Juarez pointing to someone, but did not recall Juarez saying the word "Scrap." She heard Juarez tell George Hellums and others in the group, "That's my ex." The other two young women who had arrived in Juarez's car, Cristina Boggiano and Breana Uriarte, also remembered Juarez saying that her ex-boyfriend was at the party.

Martin Navarro was an associate of the Los Monkeys Treces, a subset of the Sureño street gang. He wore a typical Sureño shirt at the party, blue with white stripes, and he had a blue bandana in his pocket.[4] He was standing near Edgar and Erick Tejeda at the time, in the back left corner of the garage, near a door to the backyard, and some household appliances. Janicett Villegas, also nearby, recalled a girl pointing at Martin and Martin's cousin, Gregorio Navarro, remembered someone staring in their direction.

Appearing upset, Jessica Juarez left the garage, and the others followed. Pacing with her cell phone in the driveway outside, Jessica made calls and texted. Then she spoke to the young men in her group, and at least some members of the group went back inside the garage, returning to the party.[5]

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[3] Defendants do not contest this point on appeal.

[4] Blue is the Sureño's color. Norteño's favor red.

[5] There was some disagreement among the witnesses about whether George Hellums went back inside the garage. Hellums testified that he remained outside, and Brian Serrano, who had recognized Hellums earlier, did not see him during the events that followed. Tony Martin testified that he thought Hellums had been with the group that returned to the party, but did not see Hellums inside the garage shortly afterward as events unfolded.

Inside the garage, Cristina Boggiano saw Jessica Juarez speaking to a group that included Tony Martin and defendant Moreno. Moreno was Latino in appearance, had long side burns with a goatee, and wore his long curly hair in a ponytail. The Tejeda twins and Brian Serrano all recalled a person matching this description walking over to the left corner of the garage, with at least two others following. The twins saw the same person punch Martin Navarro in the face.[6] Edgar Tejeda later said he thought the person might be Moreno.

Tony Martin testified he saw the incident also and the assailant was his friend, defendant Moreno.[7] When he saw his friend punch Navarro, Martin testified, he jogged over to help his friend; but he held back when he saw defendant Moreno had the upper hand, remaining nearby to "make sure nobody jumped in." Martin Navarro had covered his face with his arms, and was ducking down. Navarro and defendant Moreno exchanged a few words and then Moreno punched Navarro in the face again.

Erick Tejeda moved forward to try to break up the fight at this point, but someone put up an arm to stop him, saying "Don't touch my brother." Tony Martin testified he was that person.[8] A crowd had formed a circle around Martin Navarro and his assailant by this time and people were yelling. Guadalupe Sanchez had a bad feeling and knew something bad was about to happen. Janicett Villegas later told a grand jury she heard someone say, "Fuck you, Scrap."[9]

As Edgar Tejeda watched, Martin Navarro turned and tried to run through the door near where he had been standing, but he was shot before he could escape. Edgar heard three or four shots but did not see who had the gun. His brother, Erick Tejeda, was about five feet from the shooter and saw the gun, a revolver, but could not identify the shooter. Everything had happened too fast, and he was not sure what he had seen.

Tony Martin was the only one to identify the shooter at trial.[10]

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[6] Brian Serrano could not see what happened because a crowd gathered, blocking his view, although he did see someone throw a punch.

[7] Defendant Moreno agrees the trial evidence showed he punched Martin Navarro.

[8] According to Martin, he said, "Don't touch my brody," meaning "brother."

[9] Although she had been standing near her friend Martin Navarro at the time, and tried to stop the attack by getting between Navarro and his assailant, at trial Villegas testified that she did not remember anything about the assailant's appearance, or having heard anyone say "Fuck you, Scrap."

[10] Antioch police detective James Stenger, an expert on the Norteño and Sureño criminal street gangs, testified that community members may be beaten or shot for speaking to law enforcement about gang-related crimes. Most of the 30 to 40 people whom police interviewed in this case were reluctant to provide information. Guadalupe Sanchez agreed she was reluctant to

According to Martin, he had been standing about two feet behind defendant Moreno, next to Chris Donaldson, when defendant Ricky Mendoza grabbed and pushed him, and then defendant Moreno, out of the way and began shooting at Martin Navarro with a .357 revolver, hitting Navarro twice in the stomach. When Navarro tried to turn as if to exit through the nearby door, Martin saw defendant Mendoza shoot him again twice in the lower body. Navarro did not survive.

An expert in forensic pathology and cause of death, who performed Martin Navarro's autopsy, testified that Navarro had blunt force injuries or abrasions on his mouth consistent with a blow from a fist or blunt instrument and four gunshot wounds, two of which were fatal. An ammunition expert testified that bullet fragments taken from Navarro's body could have been fired by a .357 revolver but not from a Hi-Point pistol because of the latter's unique rifling characteristics.

B. The Aftermath

After the shots were fired, the group that had arrived with defendants Mendoza and Moreno ran back to their cars. As Tony Martin was running to the car in which he had arrived, he saw George Hellums and Chris Donaldson. Then he saw a two-door gray Honda with tinted windows driving slowly in the middle of the street. Donaldson walked in front of the car, stopping it.

Tony Martin had been carrying his gang's nine-millimeter Hi-Point pistol in the waistband of his pants. When he had ducked under the garage door to leave the party after the shooting, the gun had fallen out and Martin was carrying it in his hand. George Hellums told him to "start busting," and Martin understood this as a direction to shoot at the gray Honda.[11] Hellums had been a gang member for three or four years by then and was senior to Martin who had joined only four or five months earlier. Martin began shooting at the Honda, firing five times at the occupied vehicle while it was about 17 feet from him. At trial, he testified he felt his group was threatened, and fired at the Honda to protect them, without any intent to kill anyone. At least one of the bullets he fired wounded an occupant of the car, Naomi Caballero.[12]

After the gray Honda drove off, Tony Martin got a ride home in Jessica Juarez's car. Meanwhile, George Hellums got into a car with defendant Mendoza, Chris Donaldson, and Jairo Bermudez Robinson.

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testify, and said it was "nothing anyone want[ed] to do." Cristina Boggiano confirmed she was twice threatened about testifying in this case.

[11] George Hellums denied at trial that he told Tony Martin to "start bustin."

[12] An ammunition expert testified at trial that a bullet collected from Naomi Caballero's shoulder carried the distinctive marking of a Hi-Point firearm.

According to Hellums, when he asked his friends what had happened, defendant Mendoza said he had shot someone twice in the stomach and once in the back. At some later point, Mendoza reportedly told both George Hellums and Tony Martin that he shot Martin Navarro because he was a Scrap.

C. Text Messages[13]

Later, the evening of the party, George Hellums sent defendant Moreno a text message, "Erase *erythang*[,] *messags*[,] *kal log*" and Moreno replied "Yup." Near the same time, defendant Mendoza and his girlfriend, Amanda Blotzer, exchanged the following text messages: "[Blotzer:] *Yea* I'm *gud*. R u[?] *Dam u* had me *fukn* worried *wen* we got to the car *n u* weren't there." "[Defendant Mendoza:] Make sure *u dont* say *shyt forreal*….*an yo* friend." "[Blotzer:] *Na Wtf we not* big *mouthes* like that[.] don't even trip babe." "[Defendant Mendoza:] *K*."

The next morning, Blotzer texted defendant Mendoza: "He *die n* it says a 17 *yr* old *gurl* got hit." Later that morning, the pair continued texting: "[Blotzer:] News DUH."[14] "[Defendant Mendoza:] Im *watchn it rite* now." "I don't c nothin." "[Blotzer:] IT WAS LIKE FIVE *MINS* INTO THE *7 o clock* news right after the niner game fights." "[Defendant Mendoza:] I *dnt c* it. But *u* have a good day." "[Blotzer:] I wanna talk to you *tho* :(" "[Defendant Mendoza:] If *sumthen eva happns* to me would u stick *bu myside regadless* of *wat it iz*." "[Blotzer:] *Yea* I *wud*." "[Defendant Mendoza:] *U* sure *bout* that[?]" "[Blotzer:] Yea."[15]

D. Gang Evidence

Gang expert Detective Stenger stated his opinion at trial that defendant Mendoza was a member of the Norteño subset, the Elite Northern Empire (ENE). As support for this conclusion, Stenger relied, among other things, on defendant Mendoza's gang tattoos. Those included the word "Elite" tattooed on his stomach, and the words "Can't Stop" and "Won't Stop" on his forearms. In addition, the parties stipulated that, at some point in the five weeks before Martin Navarro was shot and killed, defendant Mendoza got the words "Real Shooter" and "SK," with a picture of a live round and a question mark, tattooed on the back of his neck. In Stenger's opinion, "Real Shooter" described the role that defendant Mendoza was willing to take for his gang and "SK" meant "Scrap Killer."

[13] Italicized portions denote spelling and grammatical errors in the original

[14] Detective Bittner, who obtained defendant Mendoza's cell phone records testified that "DUH" could mean "did you hear?

[15] In his closing argument to the jury, defendant Mendoza's counsel acknowledged that these text messages "establish[ed]" his client was "around" the party.

Expert Stenger also opined that defendant Moreno was a member of the Norteño subset, Crazy Ass Latinos or CAL. Defendant Moreno had the letters C, A, and L tattooed on his right hand and the letters X, I, and V—corresponding to the Roman numeral 14—tattooed on his left hand. Norteños like the number 14 because N is the 14th letter in the alphabet.

E. Defense Evidence

Defendant Moreno presented no evidence at trial, and his counsel acknowledged in his closing argument that Moreno might have been the one who punched or "brief[ly] scuffle[d]" with the victim, Martin Navarro, at the party. But, he said, Moreno did not anticipate someone else then would pull a gun and shoot Navarro. Rather, counsel maintained, any altercation between Moreno and Navarro was a matter between them as individuals and not a gang dispute.

Defendant Mendoza did not himself testify at trial but attempted to establish through other witnesses that another gang member—George Hellums or Chris Donaldson or both—shot Martin Navarro. The following evidence supported this theory: Tony Martin testified he loaned George Hellums a .38 special a couple of days before the shooting, and George Hellums testified he gave the firearm to Chris Donaldson while they were driving to the party. Donaldson had light-colored hair in a Mongolian cut, i.e., shaved on the sides, and long on top, with a tail in back. Erick Tejeda saw two gang members, one with a Mongolian haircut, follow and stand behind defendant Moreno while he punched Martin Navarro. According to Detective Bittner, in an interview the day after the shooting, Erick said he saw the man with the Mongolian haircut shoot Navarro with a .38. The ammunition expert testified that the bullet fragments removed from Navarro's body could have come from a .38. Shortly after the shooting, defendant Moreno texted Donaldson, "*Were u* at[?] [G]o get out of town and tell me *were u* at."[16] At trial, however, Erick Tejeda did not recall telling the police he had seen the shooter. He testified everything had happened fast, the room was poorly lit, the situation was very stressful, and he only remembered seeing the gun, not the shooter.

Mendoza also called Francisco and Brian Serrano and Antioch police officer Marty Hynes as witnesses in an attempt to show that George Hellums shot at Navarro. According to Officer Hynes, on the night of the shooting Francisco said he saw the shooter, whom he described as a tall, dark-skinned man, possibly a Puerto Rican, wearing a white shirt and a red hat. Other witnesses agreed George Hellums wore a white shirt and red hat at the party and Brian Serrano testified that Hellums was African American.

On cross-examination, however, Brian Serrano testified that he and his brother had compared notes about the shooting before the police arrived.

[16] Italicized portions denote spelling and grammatical errors in the original.

In that conversation, Brian testified, Francisco said he thought the shooter was dark-skinned or black,[17] and Brian replied that the only African American he had seen was Hellums, who, he added, had been wearing a white shirt and a red hat. In her closing argument, the prosecutor suggested that Francisco might actually have seen Tony Martin, whom she indicated was Puerto Rican, standing in front of defendant Mendoza when the latter fired his gun and might have thought Martin was the shooter. Francisco Serrano did not go to school with Hellums and did not know him. After talking with his brother, the prosecutor argued, Francisco might have assumed Tony Martin was George Hellums, and given the police the description of Hellums' clothing that his brother had supplied.[18]

Defendants also challenged Tony Martin's credibility, observing that he originally had been indicted as a co-defendant in this case, was charged both with Martin Navarro's murder and attempted murder of Naomi Caballero, and could have received a life sentence if convicted. After the jury deadlocked in a first trial, however, Martin agreed to plead guilty to an unspecified violent felony, with a ten-year sentence, and testified as a witness instead at the second trial.

In the second trial, Martin acknowledged he had lied about the facts of the case in police interviews shortly after the shooting. For example, he originally told the police he had been outside when shots were fired and did not see the shooter. He denied having had a gun at the party, denied knowing anything about the Hi-Point firearm, did not include defendant Mendoza among those with whom he initially said had attended the party, and did not admit shooting at the gray Honda. Although Martin eventually told police that defendant Mendoza had been at the party and that he had walked back into the garage in time to see defendant Mendoza shoot Martin Navarro, he did not tell the police or prosecution he actually had been just feet away at the time of the shooting until almost two years later, just before the start of the second trial.[19] The jury also was advised, pursuant to stipulation between the parties, that Tony Martin was positively identified as the shooter in a different case nine days after Martin Navarro was killed; was charged with murder, attempted robbery, and attempted carjacking, a gang enhancement, and two special allegations; and had been advised in an interview with the district attorney's office that he would receive no deal in the second case for his testimony in this matter.

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[17] Officer Hynes testified that Francisco did not use the words "black" or "African American" in describing the shooter.

[18] Other witnesses reported Tony Martin had been wearing a red and blue Atlanta Braves hat on the day of the party.

[19] Martin's claim that he was in the garage and stopped Erick Tejeda from intervening to end the fight also arguably was contradicted by Erick's testimony that the person wore a black hoodie, since Martin, Hellums, and Detective Bittner all testified Martin had been wearing a red or burgundy hoodie that day.

> Defendants also challenged George Hellums' credibility. Hellums originally was arrested in connection with Martin Navarro's murder, but was released without being charged 72 hours later after giving a statement to the police. Hellums acknowledged he was afraid when he spoke to the police and could have said anything. When he gave the statement, he left the gang. Later his life and his family's lives were threatened, and he was placed in the California Witness Relocation and Assistance Program (CalWRAP). By the time of trial, he had been in CalWRAP for more than a year and a half, receiving a regular monthly allowance to pay his rent, utilities, and food.
>
> Hellums acknowledged he violated his CalWRAP agreement by lying to the police and later to a grand jury because he was afraid of future prosecution. For example, he lied to both about the direction he ran after the shooting, lied to the police about whether he was wearing a hat at the party, and lied to the grand jury about having seen defendant Mendoza carrying a gun earlier on the day of the party.[20] Hellums also told the grand jury he had not seen anyone else with a gun that day, although he had seen Tony Martin with the Hi-Point firearm in the evening and had himself given Chris Donaldson the .38. Despite these facts, he was not terminated from CalWRAP, and a separate charge for having been found in possession of an illegal sawed-off shotgun at the time of his arrest remained on hold pending his testimony in this case.

Dkt. No. 13-10, Ex. 9 at 2-11 (footnotes in original, renumbered here).

C. The Petition

Ricky Mendoza filed a petition for writ of habeas corpus on November 27, 2018. Dkt. Nos. 1, 21. The petition raises six ground for relief, as follows:

> **Ground 1.** The judgment should be reversed because it is based on the uncorroborated testimony of accomplices, violating [California] penal code section 1111 and due process. *Id*. at 19.
>
> **Ground 2.** The judgment violates due process and should be reversed because it is not supported by sufficient evidence. *Id*. at 25.
>
> **Ground 3.** The trial court's restriction on cross-examination of the most critical prosecution witness was an abuse of discretion which violated Mendoza's constitutional rights to confront the witnesses against him, to present a defense, and to due process of law, requiring reversal. *Id*. at 29.

[20] Hellums testified that defendant Mendoza only told him the .357 revolver was in the purse of Amanda Blotzer or Melissa Vargas.

> **Ground 4.** The prosecutor committed prejudicial misconduct, violating Mr. Mendoza's constitutional rights to confront the witnesses against him, to present a defense, to the effective assistance of counsel, and to due process of law. *Id*. at 36.
>
> **Ground 5.** The jury instruction on accomplice testimony was incorrect and incomplete, violating section 1111 and due process and requiring reversal. *Id*. at 48.
>
> **Ground 6.** Cumulative prejudice violated due process and requires reversal. *Id*. at 51.

On December 21, 2018, this Court ordered respondent to show cause why the petition should not be granted. Dkt. No. 7. Respondent filed an answer on April 12, 2019, Dkt. No. 12, and petitioner filed a traverse on August 19, 2021. Dkt. No. 30. The petition is thus fully briefed. The Court will now proceed to consider the merits of the claims raised therein.

LEGAL STANDARD

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which creates a "highly deferential" standard for reviewing state court rulings and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Under AEDPA, a federal court may not grant habeas relief unless (1) the state court's ruling was "contrary to, or involved an unreasonable application of," Supreme Court precedent that was "clearly established" at the time the state court adjudicated the claim on the merits, 28 U.S.C. § 2254(d)(1); *Greene v. Fisher*, 565 U.S. 34, 39 (2011), or (2) the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). The threshold requires "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law

beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). *See also White v. Woodall*, 134 S.Ct. 1697, 1706-07 (2014) ("The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question."). This high standard is meant to be "difficult to meet," because "the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (citations omitted).

AEDPA's deferential analysis applies only to claims "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 98. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99. The presumption even applies when a state supreme court summarily denies a claim without issuing a reasoned opinion and "there [is] no lower court opinion to look to." *Wilson v. Sellers*, 138 S. Ct. 1188, 1195 (2018).

In instances where "a state court's decision is unaccompanied by an explanation," a federal habeas petitioner's burden "still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. This inquiry requires a federal court to consider what arguments or theories "could have supported" a merits-decision, and then grant relief if no fairminded jurist would agree that those arguments or theories are consistent with Supreme Court precedent. *Id.* at 102. The existence of a reasoned state court decision simplifies matters. In these cases, even when a higher state court summarily denies review of the state court decision, a federal court will "looks through" the summary denial to the last reasoned decision, and determine whether that reasoned decision is objectively reasonable and consistent with clearly established federal law. *Wilson*, 138 S.Ct. at 1192.

DISCUSSION

A. Due Process Claim Based on Uncorroborated Accomplice Testimony (Ground 1)

In Ground 1, petitioner asserts his judgment should be reversed because it is based on the uncorroborated testimony of accomplices, violating California Penal Code Section 1111 and federal Due Process. Dkt. No. 21 at 19. The Court finds petitioner is not entitled to habeas relief on this basis.

1. Petitioner's Claim and Decision Below

Petitioner argues that "none of the non-accomplice eyewitnesses identified" him as the shooter. Dkt. No. 21 at 19. Petitioner argues the two eyewitnesses that did identify him—George Hellums and Tony Martin—were both accomplices to the crime, requiring that their testimony be corroborated pursuant to Cal. Penal Code § 1111 ("section 1111") before their testimony could be used to support a conviction. The trial court's failure to adhere to section 1111, petitioner argues, violated California law and federal due process.

The California Court of Appeal considered petitioner's claims on direct review. Ex. 9 at 13-21. Dkt. No. 13-10 at 280-81. The Court of Appeal "presume[d]," based on the record evidence, that "the jury found George Hellums was not an accomplice," relieving Hellums' testimony of the corroboration requirements of section 1111. Ex. 9 at 18. Petitioner does not rebut this factual finding with clear and convincing evidence, so it remains presumptively true. 28 U.S.C. § 2254(e)(1).[21] The Court of Appeal then "assume[d]" that "the jury found Tony Martin was an accomplice," which required, before permitting the jury to rely on Martin's testimony, that there be independent corroborating evidence that "'tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.'" Ex. 9 at 19 (quoting *People v. Vu*, 143 Cal. App. 4th 1009, 1022 (2006)).

After carefully reviewing the record, the Court of Appeal concluded that there was sufficient

[21] In the Traverse, petitioner asserts he "Proved by a Preponderance that Martin and Hellums were Accomplices." Dkt. No. 30 at 46. This utilizes the wrong standard of proof.

independent evidence indicating "that defendant Mendoza was present at the party, had a motive, and made inculpatory statements afterwards." Ex. 9 at 18-21. First, the evidence established that petitioner was with Hellums, Moreno, and several others in the hours leading up to the party, and "later arrived at the party in a car with their girlfriends, but that defendant Mendoza left the party after the shooting in a different car." *Id*. at 19-20. Second, at the time of the shooting, the Norteño and Sureño gangs were engaged in a "turf war," and petitioner was willing to act as "gang enforcer" for the Norteño gang by "shooting and killing any suspected Sureños whom he might encounter." *Id*. at 18. The evidence suggests petitioner had gang tattoos conveying his commitment to be a "Scrap Killer," and, at the party, overheard Jessica Juarez point out the decedent, who was wearing a blue shirt and bandanna, as a "Scrap" (i.e., Sureño). Third, the evidence established that, right after leaving the party, petitioner told Hellums and others in the car that "he had shot someone twice in the stomach and once in the back," and later described the decedent as a "Scrap." *Id*. at 21. The Court of Appeal also referred to the various text messages sent by petitioner to his girlfriend as probative of guilt. *Id*.

2. Legal Standard

In California, a "conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." Cal. Penal Code § 1111. The evidence required by section 1111 "need not corroborate every fact to which the accomplice testified or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." *People v. Fauber*, 2 Cal.4th 792, 9 Cal.Rptr.2d 24, 831 P.2d 249, 273 (1992). Ultimately, section 1111 operates as "a state law requirement that a conviction be based on more than uncorroborated accomplice testimony." *Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000).

Being a state law rule, habeas relief cannot "lie" for a claim based solely on a state court's erroneous application or interpretation of section 1111. *Id*. at 979. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"). Accordingly,

this Court's task is not to review whether section 1111 was properly applied.

Rather, a claim based on California's section 1111 may support habeas relief "only if the alleged violation of section 1111 denied [petitioner their] due process right to fundamental fairness" by "arbitrarily depriv[ing] the defendant of a state law entitlement" inherent in the state law rule. *Laboa,* 224 F.3d at 979 (citing *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)). In *Laboa v. Calderon,* the Ninth Circuit, citing to the Supreme Court's decision in *Hicks,* held that the habeas petitioner was not arbitrarily deprived of his state-created entitlement because there existed adequate corroborative testimony to permit the trial court to find section 1111's standard met. *Id*. at 979-80. Stated differently, *Laboa* demonstrates that if there is a non-arbitrary basis for the trial court finding an accomplice's testimony satisfactory under section 1111, there can be no federal habeas claim. *Id*. *See also People v. Davis*, 36 Cal. 4th 510, 548 (2005) ("because there was no violation of California law governing accomplice corroboration in this case, we need not decide whether any such violation would have infringed defendant's federal due process rights on a theory that it denied him a state-created right.").

Importantly, section 1111's limitation on criminal judgments based on uncorroborated accomplice testimony is not itself a "clearly established" component of federal due process. *See United States v. Augenblick*, 393 U.S. 348, 352 (1969) ("When we look at the requirements of procedural due process, the use of accomplice testimony is not catalogued with constitutional restrictions."); *Laboa*, 224 F.3d at 979 ("As a state statutory rule, and to the extent that the uncorroborated testimony is not 'incredible or insubstantial on its face,' [section 1111] is not required by the Constitution or federal law"); *Odle v. Calderon,* 884 F. Supp. 1404, 1418 (N.D. Cal. 1995) ("corroboration of accomplice testimony [as required by section 1111] is not a federal constitutional requirement.").

Thus, a habeas petitioner may base their claim for relief on California's section 1111 under one—and only one— "clearly established" federal rule: the state cannot "arbitrarily deprive" the petitioner of a state-created entitlement, namely, an entitlement to sufficiently corroborated accomplice testimony under section 1111. *Laboa,* 224 F.3d at 979. Applying AEDPA's deferential

analysis to that question,[22] this Court must consider whether the California Court of Appeal was objectively unreasonable in allowing petitioner's conviction to stand given the use of accomplice testimony. Because the Court of Appeals did not articulate a reasoned decision on this issue, this Court must (1) determine what arguments or theories "could have supported" the Court of Appeals decision, and then, (2) ask whether petitioner has established that all fairminded jurists would agree that those arguments or theories "are inconsistent with the holding in a prior decision of [the U.S. Supreme Court]." *Harrington*, 562 U.S. at 102.

3. Discussion

Based on careful review of the record, this Court finds the Court of Appeal could have concluded, based on the totality of the evidence before it, that the trial court's decision permitting Martin's testimony to stand did not constitute an arbitrary deprivation of petitioner's state law entitlement under section 1111. The Court of Appeals decision carefully surveyed the evidence and testimony put forth by non-accomplice witnesses to conclude that Martin's account was adequately corroborated as to satisfy section 1111. Ex. 9 at 18-21.

The Court of Appeals could have thus concluded that the trial court "did not arbitrarily deny

[22] Petitioner insists that a *de novo* standard of review should apply. Dkt. No. 30 at 41 (Traverse). The Court disagrees. Although the California Court of Appeal decision did not address the arbitrary-denial due process claim, this Court may presume the Court of Appeal "adjudicated the claim on the merits." *Harrington*, 562 U.S. at 99. The presumption may be rebutted if the "evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." *Johnson v. Williams*, 568 U.S. 289, 303 (2013). However, if the Court of Appeal could have regarded "a fleeting reference" to a federal claim in an appellant's papers as insufficient to "raise a separate federal claim," *id*. at 299, or "simply regard[ed] a claim as too insubstantial to merit discussion," the presumption of a merits-adjudication, and thus AEDPA's standard, remain in place even absent a sustained discussion of the federal claim. *Id*.

Here, petitioner's opening brief to the Court of Appeal stated: "The judgment should be reversed because it is based on the uncorroborated testimony of accomplices, violating Penal Code section 1111 and due process. (U.S. Const., amend. XIV; Cal. Const., art. I, § 15; § 1111; *Hicks v. Oklahoma* (1980) 447 U.S. 343.)." Ex. 6 at 34. Dkt. No. 13-10 at 49. The case cited therein, *Hicks v. Oklahoma*, contains the Supreme Court's pronouncement that the arbitrary-denial-of-state-entitlements framework. 447 U.S. at 346. Because the federal due process claim was located prominently in petitioner's brief to the California Court of Appeal, this Court cannot conclude that the Court of Appeal "overlooked" the claim.

[petitioner] of a state-created entitlement," but had adequate record evidence on which to find sufficient evidence to satisfy section 1111. *Id*. Because petitioner fails to carry his burden of establishing that *no* fairminded jurists would agree that such a conclusion is consistent with *Hicks v. Oklahoma*, 447 U.S. at 346, he is not entitled to habeas relief on that basis.

B. Due Process Claim based on Sufficiency of the Evidence (Ground 2)

In Ground 2, petitioner asserts that judgment violated due process because it is not supported by sufficient evidence. Dkt. No. 21 at 25. The Court finds petitioner is not entitled to relief on this basis.

1. Petitioner's Claim and Decision Below

Petitioner argues the testimony of Tony Martin and George Hellums was "inherently improbable and insubstantial," and thus "insufficient to support Mendoza's conviction of first-degree murder." Dkt. No. 21 at 25. At trial, Martin testified he saw petitioner shoot the victim. Hellums testified that, in the getaway car after the shooting, petitioner told him he shot the victim twice in the stomach and once in the back. Both testified that, later that night, petitioner told them he shot the victim because he was a "Scrap."

To undermine the veracity of Martin's testimony, petitioner points out that Martin's story changed between the initial police interview and the subsequent trial testimony. *Id*. at 25-26. For example, Martin initially told police he was nowhere near the shooting and did not see it happen, but later, facing threats of prosecution, testified "that he walked into the garage as Mendoza shot Navarro two or three times." *Id*. at 26. Petitioner also argues Martin's testimony is "inconsistent" with the other witnesses, none of whom included petitioner in their respective groupings of who they saw confront Navarro before the shooting. *Id*. (Boggiano said: Martin and Moreno confronted Navarro) (Sanchez said: Martin, Moreno, Hellums, and Donaldson confronted Navarro) (Tejada said: Moreno and Donaldson confronted Navarro). Petitioner further argues Martin's identification is directly contradicted by Erick Tejada, who told detectives he saw Donaldson pull out a .38 and shoot Navarro twice, *id*., and Francisco Serrano, who told detectives he saw Hellums shoot Navarro.

Id.

Petitioner similarly argues Hellum's testimony is inherently improbable and unreliable. First, petitioner argues Hellums implicated petitioner only after being himself threatened with prosecution for the murder. *Id*. at 27. Hellums was placed into the Witness Assistance program shortly after providing his initial statement to police, and remained in that program, receiving monetary stipends, for nearly two years by the time he testified at the second trial. *Id*. At the second trial, Hellums "admitted that he had lied to the police officers and the grand jury." *Id*. Hellums also denied being in the garage when the shooting happened, denied telling Martin to "start bustin," and denied even seeing Martin or hearing any additional shots fired outside the garage. *Id*.

Petitioner raised his sufficiency of the evidence claim on direct appeal before the California Court of Appeal. In a reasoned opinion, the Court of Appeal concluded neither Martin's nor Hellums' account was impossible or inherently improbable, and thus held petitioner's conviction was supported by substantial evidence:

> **… Sufficiency of the Evidence as a Whole**
>
> Defendant Mendoza alternatively submits that the judgment against him violates due process and should be reversed because the evidence against him, viewed as a whole, was insufficient to support the murder conviction. The main evidence was provided by Tony Martin and George Hellums, and their testimony, he asserts, was so unreliable and inherently improbable, and the corroborating evidence so slight, that no reasonable jury could have found him guilty beyond a reasonable doubt. We cannot agree.
>
> Defendant Mendoza maintains that the testimony of Tony Martin and George Hellums was too unreliable and inherently improbable to be believed because it was coerced by threats of prosecution, giving both men a strong incentive to lie in return for leniency; both admitted they had lied to the police; and Hellums admitted he had lied to the grand jury.[23] Additionally, Mendoza observes, Martin's

[23] Although defendant Mendoza contends the police "coerced" Martin and Hellums to testify against him, we note that he does not specifically assert the police acted improperly or that the alleged coercion so impaired the reliability of their testimony that it should have been excluded. (See, e.g., *People v. Williams* (2010) 49 Cal.4th 405, 452-453 [witness testimony may be excluded based on improper police coercion], but see *People v. Badgett* (1995) 10 Cal.4th 330, 354-355 ["We have never held . . . that an offer of leniency in return for cooperation with the police renders a third party statement involuntary or eventual trial testimony coerced"].)

description of events at trial contradicted his earlier statements to the police, Hellums' complete denial of all bad acts, was unbelievable on its own, and contradicted Martin's testimony about the shooting outside the garage, and both men contradicted other witnesses' testimony, i.e., about which gang members approached the victim, and the identity of the shooter.

The argument asks this court to make a determination about credibility and to resolve conflicts in evidence adduced at trial. As our own Supreme Court has confirmed, however, "[i]n deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In this case, the jury had the eyewitness testimony of Tony Martin identifying defendant Mendoza as the shooter, with corroborating evidence as discussed in the previous section.

Defendant Mendoza did not present an alibi and has not contended it was physically impossible for him to have been the shooter. Accordingly, we examine whether Tony Martin's eyewitness testimony was inherently improbable. In deciding this point, we must examine "the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying. . . . [T]he improbability must be 'inherent,' and the falsity apparent 'without resorting to inferences or deductions.' [Citation.] In other words, the challenged evidence must be improbable ' "on its face" ' [citation], and thus we do not compare it to other evidence (except, perhaps, certain universally accepted and judicially noticeable facts). The only question is: Does it seem *possible* that what the witness claimed to have happened actually happened? [Citation.]" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729.) We here answer the question in the affirmative. Nothing in Tony Martin's testimony was inherently improbable.

Defendant Mendoza unconvincingly attempts to compare this case to *People v. Reyes* (1974) 12 Cal.3d 486 (*Reyes*), in which the court concluded the evidence was insufficient as a matter of law to convict one of the defendants. In *Reyes*, the prosecution's case against one of the defendants relied principally on the testimony of a single eyewitness who had seen a man leaving the victim's apartment with a television. (*Id.* at p. 498.) In evaluating whether the witness' testimony had been sufficient to incriminate the defendant, the appellate court observed that she had not positively identified the defendant at trial, the weather had been rainy and foggy, the light had been poor, and the witness had viewed the incident from across the street, approximately 125 feet away. (*Ibid.*) Furthermore, two other witnesses positively identified the other defendant as the man who left the apartment with a television, and a third testified he was certain the defendant in question had not been the man. (*Ibid.*) In light of these facts, and the other defendant's "convincing trial confession," the court concluded the one witness' "inherently insubstantial testimony" did not suffice to incriminate the defendant. (*Id.* at p. 499.)

In contrast, here, Tony Martin did positively identify defendant Mendoza as the shooter and that identification was not subject to the type of doubt present in *Reyes*, because Martin testified that he had known Mendoza for two years by that

time, and that Mendoza actually grabbed and pushed him aside before shooting the victim. No other witness who was in the garage at the time of the shooting contradicted Martin's testimony identifying Mendoza as the shooter at trial. Although Cristina Boggiano and Guadalupe Sanchez did not describe defendant Mendoza as having been among the small group of Norteños who approached the victim before the shooting, this did not create a conflict with Tony Martin's account, as Martin testified Mendoza approached after the assault commenced, and the jury heard evidence that Mendoza may have needed to retrieve his gun from the purse of one of the young women.

The fact that Erick Tejeda and Francisco Serrano may initially have thought someone else was the shooter does not create a contradiction rendering Tony Martin's trial testimony inherently improbable or unsubstantial. It was not surprising that witnesses' recollections varied given that the shooting occurred amidst a crowd of people, the lighting was poor, events unfolded rapidly once the group of Norteños returned to the garage, and most party attendees did not know anyone in the Norteño group apart from Hellums. In addition, both Tejeda and Serrano insisted at trial they had not actually seen the shooter. Tejeda testified that the events happened so quickly he was not even sure at the time what he had seen and, as discussed, the prosecution offered a seemingly credible explanation for the description of the shooter that Serrano initially supplied and later recanted. (See, *supra*, at p. 11.) In sum, Tony Martin's testimony was neither physically impossible nor inherently improbable.

We reach the same conclusion as to George Hellums' testimony. Defendant Mendoza does not contend Hellums' testimony was physically impossible and cites no evidence demonstrating that it was inherently improbable. Pointing again to Guadalupe Sanchez's inconclusive testimony describing the group of Norteños who approached the victim before the assault, and to the testimony of Officer Hynes and the Serrano brothers about Francisco Serrano's unsworn and subsequently recanted description of the shooter, Mendoza at best creates a question of fact, which the jury apparently resolved against him. It is not our place to reweigh that evidence on appeal.

The other cases that Mendoza cites to support his argument that the court should reject Martin's and Hellums' testimony also are distinguishable. In *In re Eugene M.* (1976) 55 Cal.App.3d 650, a minor was convicted solely on the basis of an out-of-court statement made by a 16-year-old alleged accomplice under threat of prosecution, which the accomplice later recanted under oath at trial. (*Id*. at p. 657.) The court observed that the accomplice's out-of-court statement was "apparently confused and intermingled with the narrative of another crime" (*id*. at p. 658), and concluded it was "'so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt.' [Citation.]" (*Id*. at p. 659.) The same cannot be said of Tony Martin's testimony under oath at trial unequivocally identifying defendant Mendoza as the shooter.

In *People v. Lang* (1974) 11 Cal.3d 134, which Mendoza also cites, the court merely suggested, after acknowledging the matter had not been properly briefed, that appellate counsel should at least have attempted a sufficiency of the evidence

> argument characterizing the victims' testimony as inherently improbable and insubstantial, because none of the victims' witnesses supported their account that a crime was committed in their presence. (*Id*. at p. 139.) Here, in contrast, there is no dispute a murder was committed, and reviewing the whole record in the light most favorable to the judgment below as we must, we are satisfied it is supported by substantial evidence. Although the credibility of key prosecution witnesses Tony Martin and George Hellums could reasonably be challenged, neither gave an account that was physically impossible or inherently improbable.

Ex. 9 at 21-25, Dkt. No. 13-10 at 284-287. (footnote in original, renumbered here). The California Supreme Court silently denied review of the sufficiency of the evidence claim. Ex. 11. Thus, this Court "looks through" the silent denial to the reasoned opinion of the California Court of Appeal to evaluate the sufficiency-of-the-evidence claim through AEDPA. *Wilson*, 138 S.Ct. at 1192.

2. Legal Standard

To prevail on a sufficiency of the evidence claim (a "*Jackson*" claim), a defendant must establish that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). If, in "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the conviction must stand. A reviewing court must presume that the trier of fact resolved any conflicts in the evidence in favor of the prosecution, *id*. at 326, and provide "near-total deference" to a jury's credibility determinations. *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004). *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("The *Jackson* standard . . . looks to whether there is sufficient evidence which, if credited, could support the conviction.").

AEDPA imposes an even "high[er] bar" on *Jackson* claims, subjecting conviction "to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). When considering a habeas petitioner's *Jackson* claim, "'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." *Id*. The federal court may only overturn the conviction "if the state court decision was 'objectively unreasonable,'" *id*., such that it falls "below the threshold of bare rationality." *Id*. at 656.

3. Discussion

The Court cannot conclude the California Court of Appeal decision resulted in an objectively unreasonable application of *Jackson*. Viewing the evidence in the light most favorable to the prosecution, and giving deference to the jury's credibility determinations, the Court concludes that any rational trier of fact could have found the essential elements of first-degree murder beyond a reasonable doubt.

Petitioner's challenges to Martin and Hellums "focuses on evidence undermining the reliability" of their accounts, and "foregoes any analysis of evidence supporting [the] conviction." *Santoyo v. Hedpath*, No. CV 08-5463-R (JEM), 2009 WL 3226516, at *17 (C.D. Cal. Oct. 5, 2009). Petitioner suggests, for example, that Martin and Hellums had incentives to fabricate their accounts when faced with potential prosecution. Petitioner also contends both Martin and Hellums admitted lying to police and the grand jury, and changed their stories as time went on. Stated differently, petitioner argues the jury could have found Martin and Hellums unreliable and not credible, such that their testimony at trial was "inherently improbable and insubstantial." But under *Jackson*, "the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995). Although the evidence *could have* permitted the jury find Martin and Hellums' testimony not credible, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326.

Here, the historical facts could have permitted the jury to credit Martin's account. Although Boggiano, Sanchez, and Tejada did not testify that petitioner was in the small group that initially confronted Navarro in the garage, such testimony does not contradict Martin, who testified that petitioner pushed his way past Martin to shoot Navarro after the fighting had already begun. And while Erick Tejeda and Francisco Serrano might have identified Donaldson and Hellums, respectively, as the shooter, the Court of Appeal noted that such variations were unsurprising given how quickly and chaotically events unfolded. Tejada and Serrano also did not know petitioner, or

the people with whom he arrived at the party, whereas Martin had known petitioner for two years, was in the same gang and petitioner, and testified that petitioner grabbed him and pushed him aside before opening fire. Tejada and Serrano both later recanted their identifications at trial. Because the evidence would permit a jury to find Martin's account believable, this court must presume the jury believed Martin, and "defer" to that determination.

So too, with Hellums. Witnesses confirmed Hellums was at the party—one of his classmates, Brian Serrano, immediately recognized him from school. There was also evidence indicating Hellums was in the same getaway car as petitioner; Martin testified he saw Hellums standing next to a car with Donaldson after the shooting. Further, the forensic evidence showed that Navarro was shot once in the stomach, twice in the upper thighs, and once in the back. Although this forensic account varies from Hellums' testimony (i.e., that petitioner told him he shot the victim twice in the stomach and once in the back), the jury could have still found Hellums' account believable. Thus, notwithstanding the potential incentives to fabricate faced by Martin (via threats of prosecution), and by Hellums (via threats of prosecution and the benefits of witness protection), the jury could have still credited their testimony, and this court is bound to accept that possibility.

The California Court of Appeal was thus not objectively unreasonable in concluding that Martin's and Hellums' testimony, along with other corroborating evidence, would enable a trier of fact to find petitioner guilty beyond a reasonable doubt. Other than Martin's and Hellums' testimony, the evidence against petitioner included: (1) his gang affiliation, his role as an enforcer, and knowledge that Juarez identified Navarro as a rival gang member, (2) testimony indicating he was with the Norteño group in the hours leading up to the party, and attended the party as well, and (3) subsequent text messages sent by petitioner to his girlfriend which were consistent with a culpable state of mind (e.g., "Make sure *u dont* say *shyt forreal….an yo* friend," and "If *sumthen eva happns* to me would u stick *bu myside* regadless of *wat it iz*.").

Given this corroboration, the Court cannot find Martin's or Hellums' testimony "inherently improbable and insubstantial." Thus, the Court cannot find the California Court of Appeal's determination that substantial evidence existed to support the conviction fell "below the threshold of bare rationality." *Coleman*, 566 U.S. at 656.

C. Confrontation Clause and Due Process Claim based on Cross Examination (Ground 3)

In Ground 3, petitioner asserts the trial court's restrictions on his cross-examination of Tony Martin violated his right to confront the witnesses against him, his right to present a defense, and his rights to due process. Dkt. No. 21 at 29. The Court declines to grant relief on this basis.

1. Petitioner's Claim and Decision Below

A little more a week after the birthday party shooting, Tony Martin was identified in a separate gang-related homicide of a suspected Sureño. Dkt. No. 13-7 at 132 (Reporter's Transcript). Petitioner's present claim arises from the trial court's imposition of limitations on his ability to cross-examine Martin on that separate murder charge. As he argued below, petitioner believes that had these limitations not been imposed, Martin "might have" admitted that he hoped to receive leniency in the other case in exchange for testifying against petitioner, thereby undermining his credibility before the jury. The California Court of Appeal lucidly described the background of the claim:

> At a pretrial hearing, over Mendoza's objection, the trial court granted a prosecution motion to limit Tony Martin's cross-examination, by precluding questioning about the unrelated murder case, after the prosecution declined to grant Martin immunity. Defendant Mendoza's counsel had requested leave to directly ask Martin whether he was the shooter in the other case. In the event Martin denied it, counsel proposed to challenge his credibility by presenting the testimony of two eyewitnesses and a responding police officer.
>
> Citing Evidence Code section 352, the trial judge denied the request, observing that she did not want to hold a mini-trial within a trial, and could not permit questioning before the jury that undoubtedly would cause Martin to invoke his constitutional privilege against self-incrimination.[24] Recognizing that the matter was relevant to credibility, however, she instructed the parties to work together to develop stipulated facts that might be read to the jury about the unrelated murder charges then pending against Martin.
>
> Defendant Mendoza renewed his objection to this ruling on the first day of trial, arguing that it unduly limited his cross-examination of Martin. The trial judge again overruled the objection, reiterating that she expected Martin would invoke

[24] The Fifth Amendment to the United States Constitution.

his privilege against self-incrimination if questioned under oath about the other murder. Although she offered to allow defense counsel to test the point by questioning Martin out of the jury's presence, with his counsel present, defendant Mendoza's counsel did not pursue this offer, electing instead to work with the prosecution on stipulated facts.

During a break in proceedings two days later, the prosecutor told the court she would be calling Martin as the next witness. Acknowledging that defense counsel had hoped to read the stipulated facts to the jury before cross-examining Martin, the prosecutor advised that the parties had not yet reached agreement on a final version. Referring to her prior ruling, the trial judge then cautioned both defense counsel to refrain from questioning Martin about the unrelated murder charge. Without objecting, defense counsel assured the court they understood.

Both the prosecution and defendant Moreno subsequently questioned Martin, after which the parties conferred with the trial judge in chambers, apparently about the stipulation. Defendant Mendoza's counsel then also cross-examined Martin. When he reached the end of his cross-examination, counsel asked to resume the earlier dialogue with the judge. Observing that they did not have sufficient time at that point, however, the judge refused, and counsel concluded his cross-examination of Martin without objection.

The trial proceeded for three more days (over the course of a week). On the fourth day after Tony Martin completed his testimony, the parties gave the court an update on their progress in negotiating a stipulation, and explained their two remaining areas of disagreement. Their first disagreement concerned the prosecution's inclusion of information from the police report about the amount of time (90 minutes) that had elapsed between the shooting in Martin's unrelated murder case and the eyewitnesses' identification of Tony Martin as the shooter. Defendant Mendoza's counsel objected that the information was irrelevant to Martin's credibility, and he had not had an opportunity to speak with the officer who prepared the report. The judge overruled the objection and Mendoza does not challenge that ruling on appeal.

The second disagreement concerned inclusion of a broad statement that the prosecution had offered Tony Martin no deals or promises in the second case for his testimony in this matter. Observing that Martin already had testified he was not receiving any deals other than the 10-year plea deal in this case, defendant Mendoza's counsel objected that the jury should be entitled to draw its own conclusion about whether Martin was telling the truth, and that the existence or nonexistence of other deals was not relevant to Martin's credibility. The trial judge adopted a compromise to resolve this objection.

Martin's interview with the district attorney's office after the first trial, during which he apparently agreed to testify in the second trial, had been recorded, and copies of the recordings had been provided to defense counsel. The trial judge instructed the parties to locate on those recordings, and add to the stipulation, a statement that the prosecution told Martin in that interview he would not receive a deal in the second murder case for testifying in this matter. When defendant

> Mendoza's counsel interjected that he also wanted to include a statement from an earlier Martin interview, during which, he maintained, Martin had been told "We'll help you out," the judge agreed, telling the parties, "Get the statements that you have. That's what I want included."
>
> Later that day, without objection, defendant Mendoza's counsel read the following stipulated facts to the jury: "On August 29, 2011, at approximately 10:00 p.m. in Hillcrest Park in Concord, Ever Osario, Alejandra Balderas, Idalia Sanchez, and Osmin Sanchez were approached by two males, one wearing black and one wearing white. The males confronted the group and asked what they 'claimed.' The males demanded their money, cell phones and car keys. The male wearing the black lifted Ever Osario's shirt, saw a blue belt, and yelled 'Scrap.' The male wearing the black repeatedly stabbed Ever Osario. As victim Osario attempted to flee the male wearing white fired a handgun and struck victim Osario in the upper torso.
>
> "Less than five minutes later, the male wearing black and the male wearing white were arrested less than 650 yards away from the scene, both were sweaty and out of breath. An hour and a half later Alejandra Balderas and Idalia Sanchez were transported to the site of the arrest and both immediately identified the male wearing white as the person responsible for shooting the victim Osario, stating, 'the one in white shot him.' The male wearing white was positively identified as Tony Martin.
>
> "Tony Martin is charged with attempted robbery, attempted carjacking and murder, a criminal street gang enhancement, an enhancement for intentionally discharging a firearm resulting in death, and two specific allegations, that the murder of victim Osario was committed to further the activities of a criminal street gang and that the murder was committed during the course of an attempted robbery. On May 14, 2013 when Tony Martin was interviewed by the District Attorney's Office, Mr. Martin was informed he was not being given any deal on his Concord case in exchange for his testimony in this case."
>
> In his closing argument, defendant Mendoza's counsel theorized that Martin identified defendant Mendoza as the shooter because he hoped to build credibility with the police, thereby helping himself in the other murder case. Then, attempting to cast doubt on evidence indicating Martin was receiving no leniency in the other case for his testimony in this matter, defense counsel hypothesized what might really have happened during Martin's May 14, 2013 interview at the District Attorney's office. Playing the role of the prosecutor, he said: "So, Tony, tell you what[?] You come and testify, we'll give you 10 years, and no promise on your [other murder] case 'cause everything's aboveboard and we're all super honest here. It's all about justice and nothing else. It's all aboveboard. Come on in. You take the stand."

Ex. 9 at 25-29 (footnote in original, renumbered here). The California Court of Appeal considered petitioner's argument that the trial court's evidentiary rulings violated his constitutional rights. Citing the "wide latitude" trail judges retain "to impose reasonable limits on cross examination,

'based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety, or interrogation that is repetitive or only marginally relevant,'" the Court of Appeals concluded the trial court did not abuse its discretion in imposing limitations on Martin's cross examination. Ex. 9 at 29 (citing *Delaware v. Van Arsdall* 475 U.S. 673, 679 (1986)). The Court of Appeal agreed with the trial court's prediction that Martin—having not been granted immunity in the separate case—would have asserted his Fifth Amendment right against self-incrimination. *Id*. at 29. The Court of Appeal also remarked that the trial court "recognized" the relevance of the separate murder case to Martin's credibility, and thus "properly provided the parties the alternative of negotiating a set of stipulated facts on the topic, which defendant Mendoza's counsel then read to the jury." *Id*. at 32. Specifically, petitioner's counsel was able to present the following facts to the jury:

> Martin originally was indicted and charged with murder and attempted murder in this case; if found guilty, he could have received a life sentence; he repeatedly lied to police when first questioned about the shooting; as a co-defendant, he heard all the witnesses testify in the first trial, and had opportunity to read the police reports; after the first jury deadlocked, he agreed to testify in the next trial and to plead guilty to an unspecified violent crime with a 10-year sentence; and on the night of Martin Navarro's murder, Martin fired at least five times into an occupied vehicle, apparently wounding Naomi Caballero.

Id. Although "this impeachment evidence [did not] suffice[] to make Martin's testimony inherently improbable," the Court of Appeal reasoned, "it did present ample reason for the jury to scrutinize his testimony with considerable care." *Id*. Thus, the Court of Appeal concluded that "[e]ven if the trial court had erred in precluding [petitioner] from cross-examining Tony Martin about the unrelated murder case," the error was harmless beyond a reasonable doubt because "the jury was sufficiently apprised there were reasons to doubt Martin's credibility." *Id*. at 35.

The California Supreme Court silently denied review of petitioner's claim. Ex. 11, Dkt. No. 13-10 at 453. Thus, this Court "looks through" the silent denial to the reasoned opinion of the California Court of Appeal to evaluate petitioner's claim under AEDPA. *Wilson*, 138 S.Ct. at 1192.

2. Legal Standard

The Sixth Amendment's Confrontation Clause guarantees criminal defendants "an *opportunity* for effective cross-examination, not cross-examination that is effective in every way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). Trial courts accordingly retain "wide latitude" to impose reasonable limits on cross-examination, "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Fensterer*, 474 U.S. at 20. Thus, while the Confrontation Clause guarantees "a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), that guarantee "is not unlimited, but rather is subject to reasonable restrictions," such as state or federal evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'").

While an outright denial of a defendant's right to inquire "into why a witness may be biased" would violate the Confrontation Clause, there is no violation "as long as the jury receives sufficient information to appraise the biases and motivations of the witness." *Fenenbock v. Director of Corrections*, 692 F.3d 910, 919-20 (9th Cir. 2012). *See also Van Arsdall*, 475 U.S. at 679 (holding trial court violated defendant's Confrontation Clause rights by prohibiting "all inquiry into the possibility" that a witness was biased). Among other factors,[25] a finding that the defendant received sufficient opportunity to probe the veracity of a witness could permit a court to find an alleged error

[25] The additional factors a court may consider when evaluating whether an error was harmless include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

"harmless beyond a reasonable doubt," precluding relief. *Van Arsdall*, 475 U.S. at 684.

Petitioner is only entitled to habeas relief if the California Court of Appeal's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C § 2254(d)(1). Furthermore, petitioner must satisfy this Court that any asserted constitutional error "had substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), which is more demanding than the harmless error standard articulated in *Van Arsdall*, 475 U.S. at 684. "Under this [*Brecht*] standard, habeas petitioners…are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637.

3. Discussion

The Court cannot conclude the California Court of Appeal applied "clearly established" federal law in an inconsistent or objectively unreasonable manner in denying petitioner's claim. The Court of Appeals concluded, based on careful review of the trial court record, that petitioner had sufficient "opportunity" to impeach Martin's credibility on cross-examination by pointing out Martin's lies to police, his inconsistent accounts, his own liability in the case, the plea deal he received for testifying against petitioner (i.e., 10 years for the shooting of Naomi Caballero outside the party), and the most critical facts of the separate murder charge. The Court of Appeal reasonably concluded that this impeachment evidence provided petitioner "a meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 690.

The Court of Appeal was also objectively reasonable in concluding the trial court's restrictions on cross-examination fell within the permissible "latitude" retained by trial judges to limit cross-examination into marginally relevant or confusing collateral issues. *Fensterer*, 474 U.S. at 20. The Court of Appeal reasonably credited the trial court's prediction that Martin would invoke his right against self-incrimination if cross-examined on the separate murder, because he had not

received immunity in that case. The Court of Appeal's determination that the stipulation was adequate to serve petitioner's intended impeachment purposes also did not constitute an "arbitrary" or "disproportionate" use of state evidentiary rules, as the stipulation permitted petitioner to introduce the most "critical facts" to the jury. *Scheffer*, 523 U.S. at 308. As the Court of Appeal put it, the stipulation "constituted significant impeachment evidence," which conveyed the "critical facts" about Martin's alleged crime: "i.e., that he had been found in the vicinity where the shooting occurred, was positively identified as the shooter by two eyewitnesses within hours, and was charged with murder and other crimes and enhancements." Ex. 9 at 34.

Even assuming, *arguendo*, that constitutional error occurred and the Court of Appeal was objectively unreasonable in holding otherwise, petitioner cannot satisfy the "actual prejudice" standard of *Brecht,* 507 U.S. at 637. Petitioner insists the jurors "might have" received a significantly different impression of Martin's credibility had petitioner been able to cross-examine him about his "hope" of receiving a more lenient sentence in the separate murder case in exchange for his testimony against petitioner. But petitioner's counsel was in fact "allowed to suggest in his closing argument that Martin may been motivated to testify in this case by a hope, or undisclosed promise, of leniency in the other case." Ex. 9 at 34. That suggestion at closing, coupled with the stipulation, would have enabled the jury to conclude that Martin held out "hope" for favorable terms in the separate murder case. The defense also informed the jury that Martin received a plea deal in the instant case and lied in the past. Any additional cross-examination on the topic of the separate murder case would thus have added little, if anything, to the impeachment that did take place. The Court thus cannot conclude that petitioner suffered "actual prejudice" as required by *Brecht,* 507 U.S. at 637.

D. Due Process Claim based on Prosecutorial Misconduct (Ground 4)

In Ground 4, petitioner argues that four instances of prosecutorial misconduct entitle him to habeas relief: (1) the prosecutor "vouched" for the credibility of a key witness, (2) the prosecutor argued facts not in evidence, (3) the prosecutor "impugned" the integrity of defense counsel, and (4) the prosecutor deliberately misled the jury by exploiting the limitations on Martin's cross examination. Dkt. No. 21 at 36-48. The Court finds Ground 4 procedurally defaulted and petitioner's asserted "cause" for default unexhausted.

At trial, petitioner did not raise contemporaneous objections to the four instances of alleged misconduct that comprise Ground 4. In California, "a defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.'" *People v. Fuiava* 53 Cal.4th 622, 679-680 (2012). On direct appeal, petitioner—represented by new counsel—argued that trial counsel's objection would have been futile, and no admonishment would have cured the harm. Ex. 6 at 85. Dkt. No. 13-10 at 100. The Court of Appeal carefully analyzed the applicable state law and concluded that petitioner did not establish futility, rendering those claims forfeited. Ex. 9 at 36-39, Dkt. No. 13-10 at 421-23.

The Court of Appeal alternatively rejected petitioner's claims on the merits "[e]ven if" they were not forfeited. *Id*. at 39. The Court of Appeal thus "'clearly and expressly' state[d] that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) ("a state court need not fear reaching the merits of a federal claim in an alternative holding").

Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Forfeiture based on California's contemporaneous objection rule qualifies as an independent and adequate state law ground. *See Zapata v. Vasquez*, 788 F.3d 1106, 1111 (9th Cir. 2015) (failure to object to prosecutorial misconduct imposes procedural bar). Accordingly, petitioner's Ground 4 is procedurally defaulted.

The procedural bar may be lifted, however, if petitioner demonstrates cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (given procedural default, federal

habeas review "is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

For the first time in the Traverse, petitioner argues his failure to contemporaneously object at trial was caused by trial counsel's ineffective assistance. Dkt. No. 30 at 63, 76. Petitioner is correct that ineffective assistance of counsel "is cause for procedural default." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, the exhaustion doctrine "generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id*. The "exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."' *Id*. (citing *Darr v. Burford*, 339 U.S. 200, 204 (1950)). Those concerns "hold[] true whether an ineffective assistance claim is *asserted as cause for a procedural default* or denominated as an independent ground for habeas relief." *Id*. (emphasis added). Petitioner's underlying claim of ineffective assistance of trial counsel claim has not been presented to the state courts.[26] Accordingly, the asserted "cause" for procedural default is unexhausted and will not be considered by this Court.[27]

E. Due Process and Section 1111 Claim Based on Jury Instructions on Accomplice Testimony (Ground 5)

In Ground 5, petitioner argues the trial court's instructions to the jury on how to assess the

[26] Or, for that matter, to this Court. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) ("A Traverse is not the proper pleading to raise additional grounds for relief.").

[27] In "limited circumstances," a district court may issue a "stay and abeyance" of a habeas petition containing both exhausted and unexhausted claims to enable a petitioner to fully present the unexhausted claims to the state courts. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Petitioner does not request a stay and abeyance here. Even if petitioner did request such a procedure, "stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id*. Petitioner makes no attempt to demonstrate good cause. Further, even if good cause is shown, granting a stay to allow a petitioner to pursue "plainly meritless" unexhausted claims would be an abuse of discretion. *Id*. The Court opines, but does not decide, that petitioner fails to "overcome the presumption that, under the circumstances" trial counsel's failure to object or request admonishment "might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

testimony of Tony Martin and George Hellums were "incorrect and inadequate." Dkt. No. 21 at 50. The Court finds petitioner not entitled to relief on this basis.

1. Petitioner's Claim and Decision Below

"Using a standard instruction, CALCRIM No. 334, the trial court directed jurors to decide whether Tony Martin and George Hellums were accomplices and, if they concluded either was an accomplice, on the need for corroboration and caution in viewing that witness's testimony." Ex. 9 at 50, Dkt. No. 13-10 at 435 (Court of Appeal decision). Petitioner contends the use of CALCRIM No. 334 violated his right to due process and section 1111 because it did not inform the jury that (1) Martin was an accomplice as a matter of law, and (2) Hellums was an accomplice if the murder was a natural and probable consequence of a gang assault he aided and abetted or conspired to commit. Dkt. No. 21 at 50.

CALCRIM No. 334, petitioner argues, "was inadequate because it made Martin and Hellums accomplices only if they committed, conspired to commit, or aided and abetted murder." (Rather than a gang assault *resulting* in murder). Had the correct instruction been issued, petitioner contends, the jury may have viewed the testimony of Martin and Hellums with greater "caution and disregard it if it was not independently corroborated." Dkt. No. 30 at 96.

Although the California Court of Appeal was skeptical whether petitioner's "claim of error [was] cognizable on appeal," Ex. 9 at 52 n. 41, the Court of Appeal proceeded to deny the claim on the merits:

> Using a standard instruction, CALCRIM No. 334, the trial court directed jurors to decide whether Tony Martin and George Hellums were accomplices and, if they concluded either was an accomplice, on the need for corroboration and caution in viewing that witness's testimony. Defendant Mendoza maintains the trial court violated section 1111 and his constitutional due process rights by using this instruction because it was incorrect and incomplete. It was incorrect to use CALCRIM No. 334 with respect to Tony Martin, he submits, because Martin was an accomplice as a matter of law and the trial court therefore was obligated sua sponte to instruct the jury with CALCRIM No. 335 instead. CALCRIM No. 334 also was incomplete, he submits, because it did not specifically inform jurors that Tony Martin and George Hellums were accomplices if they aided and abetted the assault on Martin Navarro, with murder being a natural and probable consequence.

Although the trial court gave standard instructions explaining aiding and abetting principles (CALCRIM Nos. 400, 401), and the natural and probable consequences doctrine (CALCRIM No. 403), Mendoza submits this was inadequate.

We begin with the second contention. As given here, CALCRIM No. 334 stated in pertinent part as follows: "Before you may consider the statement or testimony of Tony Martin and George Hellums as evidence against Ricky Mendoza and Leon Moreno, you must decide whether Tony Martin and George Hellums were accomplices to that crime. *A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant*. Someone is subject to prosecution if: [¶] 1. He or she personally committed the crime; [¶] OR [¶] 2. He or she knew of the criminal purpose of the person who committed the crime; [¶] AND [¶] 3. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;] [or] participate in a criminal conspiracy to commit the crime)." (See CALCRIM No. 334, italics added.)

Using CALCRIM No. 403, the trial judge also instructed: "To prove that the defendant is guilty of murder, the People must prove that: [¶] 1. The defendant is guilty of assault with force likely to cause great bodily injury or simple assault; [¶] 2. During the commission of assault with force likely to cause great bodily injury or simple assault a coparticipant in that assault with force likely to cause great bodily injury or simple assault committed the crime of murder; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of murder was a natural and probable consequence of the commission of the assault with force likely to cause great bodily injury or simple assault. [¶] A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator . . . . [¶] . . . [¶] *The People are alleging that the defendant originally intended to aid and abet assault with force likely to cause great bodily injury or simple assault. [¶] If you decide that the defendant aided and abetted one of these crimes and that murder was a natural and probable consequence of that crime, the defendant is guilty of murder*. . . ." (See CALCRIM No. 403, italics added.)

Defendant Mendoza submits that, notwithstanding the court's use of CALCRIM No. 403, the jury nonetheless could have understood CALCRIM No. 334 as meaning that Martin and Hellums were only accomplices if they committed, conspired to commit, or aided and abetted murder, i.e., jurors may not have understood the two were accomplices if they aided and abetted an assault, with murder being the natural and probable consequence. The trial court's failure, sua sponte, to modify or replace CALCRIM No. 334 to clarify this point, he maintains, was constitutional error. "This claim is not cognizable. It is merely a claim that an instruction that is otherwise correct on the law should have been modified to make it clearer. 'A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.' [Citation.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165.) If defendant Mendoza had been concerned that the jury would not understand CALCRIM Nos. 334 and 403, given separately, he should have

requested a clarifying modification. He did not do so.[28] (See, e.g., *People v. DeSantis* (1992) 2 Cal.4th 1198, 1251 [trial court had no duty to modify accomplice instructions on its own motion; defendant forfeited the argument].)

In any event, we do not agree that CALCRIM No. 334 was inadequate, when viewed in the context of the instructions given as a whole. "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

In this case, the jury was fully and fairly instructed on the applicable law. CALCRIM No. 334 instructed that "[a] person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant." CALCRIM No. 403 then instructed, "The People are alleging that defendant originally intended *to aid and abet assault with force likely to cause great bodily injury or simple assault*. [¶] *If you decide that the defendant aided and abetted one of these crimes and that murder was a natural and probable consequence of that crime, the defendant is guilty of murder*. . . ." (Italics added.) Contrary to Mendoza's contention, we think intelligent jurors would be capable of understanding from these instructions that, if they concluded Tony Martin or George Hellums had committed the crime charged against the defendant, i.e., aiding and abetting assault with force likely to cause great bodily injury or simple assault, and that murder was a natural and probable consequence, they qualified as accomplices.

Defendant Mendoza's reliance on *People v. Felton* (2004) 122 Cal.App.4th 260, as support for the proposition that the trial court here had a duty, sua sponte, to modify CALCRIM No. 334, is misplaced. In *Felton*, the trial court had refused the defendant's request for accomplice instructions, relying on CALJIC No. 3.14, which addresses accomplice liability for one alleged to be an aider and abettor, and requires criminal intent. (*Id*. at p. 267.) After concluding the trial court had erred, the appellate court observed, in dicta, that giving CALJIC No. 3.14 in an unmodified form would have only replaced one error with another. (*Id*. at p. 271.) CALJIC No. 3.14 was "legally incorrect" as applied to that case, the appellate court explained, because it did not instruct that a coperpetrator could be an accomplice, as the evidence suggested was the case for the witness there in question, or that the person's alleged crime (there, child endangerment) might not include a specific intent requirement. (*Id*. at pp. 269-271; but see CALJIC No. 3.10.) *Felton* did not

[28] Although we agree with defendant Mendoza that the record does not suggest his counsel made a conscious and deliberate tactical choice in requesting CALCRIM No. 334 without modification, and the invited error doctrine, therefore, does not apply (see *People v. DeHoyos* (2013) 57 Cal.4th 79, 138), it does not necessarily follow that his claim of error is cognizable on appeal. (See, e.g., *People v. Townsel* (2016) 63 Cal.4th 25, 59 [defendant forfeited a claim of instructional error for appellate purposes even though the invited error doctrine did not apply].)

> address the adequacy of CALCRIM No. 334, or establish that a party may pursue such a challenge on appeal having failed to raise it in the trial court.
>
> In any event, as was the case in *Lawley, supra*, "the jury was made keenly aware of the inconsistencies [of Tony Martin's and George Hellums's] various incourt and out-of-court statements, as well as the prosecutor's acknowledgement that [they were] not always truthful and that it was up to the jury to determine [their] credibility." (*Lawley, supra*, 27 Cal.4th at p. 161.) In this case, the parties also stipulated that Tony Martin had been positively identified as the shooter in a separate murder case. Under these circumstances, it is not reasonably probable the jury would have reached a result more favorable to defendant Mendoza had the trial court instructed it with a modified CALCRIM No. 334. (*Ibid*., citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)
>
> We reach the same conclusion with respect to defendant Mendoza's remaining instructional argument, i.e., that the trial court erred in not giving CALCRIM No. 335, because Tony Martin was an accomplice as a matter of law. It was not reasonably probable jurors would have reached a result more favorable to defendant Mendoza if the trial court had instructed them, using CALCRIM No. 335, that Martin was an accomplice and corroboration of his testimony was required. Further, as discussed in section II., A., 1., c., *supra*, there was sufficient evidence corroborating Martin's testimony. Accordingly, any error was harmless. (See, e.g., *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303-304 [A court may conclude that omission of accomplice instructions is harmless either because sufficient evidence corroborated the witness's testimony, or because it is not reasonably probable that a result more favorable to the defendant would have been reached].)

Ex. 9 at 50-54, Dkt. No. 13-10 at 435-439 (footnote in original, renumbered here). The California Supreme Court summarily denied review of this claim. Ex. 11. Thus, for purposed of AEDPA review, this Court "looks through" the silent denial to the reasoned opinion of the California Court of Appeal in evaluate the claim under AEDPA. *Wilson*, 138 S.Ct. at 1192.

2. Legal Standard

The Supreme Court has made clear that "the fact that [a jury] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). The "only question" for a federal courts sitting in habeas is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id*. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). As discussed, Ground 1, *supra*, in Section A.2, a habeas claim predicated on Cal. Penal. Code § 1111 is only cognizable as a federal due

process claim if the petitioner alleged the state "arbitrarily" deprived him of his entitlement under section 1111. *Laboa,* 224 F.3d at 979 (citing *Hicks*, 447 U.S. at 346). The Supreme Court has not otherwise "clearly established" that a verdict based on uncorroborated accomplice testimony violates due process. *See Love v. McDonnell,* 2017 WL 7049526, at *7 (C.D. Cal. 2017) (failure to give accomplice instruction could not have been contrary to clearly established law, because "the corroboration of accomplice testimony is not constitutionally mandated"); *Rodriguez v. Biter*, 2015 WL 7271791, at *6 (C.D. Cal. 2015) ("[T]here is no clearly established federal law limiting the use of accomplice testimony in a criminal prosecution. As such, the trial court's failure to give cautionary instructions regarding Tapia's testimony could not have violated Petitioner's federal constitutional rights."), report and recommendation adopted by, 2015 WL 7271720 (C.D. Cal. 2015).

3. Discussion

The Court finds that the California Court of Appeal decision on petitioner's claim could not have been "contrary to, or involved an unreasonable application of" clearly established federal law, because the Supreme Court has never held that federal due process requires accomplice testimony be corroborated in order to support a conviction. Thus, even assuming, *arguendo*, that the jury might have viewed Martin and Hellems' testimony with an added degree of skepticism had the trial court issued petitioner's preferred instruction, the trial court's failure to do so does not raise a federal claim unless the instruction "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72. *See also Middleton v. McNeil*, 541 U.S. 433, 437 (2004) ("[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.").

No such "infect[ion]" occurred here. As discussed in Ground 2, *supra,* in Section B.3, even assuming the jury thought both Martin and Hellums were accomplices, there was adequate corroborative testimony the jury could have relied on credit both of their accounts. The California Court of Appeal was thus not objectively unreasonable in finding, as it did, that "any error was harmless." Ex. 9 at 54. And given the existing corroborative testimony, the Court cannot find, even

if it assumes constitutional error, that petitioner has established "actual prejudice" as required by *Brecht,* 507 U.S. at 637.

F. Due Process Claim based on Cumulative Prejudice (Ground 6)

In Ground 6, petitioner asserts he experienced cumulative prejudice arising from the restrictions on cross examination (Ground 3), the prosecutor's improprieties (Ground 4), and the accomplice jury instructions (Ground 5). Dkt. No. 21 at 51-53. The Court cannot find petitioner is entitled to relief on this basis.

On direct review, the California Court of Appeal determined, after "reject[ing] the individual claims of error," that "there is no cumulative error requiring reversal." Ex. 9 at 54. The California Supreme Court silently denied review. Ex. 11. Thus, this Court "looks through" the silent denial to the reasoned opinion of the California Court of Appeal to evaluate the claim of cumulative prejudice under AEDPA. *Wilson*, 138 S.Ct. at 1192.

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)). "[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process." *Id*. (citing *Chambers*, 410 U.S. at 294).

The Court cannot conclude the California Court of Appeal decision was "contrary to" or an "unreasonable application of" clearly established federal law. In this Order, this Court determined that the California Court of Appeal decision was objectively reasonable and consistent with federal law in finding none of petitioner's claims meritorious. For both Ground 3 and Ground 5, the Court of Appeal held that no error was made, but even if errors were made, the errors were harmless. Ex. 9 at 35, 54. This Court found those determinations objectively reasonable and consistent with federal law. Even if Ground 4 were properly before the Court, the Court of Appeal there held that none of the alleged instances of prosecutorial misconduct *actually amounted to error*. Ex, 9 at 50. Because only harmless *errors* can be accumulated as a matter of law, Ground 4 would not have

factored into the Court of Appeal's analysis. Thus, because the Court of Appeal found no errors in Grounds 3, 4, or 5, this Court concludes that the Court of Appeal was not objectively unreasonable in concluding there were no errors to cumulate. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.).

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**.

IT IS SO ORDERED.

Dated: May 31, 2022

SUSAN ILLSTON
United States District Judge

United States District Court
Northern District of California

Filed 5/22/17

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
RICKY ANGELO MENDOZA,
Defendant and Appellant.

THE PEOPLE,
Plaintiff and Respondent,
v.
LEON JOHN MORENO,
Defendant and Appellant.

A139901; A140431

(Contra Costa County
Super. Ct. No. 05-120929-5)

Defendants Ricky Angelo Mendoza and Leon John Moreno were jointly tried by a jury and convicted of first degree murder with criminal street gang enhancements. We ordered defendants' appeals consolidated.

Defendant Mendoza asserts six grounds for his appeal: (1) the judgment is based on uncorroborated accomplice testimony; (2) there is insufficient evidence to support the judgment; (3) the trial court erred in restricting cross-examination of a key prosecution witness; (4) the prosecutor committed prejudicial misconduct; (5) the trial court committed instructional error; and (6) cumulative prejudice resulting from these errors violated his due process. We affirm the judgment against Mendoza.

Defendant Moreno asserts two grounds for his appeal: (1) his first degree murder finding based on accomplice liability and the natural and probable consequences doctrine must be reduced to second degree murder under *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*); and (2) the trial court committed instructional error.[1] The Attorney General concurs on defendant Moreno's first ground and we agree the argument is well taken; we therefore modify the judgment against defendant Moreno, reducing his conviction for first degree murder to second degree murder, and reducing his sentence from 25-years-to-life to 15-years-to-life. Otherwise we affirm the judgment against him.

I. BACKGROUND

A. The Birthday Party

On the evening of August 20, 2011, twin brothers Erick and Edgar Tejeda celebrated their 18th birthday with a party in the garage of their Antioch home. The brothers hired a deejay and posted an invitation on Facebook. By about 9:30 or 10:00 p.m., about 30 young people were in the garage. There was music, dancing, and flashing colored lights. Erick's girlfriend, Janicett Villegas, was at the party. Her friend Martin Navarro was also there with his cousin Gregorio Navarro. Brothers Brian and Francisco Serrano were there too.

At some point, the friends noticed a new group had arrived at the party. Brian Serrano immediately recognized one of the new arrivals, George Hellums, whom he knew from school, but he did not know the others. Neither Erick nor Edgar Tejeda knew the group.

The newcomers arrived in three cars, and entered the party together. Jessica Juarez drove one of the cars, bringing three girlfriends, Cristina Boggiano, Breana Uriarte, and Guadalupe Sanchez. George Hellums drove another car, bringing Tony Martin, Chris Donaldson, and Jairo Bermudez Robinson. According to George Hellums

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[1] Although defendant Moreno initially reserved the right to join in any claims benefiting him that defendant Mendoza might include in his subsequently filed opening brief, he later acknowledged Mendoza had raised no such issues.

and Tony Martin, defendants Ricky Mendoza and Leon Moreno arrived in a third car with their girlfriends, Amanda Blotzer and Melissa Vargas.[2]

The young men in the group were members of the Norteño criminal street gang.[3] Jessica Juarez was the girlfriend of a Norteño member (Carlos Guzman). The group carried a gallon-size bottle of cognac and a bottle of coca cola that they had been sharing earlier in the day into the garage with them, where they continued drinking from both.

According to George Hellums, at some point Jessica Juarez pointed to someone in the back left corner of the garage, telling her group the person was a "Scrap," meaning a member of the rival criminal street gang, the Sureños, and had snitched on her boyfriend, a Norteño. The jury heard expert testimony that Norteños and Sureños were engaged in a turf war in Antioch at the time and their members were obligated, under gang rules, to attack each other on sight.

Guadalupe Sanchez was standing in the same general part of the garage as Juarez. She also remembered Juarez pointing to someone, but did not recall Juarez saying the word "Scrap." She heard Juarez tell George Hellums and others in the group, "That's my ex." The other two young women who had arrived in Juarez's car, Cristina Boggiano and Breana Uriarte, also remembered Juarez saying that her ex-boyfriend was at the party.

Martin Navarro was an associate of the Los Monkeys Treces, a subset of the Sureño street gang. He wore a typical Sureño shirt at the party, blue with white stripes, and he had a blue bandana in his pocket.[4] He was standing near Edgar and Erick Tejeda at the time, in the back left corner of the garage, near a door to the backyard, and some household appliances. Janicett Villegas, also nearby, recalled a girl pointing at Martin and Martin's cousin, Gregorio Navarro, remembered someone staring in their direction.

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[2] Neither defendant offered evidence they were elsewhere at the time and video surveillance tape shown to the jury confirmed both had been with others in the group earlier the same day.

[3] Defendants do not contest this point on appeal.

[4] Blue is the Sureño's color. Norteño's favor red.

Appearing upset, Jessica Juarez left the garage, and the others followed. Pacing with her cell phone in the driveway outside, Jessica made calls and texted. Then she spoke to the young men in her group, and at least some members of the group went back inside the garage, returning to the party.[5]

Inside the garage, Cristina Boggiano saw Jessica Juarez speaking to a group that included Tony Martin and defendant Moreno. Moreno was Latino in appearance, had long side burns with a goatee, and wore his long curly hair in a ponytail. The Tejeda twins and Brian Serrano all recalled a person matching this description walking over to the left corner of the garage, with at least two others following. The twins saw the same person punch Martin Navarro in the face.[6] Edgar Tejeda later said he thought the person might be Moreno.

Tony Martin testified he saw the incident also and the assailant was his friend, defendant Moreno.[7] When he saw his friend punch Navarro, Martin testified, he jogged over to help his friend; but he held back when he saw defendant Moreno had the upper hand, remaining nearby to "make sure nobody jumped in." Martin Navarro had covered his face with his arms, and was ducking down. Navarro and defendant Moreno exchanged a few words and then Moreno punched Navarro in the face again.

Erick Tejeda moved forward to try to break up the fight at this point, but someone put up an arm to stop him, saying "Don't touch my brother." Tony Martin testified he was that person.[8] A crowd had formed a circle around Martin Navarro and his assailant

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[5] There was some disagreement among the witnesses about whether George Hellums went back inside the garage. Hellums testified that he remained outside, and Brian Serrano, who had recognized Hellums earlier, did not see him during the events that followed. Tony Martin testified that he thought Hellums had been with the group that returned to the party, but did not see Hellums inside the garage shortly afterward as events unfolded.

[6] Brian Serrano could not see what happened because a crowd gathered, blocking his view, although he did see someone throw a punch.

[7] Defendant Moreno agrees the trial evidence showed he punched Martin Navarro.

[8] According to Martin, he said, "Don't touch my brody," meaning "brother."

by this time and people were yelling. Guadalupe Sanchez had a bad feeling and knew something bad was about to happen. Janicett Villegas later told a grand jury she heard someone say, "Fuck you, Scrap."[9]

As Edgar Tejeda watched, Martin Navarro turned and tried to run through the door near where he had been standing, but he was shot before he could escape. Edgar heard three or four shots but did not see who had the gun. His brother, Erick Tejeda, was about five feet from the shooter and saw the gun, a revolver, but could not identify the shooter. Everything had happened too fast, and he was not sure what he had seen.

Tony Martin was the only one to identify the shooter at trial.[10] According to Martin, he had been standing about two feet behind defendant Moreno, next to Chris Donaldson, when defendant Ricky Mendoza grabbed and pushed him, and then defendant Moreno, out of the way and began shooting at Martin Navarro with a .357 revolver, hitting Navarro twice in the stomach. When Navarro tried to turn as if to exit through the nearby door, Martin saw defendant Mendoza shoot him again twice in the lower body. Navarro did not survive.

An expert in forensic pathology and cause of death, who performed Martin Navarro's autopsy, testified that Navarro had blunt force injuries or abrasions on his mouth consistent with a blow from a fist or blunt instrument and four gunshot wounds, two of which were fatal. An ammunition expert testified that bullet fragments taken from Navarro's body could have been fired by a .357 revolver but not from a Hi-Point pistol because of the latter's unique rifling characteristics.

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[9] Although she had been standing near her friend Martin Navarro at the time, and tried to stop the attack by getting between Navarro and his assailant, at trial Villegas testified that she did not remember anything about the assailant's appearance, or having heard anyone say "Fuck you, Scrap."

[10] Antioch police detective James Stenger, an expert on the Norteño and Sureño criminal street gangs, testified that community members may be beaten or shot for speaking to law enforcement about gang-related crimes. Most of the 30 to 40 people whom police interviewed in this case were reluctant to provide information. Guadalupe Sanchez agreed she was reluctant to testify, and said it was "nothing anyone want[ed] to do." Cristina Boggiano confirmed she was twice threatened about testifying in this case.

B. The Aftermath

After the shots were fired, the group that had arrived with defendants Mendoza and Moreno ran back to their cars. As Tony Martin was running to the car in which he had arrived, he saw George Hellums and Chris Donaldson. Then he saw a two-door gray Honda with tinted windows driving slowly in the middle of the street. Donaldson walked in front of the car, stopping it.

Tony Martin had been carrying his gang's nine-millimeter Hi-Point pistol in the waistband of his pants. When he had ducked under the garage door to leave the party after the shooting, the gun had fallen out and Martin was carrying it in his hand. George Hellums told him to "start busting," and Martin understood this as a direction to shoot at the gray Honda.[11] Hellums had been a gang member for three or four years by then and was senior to Martin who had joined only four or five months earlier. Martin began shooting at the Honda, firing five times at the occupied vehicle while it was about 17 feet from him. At trial, he testified he felt his group was threatened, and fired at the Honda to protect them, without any intent to kill anyone. At least one of the bullets he fired wounded an occupant of the car, Naomi Caballero.[12]

After the gray Honda drove off, Tony Martin got a ride home in Jessica Juarez's car. Meanwhile, George Hellums got into a car with defendant Mendoza, Chris Donaldson, and Jairo Bermudez Robinson. According to Hellums, when he asked his friends what had happened, defendant Mendoza said he had shot someone twice in the stomach and once in the back. At some later point, Mendoza reportedly told both George Hellums and Tony Martin that he shot Martin Navarro because he was a Scrap.

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[11] George Hellums denied at trial that he told Tony Martin to "start bustin."

[12] An ammunition expert testified at trial that a bullet collected from Naomi Caballero's shoulder carried the distinctive marking of a Hi-Point firearm.

C. Text Messages[13]

Later, the evening of the party, George Hellums sent defendant Moreno a text message, "Erase *erythang*[,] *messags*[,] *kal* log" and Moreno replied "Yup." Near the same time, defendant Mendoza and his girlfriend, Amanda Blotzer, exchanged the following text messages: "[Blotzer:] *Yea* I'm *gud*. *R u*[?] *Dam u* had me *fukn* worried *wen* we got to the car *n u* weren't there." "[Defendant Mendoza:] Make sure *u dont* say *shyt forreal....an yo* friend." "[Blotzer:] *Na Wtf we not* big *mouthes* like that[.] *d*on't even trip babe." "[Defendant Mendoza:] *K*."

The next morning, Blotzer texted defendant Mendoza: "He *die n* it says a 17 *yr* old *gurl* got hit." Later that morning, the pair continued texting: "[Blotzer:] News DUH."[14] "[Defendant Mendoza:] *Im watchn* it *rite* now." "I don't *c nothin*." "[Blotzer:] IT WAS LIKE FIVE *MINS* INTO THE 7 *o clock* news right after the niner game fights." "[Defendant Mendoza:] I *dnt c* it. But *u* have a good day." "[Blotzer:] I wanna talk to you *tho* :(" "[Defendant Mendoza:] If *sumthen eva happns* to me would *u* stick *bu myside regadless* of *wat* it *iz*." "[Blotzer:] *Yea* I *wud*." "[Defendant Mendoza:] *U* sure *bout* that[?]" "[Blotzer:] *Yea*."[15]

D. Gang Evidence

Gang expert Detective Stenger stated his opinion at trial that defendant Mendoza was a member of the Norteño subset, the Elite Northern Empire (ENE). As support for this conclusion, Stenger relied, among other things, on defendant Mendoza's gang tattoos. Those included the word "Elite" tattooed on his stomach, and the words "Can't Stop" and "Won't Stop" on his forearms. In addition, the parties stipulated that, at some point in the five weeks before Martin Navarro was shot and killed, defendant Mendoza got the words "Real Shooter" and "SK," with a picture of a live round and a question

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[13] Italicized portions denote spelling and grammatical errors in the original.

[14] Detective Bittner, who obtained defendant Mendoza's cell phone records testified that "DUH" could mean "did you hear?"

[15] In his closing argument to the jury, defendant Mendoza's counsel acknowledged that these text messages "establish[ed]" his client was "around" the party.

mark, tattooed on the back of his neck. In Stenger's opinion, "Real Shooter" described the role that defendant Mendoza was willing to take for his gang and "SK" meant "Scrap Killer."

Expert Stenger also opined that defendant Moreno was a member of the Norteño subset, Crazy Ass Latinos or CAL. Defendant Moreno had the letters C, A, and L tattooed on his right hand and the letters X, I, and V—corresponding to the Roman numeral 14—tattooed on his left hand. Norteños like the number 14 because N is the 14th letter in the alphabet.

E. Defense Evidence

Defendant Moreno presented no evidence at trial, and his counsel acknowledged in his closing argument that Moreno might have been the one who punched or "brief[ly] scuffle[d]" with the victim, Martin Navarro, at the party. But, he said, Moreno did not anticipate someone else then would pull a gun and shoot Navarro. Rather, counsel maintained, any altercation between Moreno and Navarro was a matter between them as individuals and not a gang dispute.

Defendant Mendoza did not himself testify at trial but attempted to establish through other witnesses that another gang member—George Hellums or Chris Donaldson or both—shot Martin Navarro. The following evidence supported this theory: Tony Martin testified he loaned George Hellums a .38 special a couple of days before the shooting, and George Hellums testified he gave the firearm to Chris Donaldson while they were driving to the party. Donaldson had light-colored hair in a Mongolian cut, i.e., shaved on the sides, and long on top, with a tail in back. Erick Tejeda saw two gang members, one with a Mongolian haircut, follow and stand behind defendant Moreno while he punched Martin Navarro. According to Detective Bittner, in an interview the day after the shooting, Erick said he saw the man with the Mongolian haircut shoot Navarro with a .38. The ammunition expert testified that the bullet fragments removed from Navarro's body could have come from a .38. Shortly after the shooting, defendant

Moreno texted Donaldson, "*Were u* at[?] [G]o get out of town and tell me *were u* at."[16] At trial, however, Erick Tejeda did not recall telling the police he had seen the shooter. He testified everything had happened fast, the room was poorly lit, the situation was very stressful, and he only remembered seeing the gun, not the shooter.

Mendoza also called Francisco and Brian Serrano and Antioch police officer Marty Hynes as witnesses in an attempt to show that George Hellums shot at Navarro. According to Officer Hynes, on the night of the shooting Francisco said he saw the shooter, whom he described as a tall, dark-skinned man, possibly a Puerto Rican, wearing a white shirt and a red hat. Other witnesses agreed George Hellums wore a white shirt and red hat at the party and Brian Serrano testified that Hellums was African American.

On cross-examination, however, Brian Serrano testified that he and his brother had compared notes about the shooting before the police arrived. In that conversation, Brian testified, Francisco said he thought the shooter was dark-skinned or black,[17] and Brian replied that the only African American he had seen was Hellums, who, he added, had been wearing a white shirt and a red hat. In her closing argument, the prosecutor suggested that Francisco might actually have seen Tony Martin, whom she indicated was Puerto Rican, standing in front of defendant Mendoza when the latter fired his gun and might have thought Martin was the shooter. Francisco Serrano did not go to school with Hellums and did not know him. After talking with his brother, the prosecutor argued, Francisco might have assumed Tony Martin was George Hellums, and given the police the description of Hellums' clothing that his brother had supplied.[18]

Defendants also challenged Tony Martin's credibility, observing that he originally had been indicted as a co-defendant in this case, was charged both with Martin Navarro's murder and attempted murder of Naomi Caballero, and could have received a life

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[16] Italicized portions denote spelling and grammatical errors in the original.

[17] Officer Hynes testified that Francisco did not use the words "black" or "African American" in describing the shooter.

[18] Other witnesses reported Tony Martin had been wearing a red and blue Atlanta Braves hat on the day of the party.

sentence if convicted. After the jury deadlocked in a first trial, however, Martin agreed to plead guilty to an unspecified violent felony, with a ten-year sentence, and testified as a witness instead at the second trial.

In the second trial, Martin acknowledged he had lied about the facts of the case in police interviews shortly after the shooting. For example, he originally told the police he had been outside when shots were fired and did not see the shooter. He denied having had a gun at the party, denied knowing anything about the Hi-Point firearm, did not include defendant Mendoza among those with whom he initially said had attended the party, and did not admit shooting at the gray Honda. Although Martin eventually told police that defendant Mendoza had been at the party and that he had walked back into the garage in time to see defendant Mendoza shoot Martin Navarro, he did not tell the police or prosecution he actually had been just feet away at the time of the shooting until almost two years later, just before the start of the second trial.[19] The jury also was advised, pursuant to stipulation between the parties, that Tony Martin was positively identified as the shooter in a different case nine days after Martin Navarro was killed; was charged with murder, attempted robbery, and attempted carjacking, a gang enhancement, and two special allegations; and had been advised in an interview with the district attorney's office that he would receive no deal in the second case for his testimony in this matter.

Defendants also challenged George Hellums' credibility. Hellums originally was arrested in connection with Martin Navarro's murder, but was released without being charged 72 hours later after giving a statement to the police. Hellums acknowledged he was afraid when he spoke to the police and could have said anything. When he gave the statement, he left the gang. Later his life and his family's lives were threatened, and he was placed in the California Witness Relocation and Assistance Program (CalWRAP).

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[19] Martin's claim that he was in the garage and stopped Erick Tejeda from intervening to end the fight also arguably was contradicted by Erick's testimony that the person wore a black hoodie as Martin, Hellums, and Detective Bittner all testified Martin had been wearing a red or burgundy hoodie that day.

By the time of trial, he had been in CalWRAP for more than a year and a half, receiving a regular monthly allowance to pay his rent, utilities, and food.

Hellums acknowledged he violated his CalWRAP agreement by lying to the police and later to a grand jury because he was afraid of future prosecution. For example, he lied to both about the direction he ran after the shooting, lied to the police about whether he was wearing a hat at the party, and lied to the grand jury about having seen defendant Mendoza carrying a gun earlier on the day of the party.[20] Hellums also told the grand jury he had not seen anyone else with a gun that day, although he had seen Tony Martin with the Hi-Point firearm in the evening and had himself given Chris Donaldson the .38. Despite these facts, he was not terminated from CalWRAP, and a separate charge for having been found in possession of an illegal sawed-off shotgun at the time of his arrest remained on hold pending his testimony in this case.

F. Procedural History

On June 1, 2012, both defendants were charged by indictment with one count of murdering Martin Navarro (Pen. Code,[21] § 187) (count one), and one count of attempted murder of Naomi Caballero (§§ 187, 664) (count two). Tony Martin and Chris Donaldson also were charged as co-defendants on both counts, and Jessica Juarez was charged as a co-defendant on the first count, and as an accessory after the fact. (§ 32) (count three). Gang enhancements were alleged against all defendants. Carlos Guzman had been separately charged with Mr. Navarro's murder previously by information and his case was later consolidated with that of the other defendants.

During jury selection, Donaldson accepted an agreement with the prosecution to plead guilty to manslaughter with gang enhancements and Guzman accepted an agreement to plead guilty as an accessory to murder with gang enhancements. Although not entirely clear from the record, it appears Juarez's case had been severed by this

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[20] Hellums testified that defendant Mendoza only told him the .357 revolver was in the purse of Amanda Blotzer or Melissa Vargas.

[21] All undesignated statutory references below are to the Penal Code.

time.[22] The charges against the remaining defendants were tried to a jury. On March 20, 2013, the jury announced it was deadlocked and a mistrial was declared.

Two months later, on May 22, 2013, the prosecution filed an amended indictment charging only defendants Mendoza and Moreno, after Tony Martin agreed to plead guilty to an unspecified charge, with a ten-year sentence. The amended indictment charged both defendants with the murder of Martin Navarro. (§ 187.) It also contained enhancements alleging that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), that defendants each personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c), (d), & (e)(1)), and that defendant Mendoza intentionally killed Martin Navarro while an active participant in a criminal street gang, the Norteños, and to further the activities of that criminal street gang (a gang murder special circumstances enhancement) (§ 190.2, subd. (a)(22)).

The second jury trial began on June 5, 2013 and concluded on June 25, 2013, when the jury returned its verdict. The jury found both defendants guilty of first-degree murder and found true the criminal street gang enhancements. As to defendant Mendoza, the jury found true the allegation that one of the principals had personally used and discharged a firearm causing great bodily injury or death, but the jury found the same allegation not true as to defendant Moreno. The jury found true the gang murder special circumstances enhancement with regard to defendant Mendoza.

On August 16, 2013, the trial court denied defendant Mendoza's motion for new trial and imposed a sentence of life without possibility of parole, with a consecutive term of 25 years to life. The court denied defendant Moreno's motion for a new trial on

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[22] Defendant Mendoza has filed a request that we take judicial notice of certain superior court records—plea agreements, abstracts of judgment, and a court docket sheet—reportedly reflecting the ultimate disposition of the charges against Guzman, Donaldson, and Martin in this case and confirming the pendency of Juarez's charges as of July 1, 2014. As he has failed to explain the relevance of these documents, we deny his request. (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6.)

November 22, 2013, and sentenced him to a term of 25 years to life. These timely appeals followed.

II. DISCUSSION

A. Mendoza's Appeal

1. Sufficiency of the Evidence

Defendant Mendoza contends his convictions must be reversed because key prosecution witnesses, Tony Martin and George Hellums, both were accomplices to the crime and insufficient evidence corroborated their testimony. Alternatively, he contends that the judgment violates due process and should be reversed because the accomplice testimony was so unreliable and inherently improbable and the corroborating evidence so slight that collectively they did not constitute sufficient evidence as a matter of law.

a. Standard of Review and Legal Principles

A conviction that is not supported by sufficient evidence violates the due process clause of the federal and state constitutions. (*People v. Rowland, supra*, 4 Cal.4th at p. 269.) "Our task in deciding a challenge to the sufficiency of the evidence is a well-established one. '[W]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]' " (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.) In applying this standard, "we do not resolve credibility issues or evidentiary conflicts. Instead, we presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict.' [Citations.]" (*People v. Solis* (2013) 217 Cal.App.4th 51, 56-57; see also *People v. Vasquez* (2015) 239 Cal.App.4th 1512, 1517 [An appellate court "must accept logical inferences that the jury might have drawn from the evidence although [the court] would have concluded otherwise"].)

In California, "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (§ 1111.) "The purpose of this corroboration requirement is 'to ensure that a defendant will not be convicted solely upon the testimony of an accomplice because an accomplice is likely to have self-serving motives.' [Citation.]" (*People v. Beaver* (2010) 186 Cal.App.4th 107, 114.) An "accomplice" is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) " 'This definition encompasses all principals to the crime [citation], including aiders and abettors and coconspirators. [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 93.)

" ' "An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets." [Citation.]' " (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 472.) A person who aids and abets an assault, for example, may be guilty of murder if death was a reasonably foreseeable consequence. (*People v. Montano* (1979) 96 Cal.App.3d 221, 227, superseded by statute on another ground.)

" 'Whether someone is an accomplice is ordinarily a question of fact for the jury; only if there is no reasonable dispute as to the facts or the inferences to be drawn from the facts may a trial court instruct a jury that a witness is an accomplice as a matter of law.' " (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 430 (*Bryant*).) The burden is on defendant to prove by a preponderance of the evidence that a person is an accomplice. (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1219.) " '[T]he fact that a witness has been held to answer for the same crimes as the defendant and then granted immunity does not necessarily establish that he or she is an accomplice.' " (*Bryant*, *supra*, at p. 431.)

b. Accomplice Status

The parties agree that the jury could have considered Tony Martin to be an accomplice, given his testimony that he put out an arm to prevent Erick Tejeda from interrupting the assault on Martin Navarro.[23] They disagree, however, about whether George Hellums qualified as an accomplice. Defendant Mendoza maintains the evidence proved that Hellums was an accomplice. Elsewhere, however, defendant Mendoza concedes "Hellums was not an accomplice as a matter of law because there was *a reasonable factual dispute*" about whether Hellums was inside or outside the garage at the time of the shooting. (Italics added.) Defendant Mendoza appears to agree that Hellums could not be considered an accomplice if he was outside the garage at the time.

We agree that there was a reasonable factual dispute about Hellums' whereabouts. This is fatal to defendant's argument, because, as noted, it is not our role to resolve credibility issues or evidentiary conflicts on appeal. " ' "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" ' " (*People v. Manibusan, supra*, 58 Cal.4th at p. 87.) Instead, we must review the evidence in the light most favorable to the prosecution, presuming in favor of the judgment the existence of every fact the jury reasonably could have deduced from the evidence. (*Ibid.*) Here, the jury reasonably could have deduced from the evidence that Hellums was outside the garage at the time of the shooting and, thus, not an accomplice.

As defendant Mendoza acknowledges, the parties presented conflicting evidence on this point. The People presented George Hellums' testimony that he was outside the garage when the shooting occurred. Although the jury heard evidence calling Hellums' credibility into doubt—i.e., evidence that Hellums was among those initially arrested for

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[23] As will be discussed separately, below, the parties disagree about whether the trial court should have ruled Tony Martin was an accomplice as a matter of law.

Martin Navarro's murder, that he agreed to testify and was released,[24] and that he subsequently lied to the police and grand jury on other topics because he feared prosecution—the People suggested the jury should credit Hellums' testimony because he had a reason to remain outside when the other gang members returned to the party. Unlike the other Norteños, Hellums knew some of the Tejedas' other guests because they attended the same high school he did, and this meant he could be identified as a participant in whatever followed if he returned to the garage and joined in.[25] Although his credibility had been impeached, the jury could reasonably have credited Hellums' testimony that he remained outside. (See, e.g., *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [It is the exclusive province of the jury to determine witness credibility].)[26]

Defense witness Brian Serrano provided support for the conclusion that Hellums had been outside the garage. Although Serrano did not know anyone else in the group of Norteños who arrived at the Tejedas' party, he testified he immediately recognized Hellums when the latter originally walked into the garage with the other gang members, because he had attended middle school and high school with Hellums. Serrano saw the group of Norteños leave the garage, then return, and he saw one of the gang members then cross the garage to confront a person (apparently Navarro), with two other gang members following. But he did not recall seeing Hellums return to the garage with other Norteños, and he did not see Hellums accompany the other Norteños who crossed the garage in the moments before the assault. Although Serrano testified he could not see well after that point because a crowd gathered, the jury could reasonably find that

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[24] There is no evidence Hellums received immunity in exchange for his agreement to testify.

[25] Hellums attended Antioch High School, while Cristina Boggiano and Jessica Juarez, for example, attended Deer Valley High School.

[26] The jury was instructed that it must judge the credibility or believability of the witnesses, taking into consideration, among other things, their prior record for truthfulness.

Serrano would have noticed and remembered had Hellums re-entered the garage and joined in confronting Navarro.

Defendant Mendoza points to other evidence that he maintains proved Hellums was inside the garage at the time of the shooting and either aided and abetted the assault that preceded the shooting or actually shot Martin Navarro himself. He cites the testimony of Guadalupe Sanchez as support for the first theory, and the testimony of Officer Hynes and the Serrano brothers as support for the second. As defendant Mendoza acknowledges, however, none of this evidence compelled a finding that Hellums was an accomplice.

Guadalupe Sanchez testified George Hellums was in the group with whom she attended the Tejedas' party, along with defendant Moreno, Chris Donaldson, Tony Martin, and a person matching Jairo Bermudez Robinson's description. At one point, Sanchez recalled, Jessica Juarez pointed at someone, and told Hellums and others, "That's my ex." Sanchez later saw members of her group heading over to a corner of the garage and thought something bad was about to happen.

As defendant Mendoza acknowledged in his opening brief, however, Guadalupe Sanchez never specifically identified any of the gang members who walked across the garage toward Martin Navarro and, particularly, never claimed Hellums was among them.[27] She did not claim Hellums specifically stood nearby during the assault, participated in it, or took other action to encourage or facilitate it. At best, Sanchez placed Hellums at the party long enough to hear Jessica Juarez point out Navarro. This was insufficient to establish as a matter of law that Hellums acted to encourage or facilitate the assault and, therefore, could be held liable for aiding and abetting it. (See, e.g., *People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [An individual's presence during

[27] Although, in his reply brief, defendant Mendoza did claim Sanchez testified that Hellums was among those who approached Navarro before the assault, the record does not support this claim.

planning and execution of a crime, and failure to prevent its commission, is not sufficient to establish aiding and abetting].)

Nor did the testimony of Officer Hynes and the Serrano brothers compel a conclusion that George Hellums was the shooter. That testimony, summarized in the background section, above, at best indicated that Francisco initially thought he saw the shooter, whom he described to the officer as tall and dark-skinned, possibly Puerto Rican, wearing a white shirt and red hat. George Hellums may have broadly matched this description, as he is six feet tall, wore a white shirt and red hat at the party, and is African American, although we find no evidence suggesting he appeared to be Puerto Rican, and Officer Hynes testified Francisco did not use the words "black" or "African American" in describing the "dark-skinned" shooter. But Francisco never positively identified Hellums. At trial, Francisco testified that he did not recognize a photo of Hellums, did not actually recall having seen anyone at the party dressed as he had described to the police, and insisted he had not actually seen the shooter. Again, this evidence does not compel a conclusion that Hellums was either the actual shooter or an accomplice.

Since it could be inferred that George Hellums was not an accomplice, "the question whether he was, was properly left to the jury, and as a reviewing court, we are bound to presume in favor of affirming the judgment that the jury found he was not an accomplice." (*People v. Santo* (1954) 43 Cal.2d 319, 326-327; see *People v. Zaragoza* (2016) 1 Cal.5th 21, 44 [courts "must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence"].)

c. Corroborating Evidence

Defendant Mendoza also contends independent evidence did not sufficiently corroborate the accomplice testimony. In evaluating this argument, for the reasons set forth above, we presume the jury found George Hellums was not an accomplice. Without

deciding the question, we also assume, as defendant Mendoza maintains, that the jury found Tony Martin was an accomplice.[28]

Under section 1111, the jury had to find that independent evidence linked defendant Mendoza to Martin Navarro's murder before relying on Tony Martin's trial testimony. "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, so long as it tends to implicate the defendant by relating to an act that is an element of the crime. [Citations.] The independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies [citation] and need not establish every element of the charged offense. [Citation.] The corroborating evidence is sufficient if, without aid from accomplice testimony, it ' " 'tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.' " ' [Citations.]" (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022; accord *People v. Avila* (2006) 38 Cal.4th 491, 562-563.) The corroborating evidence here met that standard. The jury heard evidence—independent of Tony Martin's testimony—that defendant Mendoza was present at the party, had a motive, and made inculpatory statements afterward.

Gang expert Detective Stenger provided the following undisputed testimony, which established a motive: defendant Mendoza was an active member of the Norteño gang; he had a tattoo with the name of his Norteño subset on his stomach; the Sureño gang was the primary rival of the Norteño gang; in August 2011, the month of the party during which Martin Navarro was shot, the Norteños and Sureños were engaged in a turf war in Antioch; according to gang rules, Norteño and Sureño members must attack each other on sight; if several members of one gang encountered a single member of the other gang, the group would feel obligated to assault the lone rival; a Norteño member could build his reputation within the gang by shooting a person suspected of being a Sureño (or

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[28] Crediting Tony Martin's testimony that he prevented an attempt to stop the assault, the People do not dispute the jury reasonably could have concluded he was an accomplice.

"Scrap") because such action demonstrated loyalty to the gang and promoted the gang's reputation with rivals and within the community; and Martin Navarro, an associate of the Sureño gang subset, Los Monkeys Treces, wore typical Sureño clothing to the party, a shirt and bandanna bearing the Sureño color, blue.

The parties stipulated that, in the five weeks before the party, defendant Mendoza added a tattoo on his neck with the words "Real Shooter" and "SK," which expert Stenger testified meant "Scrap Killer," and a picture of a live round of ammunition with a question mark. Defendant Stenger testified that gang members' tattoos communicate the acts members are willing to undertake for their gangs, for example, a willingness to act as a gang enforcer. The jury reasonably might infer from this evidence that defendant Mendoza got the new tattoo to show he intended to enforce gang rules by shooting and killing any suspected Sureños whom he might encounter.

George Hellums' testimony that, at the party, Jessica Juarez pointed out for their group a person whom she claimed was a "Scrap" and had snitched on her Norteño boyfriend—corroborated by Martin Navarro's friend, Janicett Villegas, who recalled a girl pointing to Martin Navarro—provided further evidence of motive. Although there is no evidence Juarez directed her statement to defendant Mendoza specifically, we do not agree there is no evidence he heard it. Hellums testified that the Norteño group, including Juarez and Mendoza, entered the party together, they stayed together once inside the garage, and Juarez made her comment to that group.[29]

Other evidence supported the conclusion that defendant Mendoza was present when the shooting occurred. George Hellums testified that he, defendants Mendoza and Moreno, and the defendants' girlfriends had been part of a group of Norteños who had gone into San Francisco together earlier on the day of the party, and the People presented surveillance video of the three young men in a San Francisco hat store on that day as

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[29] Even if defendant Mendoza did not hear Jessica Juarez's comment, Detective Stenger's expert testimony about the ongoing gang turf war, gang rules, defendant Mendoza's tattoo, the victim's attire at the party, and his Sureño association establish motive.

Hellums had described. Hellums testified that the two defendants later arrived at the party in a car with their girlfriends, but that defendant Mendoza left the party after the shooting in a different car with Hellums, Chris Donaldson, and Jairo Bermudez Robinson. A text message that defendant Mendoza's girlfriend, Amanda Blotzer, sent him later that evening provided strong support on this point. In it, Blotzer asked defendant Mendoza if he was okay, remarking that she had been worried when "we got to the car [and] [you] weren't there." The next morning, Blotzer sent defendant Mendoza a series of texts about a news report that appeared to describe the shooting. Taken together, the evidence was substantial that defendant Mendoza was present when Martin Navarro was killed.

Finally, George Hellums testified that defendant Mendoza confessed the crime to him immediately after it occurred. In the car leaving the party, Hellums testified, he asked his friends what had happened, and defendant Mendoza responded that he had shot someone twice in the stomach and once in the back.[30] According to Hellums, defendant Mendoza later explained the person he shot had been a "Scrap." Defendant Mendoza also made a statement that could be construed as reflecting consciousness of guilt, when he texted his girlfriend the following day, asking if she would stick by him if something ever happened to him, regardless of what it was.

In sum, assuming that the jury found Tony Martin to be an accomplice, the evidence adduced at trial sufficiently corroborated his eyewitness testimony that defendant Mendoza shot and killed Martin Navarro.[31]

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[30] The expert witness in forensic pathology who conducted Martin Navarro's autopsy testified that Navarro was shot once in the stomach, once in the back, and twice in the upper legs.

[31] In light of this conclusion, we do not address the prosecution's argument that sufficient independent evidence corroborated the testimony of Tony Martin and George Hellums, even if both were accomplices.

d. Sufficiency of the Evidence as a Whole

Defendant Mendoza alternatively submits that the judgment against him violates due process and should be reversed because the evidence against him, viewed as a whole, was insufficient to support the murder conviction. The main evidence was provided by Tony Martin and George Hellums, and their testimony, he asserts, was so unreliable and inherently improbable, and the corroborating evidence so slight, that no reasonable jury could have found him guilty beyond a reasonable doubt. We cannot agree.

Defendant Mendoza maintains that the testimony of Tony Martin and George Hellums was too unreliable and inherently improbable to be believed because it was coerced by threats of prosecution, giving both men a strong incentive to lie in return for leniency; both admitted they had lied to the police; and Hellums admitted he had lied to the grand jury.[32] Additionally, Mendoza observes, Martin's description of events at trial contradicted his earlier statements to the police , Hellums' complete denial of all bad acts, was unbelievable on its own, and contradicted Martin's testimony about the shooting outside the garage, and both men contradicted other witnesses' testimony, i.e., about which gang members approached the victim, and the identity of the shooter.

The argument asks this court to make a determination about credibility and to resolve conflicts in evidence adduced at trial. As our own Supreme Court has confirmed, however, "[i]n deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In this case, the jury had the eyewitness

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[32] Although defendant Mendoza contends the police "coerced" Martin and Hellums to testify against him, we note that he does not specifically assert the police acted improperly or that the alleged coercion so impaired the reliability of their testimony that it should have been excluded. (See, e.g., *People v. Williams* (2010) 49 Cal.4th 405, 452-453 [witness testimony may be excluded based on improper police coercion], but see *People v. Badgett* (1995) 10 Cal.4th 330, 354-355 ["We have never held . . . that an offer of leniency in return for cooperation with the police renders a third party statement involuntary or eventual trial testimony coerced"].)

testimony of Tony Martin identifying defendant Mendoza as the shooter, with corroborating evidence as discussed in the previous section.

Defendant Mendoza did not present an alibi and has not contended it was physically impossible for him to have been the shooter. Accordingly, we examine whether Tony Martin's eyewitness testimony was inherently improbable. In deciding this point, we must examine "the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying. . . . [T]he improbability must be 'inherent,' and the falsity apparent 'without resorting to inferences or deductions.' [Citation.] In other words, the challenged evidence must be improbable ' "on its face" ' [citation], and thus we do not compare it to other evidence (except, perhaps, certain universally accepted and judicially noticeable facts). The only question is: Does it seem *possible* that what the witness claimed to have happened actually happened? [Citation.]" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729.) We here answer the question in the affirmative. Nothing in Tony Martin's testimony was inherently improbable.

Defendant Mendoza unconvincingly attempts to compare this case to *People v. Reyes* (1974) 12 Cal.3d 486 (*Reyes*), in which the court concluded the evidence was insufficient as a matter of law to convict one of the defendants. In *Reyes,* the prosecution's case against one of the defendants relied principally on the testimony of a single eyewitness who had seen a man leaving the victim's apartment with a television. (*Id.* at p. 498.) In evaluating whether the witness' testimony had been sufficient to incriminate the defendant, the appellate court observed that she had not positively identified the defendant at trial, the weather had been rainy and foggy, the light had been poor, and the witness had viewed the incident from across the street, approximately 125 feet away. (*Ibid.*) Furthermore, two other witnesses positively identified the other defendant as the man who left the apartment with a television, and a third testified he was certain the defendant in question had not been the man. (*Ibid.*) In light of these facts, and the other defendant's "convincing trial confession," the court concluded the one

witness' "inherently insubstantial testimony" did not suffice to incriminate the defendant. (*Id.* at p. 499.)

In contrast, here, Tony Martin did positively identify defendant Mendoza as the shooter and that identification was not subject to the type of doubt present in *Reyes*, because Martin testified that he had known Mendoza for two years by that time, and that Mendoza actually grabbed and pushed him aside before shooting the victim. No other witness who was in the garage at the time of the shooting contradicted Martin's testimony identifying Mendoza as the shooter at trial. Although Cristina Boggiano and Guadalupe Sanchez did not describe defendant Mendoza as having been among the small group of Norteños who approached the victim before the shooting, this did not create a conflict with Tony Martin's account, as Martin testified Mendoza approached after the assault commenced, and the jury heard evidence that Mendoza may have needed to retrieve his gun from the purse of one of the young women.

The fact that Erick Tejeda and Francisco Serrano may initially have thought someone else was the shooter does not create a contradiction rendering Tony Martin's trial testimony inherently improbable or unsubstantial. It was not surprising that witnesses' recollections varied given that the shooting occurred amidst a crowd of people, the lighting was poor, events unfolded rapidly once the group of Norteños returned to the garage, and most party attendees did not know anyone in the Norteño group apart from Hellums. In addition, both Tejeda and Serrano insisted at trial they had not actually seen the shooter. Tejeda testified that the events happened so quickly he was not even sure at the time what he had seen and, as discussed, the prosecution offered a seemingly credible explanation for the description of the shooter that Serrano initially supplied and later recanted. (See, *supra,* at p. 11.) In sum, Tony Martin's testimony was neither physically impossible nor inherently improbable.

We reach the same conclusion as to George Hellums' testimony. Defendant Mendoza does not contend Hellums' testimony was physically impossible and cites no evidence demonstrating that it was inherently improbable. Pointing again to Guadalupe Sanchez's inconclusive testimony describing the group of Norteños who approached the

victim before the assault, and to the testimony of Officer Hynes and the Serrano brothers about Francisco Serrano's unsworn and subsequently recanted description of the shooter, Mendoza at best creates a question of fact, which the jury apparently resolved against him. It is not our place to reweigh that evidence on appeal.

The other cases that Mendoza cites to support his argument that the court should reject Martin's and Hellums' testimony also are distinguishable. In *In re Eugene M.* (1976) 55 Cal.App.3d 650, a minor was convicted solely on the basis of an out-of-court statement made by a 16-year-old alleged accomplice under threat of prosecution, which the accomplice later recanted under oath at trial. (*Id.* at p. 657.) The court observed that the accomplice's out-of-court statement was "apparently confused and intermingled with the narrative of another crime" (*id.* at p. 658), and concluded it was " 'so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt.' [Citation.]" (*Id.* at p. 659.) The same cannot be said of Tony Martin's testimony under oath at trial unequivocally identifying defendant Mendoza as the shooter.

In *People v. Lang* (1974) 11 Cal.3d 134, which Mendoza also cites, the court merely suggested, after acknowledging the matter had not been properly briefed, that appellate counsel should at least have attempted a sufficiency of the evidence argument characterizing the victims' testimony as inherently improbable and insubstantial, because none of the victims' witnesses supported their account that a crime was committed in their presence. (*Id.* at p. 139.) Here, in contrast, there is no dispute a murder was committed, and reviewing the whole record in the light most favorable to the judgment below as we must, we are satisfied it is supported by substantial evidence. Although the credibility of key prosecution witnesses Tony Martin and George Hellums could reasonably be challenged, neither gave an account that was physically impossible or inherently improbable.

2. Restriction on Cross-Examination

Defendant Mendoza contends the trial court violated his constitutional rights to confront the witnesses against him and, by extension, his rights to present a defense, and to due process (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15), by preventing

him from impeaching Tony Martin's credibility through cross-examination about the unrelated murder case then pending against Martin. We conclude the court properly exercised its discretion in limiting impeachment under Evidence Code section 352.[33]

a. Background

At a pretrial hearing, over Mendoza's objection, the trial court granted a prosecution motion to limit Tony Martin's cross-examination, by precluding questioning about the unrelated murder case, after the prosecution declined to grant Martin immunity. Defendant Mendoza's counsel had requested leave to directly ask Martin whether he was the shooter in the other case. In the event Martin denied it, counsel proposed to challenge his credibility by presenting the testimony of two eyewitnesses and a responding police officer.

Citing Evidence Code section 352, the trial judge denied the request, observing that she did not want to hold a mini-trial within a trial, and could not permit questioning before the jury that undoubtedly would cause Martin to invoke his constitutional privilege against self-incrimination.[34] Recognizing that the matter was relevant to credibility, however, she instructed the parties to work together to develop stipulated facts that might be read to the jury about the unrelated murder charges then pending against Martin.

Defendant Mendoza renewed his objection to this ruling on the first day of trial, arguing that it unduly limited his cross-examination of Martin. The trial judge again overruled the objection, reiterating that she expected Martin would invoke his privilege against self-incrimination if questioned under oath about the other murder. Although she offered to allow defense counsel to test the point by questioning Martin out of the jury's presence, with his counsel present, defendant Mendoza's counsel did not pursue this offer, electing instead to work with the prosecution on stipulated facts.

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[33] Evidence Code section 352 provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[34] The Fifth Amendment to the United States Constitution.

During a break in proceedings two days later, the prosecutor told the court she would be calling Martin as the next witness. Acknowledging that defense counsel had hoped to read the stipulated facts to the jury before cross-examining Martin, the prosecutor advised that the parties had not yet reached agreement on a final version. Referring to her prior ruling, the trial judge then cautioned both defense counsel to refrain from questioning Martin about the unrelated murder charge. Without objecting, defense counsel assured the court they understood.

Both the prosecution and defendant Moreno subsequently questioned Martin, after which the parties conferred with the trial judge in chambers, apparently about the stipulation. Defendant Mendoza's counsel then also cross-examined Martin. When he reached the end of his cross-examination, counsel asked to resume the earlier dialogue with the judge. Observing that they did not have sufficient time at that point, however, the judge refused, and counsel concluded his cross-examination of Martin without objection.

The trial proceeded for three more days (over the course of a week). On the fourth day after Tony Martin completed his testimony, the parties gave the court an update on their progress in negotiating a stipulation, and explained their two remaining areas of disagreement. Their first disagreement concerned the prosecution's inclusion of information from the police report about the amount of time (90 minutes) that had elapsed between the shooting in Martin's unrelated murder case and the eyewitnesses' identification of Tony Martin as the shooter. Defendant Mendoza's counsel objected that the information was irrelevant to Martin's credibility, and he had not had an opportunity to speak with the officer who prepared the report. The judge overruled the objection and Mendoza does not challenge that ruling on appeal.

The second disagreement concerned inclusion of a broad statement that the prosecution had offered Tony Martin no deals or promises in the second case for his testimony in this matter. Observing that Martin already had testified he was not receiving any deals other than the 10-year plea deal in this case, defendant Mendoza's counsel objected that the jury should be entitled to draw its own conclusion about whether Martin

was telling the truth, and that the existence or nonexistence of other deals was not relevant to Martin's credibility. The trial judge adopted a compromise to resolve this objection.

Martin's interview with the district attorney's office after the first trial, during which he apparently agreed to testify in the second trial, had been recorded, and copies of the recordings had been provided to defense counsel. The trial judge instructed the parties to locate on those recordings, and add to the stipulation, a statement that the prosecution told Martin in that interview he would not receive a deal in the second murder case for testifying in this matter. When defendant Mendoza's counsel interjected that he also wanted to include a statement from an earlier Martin interview, during which, he maintained, Martin had been told "We'll help you out," the judge agreed, telling the parties, "Get the statements that you have. That's what I want included."

Later that day, without objection, defendant Mendoza's counsel read the following stipulated facts to the jury:

"On August 29, 2011, at approximately 10:00 p.m. in Hillcrest Park in Concord, Ever Osario, Alejandra Balderas, Idalia Sanchez, and Osmin Sanchez were approached by two males, one wearing black and one wearing white. The males confronted the group and asked what they 'claimed.' The males demanded their money, cell phones and car keys. The male wearing the black lifted Ever Osario's shirt, saw a blue belt, and yelled 'Scrap.' The male wearing the black repeatedly stabbed Ever Osario. As victim Osario attempted to flee the male wearing white fired a handgun and struck victim Osario in the upper torso.

"Less than five minutes later, the male wearing black and the male wearing white were arrested less than 650 yards away from the scene, both were sweaty and out of breath. An hour and a half later Alejandra Balderas and Idalia Sanchez were transported to the site of the arrest and both immediately identified the male wearing white as the person responsible for shooting the victim Osario, stating, 'the one in white shot him.' The male wearing white was positively identified as Tony Martin.

"Tony Martin is charged with attempted robbery, attempted carjacking and murder, a criminal street gang enhancement, an enhancement for intentionally discharging a firearm resulting in death, and two specific allegations, that the murder of victim Osario was committed to further the activities of a criminal street gang and that the murder was committed during the course of an attempted robbery. On May 14, 2013 when Tony Martin was interviewed by the District Attorney's Office, Mr. Martin was informed he was not being given any deal on his Concord case in exchange for his testimony in this case."

In his closing argument, defendant Mendoza's counsel theorized that Martin identified defendant Mendoza as the shooter because he hoped to build credibility with the police, thereby helping himself in the other murder case. Then, attempting to cast doubt on evidence indicating Martin was receiving no leniency in the other case for his testimony in this matter, defense counsel hypothesized what might really have happened during Martin's May 14, 2013 interview at the District Attorney's office. Playing the role of the prosecutor, he said: "So, Tony, tell you what[?] You come and testify, we'll give you 10 years, and no promise on your [other murder] case 'cause everything's aboveboard and we're all super honest here. It's all about justice and nothing else. It's all aboveboard. Come on in. You take the stand."

b. Standard of Review and Legal Principles

"The right of cross-examination is included in the [constitutional] right of an accused in a criminal case to confront the witnesses against him" (*Lee v. Illinois* (1986) 476 U.S. 530, 539 (*Lee*)), and is "secured for defendants in state as well as federal criminal proceedings" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 (*Van Arsdall*)). It "is the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis v. Alaska* (1974) 415 U.S. 308, 316 (*Davis*).) Among other things, "a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias." (*People v. Pearson* (2013) 56 Cal.4th 393, 455 (*Pearson*).) "[W]hen one person accuses another of a crime under circumstances in

which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." (*Lee*, *supra*, at p. 541.) " ' "[C]ross-examination to test the credibility of a prosecuting witness in a criminal case should be given wide latitude." ' " (*Pearson*, *supra*, at p. 455.)

It does not follow, however, that a trial judge is constitutionally prevented from imposing limits on the inquiry. On the contrary, trial judges retain "wide latitude" to impose reasonable limits on cross examination, "based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Van Arsdall, supra*, 475 U.S. at p. 679; see also, *United States v. Owen* (1988) 484 U.S. 554, 559 [" '[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" ' "]; but see *Michigan v. Lucas* (1991) 500 U.S. 145, 151 ["Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve' "].) Even where the scope of cross-examination is " 'narrowed,' " the defendant's confrontation rights are not violated if the jury had the opportunity to assess the witness's demeanor and credibility. (*People v. Homick* (2012) 55 Cal.4th 816, 861.) " ' "[U]nless the defendant can show that the prohibited cross-examination would have produced a 'significantly different impression of [the witness's] credibility' ([*Van Arsdall*], *supra*, 475 U.S. at p. 680), the trial court's exercise of its discretion in this regard does not violate" ' " the constitutional confrontation clause. (*Pearson*, *supra*, 56 Cal.4th at pp. 455-456.)

Nor does reliance on Evidence Code section 352 to limit cross-examination by excluding evidence of marginal impeachment value that would entail the undue consumption of time contravene a defendant's constitutional rights. (*Pearson*, *supra*, 56 Cal.4th at p. 455; see, e.g., *People v. Hovarter* (2008) 44 Cal.4th 983, 1010 ["The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights' "].) " 'Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the

exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right.' [Citation.]" (*People v. Leonard* (2014) 228 Cal.App.4th 465, 495-496.) A trial court's discretionary ruling excluding evidence under section 352 will not be disturbed on appeal absent an abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 743 (*Peoples*).) To establish an abuse of discretion, defendant "must demonstrate that the trial court's decision was so erroneous that it 'falls outside the bounds of reason.' [Citations.] A merely debatable ruling cannot be deemed an abuse of discretion. [Citations.]" (*Bryant, supra*, 60 Cal.4th at p. 390.)

c. Forfeiture

As an initial matter, the People argue that defendant Mendoza forfeited his challenge to the trial court's ruling limiting cross-examination of Tony Martin by choosing to collaborate in developing stipulated facts, which his counsel then read to the jury without objection. We do not agree. The record reflects that Mendoza specifically requested and was denied leave to cross-examine Martin about the unrelated murder case before the trial commenced and renewed his request, objecting to the limitation, on the first day of trial. As the People acknowledge, the trial court was clear in its ruling on the matter, repeatedly directing the parties to work together on stipulated facts instead. By making the best of an allegedly erroneous ruling, Mendoza did not relinquish his right to assert error on appeal. (*People v. Riggs* (2008) 44 Cal.4th 248, 289.) *People v. Partida* (2005) 37 Cal.4th 428, which the People cite in their responding brief, is not to the contrary, but, rather, discusses the need for a "specific objection," allowing an opportunity to cure defects and prevent errors. (*Id.* at pp. 433-434.) Here, Mendoza's counsel adequately identified his concern, giving the trial court opportunity to consider and rule on the issue. More was not required.

d. Analysis

If he had been permitted to cross-examine Tony Martin about the unrelated murder charges pending against him, defendant Mendoza maintains, Martin "might" have admitted he hoped for leniency in the other case in exchange for his testimony, giving the jury a significantly different impression of his credibility. We are unconvinced.

The prosecution had not granted Tony Martin immunity in the other case.[35] The trial judge reasonably anticipated, therefore, that Martin would invoke his Fifth Amendment privilege against self-incrimination if Mendoza's counsel asked him on cross-examination—as counsel proposed to do—whether he had shot and killed the victim, as charged in that other case. The judge offered defendants the opportunity to test whether Martin would do so in a hearing outside the jury's presence (see Evid. Code, § 402), but they did not pursue it. We reject the suggestion that the trial judge was obligated to allow the line of inquiry in such circumstances. (See, e.g., *People v. Murillo* (2014) 231 Cal.App.4th 448, 458 ["When a court determines that a witness has a valid Fifth Amendment right not to testify, it may not require the witness to invoke that privilege in front of a jury"]; *People v. Cudjo* (1993) 6 Cal.4th 585, 619-620 [compelling a witness to assert the privilege against self-incrimination in the jury's presence would serve "no legitimate purpose and may cause the jury to draw an improper inference"].)

Recognizing that the charges in the other case were relevant to Martin's credibility, however, the trial judge properly provided the parties the alternative of negotiating a set of stipulated facts on the topic, which defendant Mendoza's counsel then read to the jury. (See, e.g., *People v. Murillo, supra*, 231 Cal.App.4th at p. 458 [rather than having a witness refuse to answer questions, a trial court may assist the parties in arriving at a possible stipulation to read to the jury].) According to that stipulation, police stopped Tony Martin less than five minutes after that murder occurred, "less than 650 yards" from the scene, sweaty and out of breath; about an hour and a half later, two eyewitnesses "positively identified" him as the shooter; and he was charged with murder, attempted robbery, attempted carjacking, two enhancements, and two special allegations. This alone constituted significant impeachment evidence.

Mendoza's counsel also cross-examined Tony Martin at some length, eliciting the following significant facts relevant to his credibility: Martin originally was indicted and

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[35] See § 1324; *People v. Stewart* (2004) 33 Cal.4th 425, 468 ("the power to confer immunity is granted by statute to the . . . prosecution).

charged with murder and attempted murder in this case ; if found guilty, he could have received a life sentence; he repeatedly lied to police when first questioned about the shooting ; as a co-defendant, he heard all the witnesses testify in the first trial, and had opportunity to read the police reports; after the first jury deadlocked, he agreed to testify in the next trial and to plead guilty to an unspecified violent crime with a 10-year sentence ; and on the night of Martin Navarro's murder, Martin fired at least five times into an occupied vehicle, apparently wounding Naomi Caballero. Additionally, in his closing argument, Mendoza's counsel suggested Martin decided to testify against Mendoza to help himself in the second case and, through his sarcastic reenactment, implied Martin should not be believed in claiming he actually received no benefit in that case for his testimony.

Although, as previously discussed, we do not agree this impeachment evidence sufficed to make Martin's testimony inherently improbable, it did present ample reason for the jury to scrutinize his testimony with considerable care. We do not agree jurors would have received a significantly different impression of Martin's credibility had they also heard him testify on cross-examination that he "hoped" for some leniency in the second case. Nor do we agree that Mendoza should have been permitted to explore, on cross-examination before the jury, his unsupported surmise on this topic. "[T]he constitutional right to confront and cross-examine adverse witnesses does not include the right to ask wholly speculative questions ungrounded in factual predicate even when posed in the quest to discredit a witness." (*People v. Schilling* (1987) 188 Cal.App.3d 1021, 1033; see also *People v. Mincey* (1992) 2 Cal.4th 408, 442 ["A defendant's rights to due process and to present a defense do not include a right to present to the jury a speculative, factually unfounded inference"].) In sum, the trial court's ruling did not violate defendant's constitutional right to confront witnesses.

Defendant Mendoza also asserts that the delay of about one week between completion of Tony Martin's testimony and presentation of the stipulated facts about the unrelated murder charges against Martin reduced the impact of the information for the jury. He cites no legal authority suggesting this delay itself constituted error, however,

and we are unpersuaded. The jurors were instructed at the beginning of the trial to keep an "open mind" and not form an opinion on "any issue" until all evidence had been presented and the case submitted. We presume the jurors understood and followed the court's instructions, delaying a weighing of Martin's testimony until they had seen all the evidence[36] and commenced deliberations. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

The many federal decisions that defendant Mendoza cites to support his argument are distinguishable and, therefore, neither binding nor persuasive. *Davis*, *supra*, is a case in point. There the defendant was charged with a burglary involving the theft of a safe. (*Davis*, *supra*, 415 U.S. at pp. 309-311.) The key prosecution witness was a juvenile, who testified he saw the defendant near where the abandoned safe was found. (*Id.* at pp. 309-310.) Although the juvenile was on probation for burglary, the trial court issued a protective order prohibiting the defendant from referring to his juvenile record during cross-examination. (*Id.* at pp. 310-311.) The ruling precluded presentation of the defense theory that the juvenile had identified the defendant out of fear the police otherwise might suspect him, or because the police unduly pressured him. (*Id.* at pp. 311, 317.) On cross-examination, the juvenile subsequently gave unchallenged testimony that he was unconcerned about police suspicion and had never been the subject of any similar law-enforcement interrogation. (*Id.* at pp. 313-314.) The United States Supreme Court ruled that "defense counsel should have been permitted to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness. (*Id.* at p. 318.)

In this case, the jury was not precluded from hearing critical facts about the witness's alleged criminal acts. Rather, the trial judge assisted the parties in developing stipulated facts that exposed to the jury the essential facts of the unrelated murder charges against Martin, i.e., that he had been found in the vicinity where the shooting occurred, was positively identified as the shooter by two eyewitnesses within hours, and was

[36] One witness remained to testify, after the stipulated facts were read to the jury.

charged with murder and other crimes and enhancements. In addition, defendant Mendoza's counsel was allowed to suggest in his closing argument that Martin may been motivated to testify in this case by a hope, or undisclosed promise, of leniency in the other case.

The other cases that defendant Mendoza cites are similarly distinguishable. (See, e.g., *Lee, supra*, 476 U.S. at p. 547 [admission of the codefendant's written confession, untested by any cross-examination, violated defendant's Confrontation Clause rights]; *Ortiz v. Yates* (9th Cir. 2012) 704 F.3d 1026, 1030, 1036 [cross-examination limited, with no stipulation offered, entirely precluding evidence that perceived prosecution threats might have motivated the victim and sole eyewitness in a domestic violence case in testifying against her husband]; *United States v. Brooke* (9th Cir. 1993) 4 F.3d 1480, 1489 [cross-examination limited, with no stipulation offered, entirely precluding evidence of a co-defendant's past statements, which tended "to impeach the credibility of significant parts of [his] testimony"]; *United States v. Schoneberg* (9th Cir. 2004) 396 F.3d 1036, 1043 [cross-examination limited, with no stipulation offered, precluding inquiry about the details of a prosecution witness's plea deal on grounds it was irrelevant and misleading].)

e. Harmless Error

Even if the trial court had erred in precluding defendant Mendoza from cross-examining Tony Martin about the unrelated murder case pending against him, or Martin's hope that he might have harbored about his testimony in this case possibly winning him a beneficial plea deal or other form of leniency in the other matter, the error was harmless beyond a reasonable doubt. (*People v. Mincey, supra*, 2 Cal.4th at p. 463; see also *Van Arsdall, supra*, 475 U.S. at p. 684.) As previously described, the jury had before it ample information providing reason to scrutinize Martin's testimony. Based on that significant body of information, the jury was sufficiently apprised there were reasons to doubt Martin's credibility.

Additionally, although Tony Martin was the only witness who claimed actually to have seen Mendoza shoot Martin Navarro and his credibility, therefore, was important to

the case, other independent pieces of evidence corroborated his account. As discussed above, in section II., A., 1., c., the jury heard evidence from a gang expert that Mendoza was an active Norteño gang member; Norteños were engaged in a turf war with their Sureño rivals at the time of the party; gang rules obligated Norteños to attack Sureños on sight; the victim wore typical Sureño clothing to the party; and Mendoza recently had added a tattoo to his neck suggesting he was willing to act as a Norteño enforcer by killing Sureños. Text messages that Mendoza exchanged with his girlfriend after the shooting strongly suggested he had been present at the time of the shooting. The jury could have inferred from George Hellums' testimony that Jessica Juarez was speaking to a group that included defendant Mendoza when she pointed out the victim as a "Scrap" and a "snitch." And Hellums also testified that Mendoza confessed the crime to him immediately afterward.

In sum, even if, on cross-examination, defendant Mendoza had been permitted to seek confirmation from Tony Martin that he hoped he would be rewarded for his testimony with leniency in his other murder case, we are certain beyond a reasonable doubt, based on a consideration of the record as a whole, the result would not have been any different. (*Chapman v. California* (1967) 386 U.S. 18.)

3. Prosecutorial Misconduct

a. Legal Principles and Forfeiture

Defendant Mendoza claims the prosecution engaged in several instances of misconduct at trial, thereby violating his rights under the federal and state constitutions. " 'The standards governing review of misconduct claims are settled. "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial" ' " (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275), if " ' "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct" ' "

(*People v. Davis* (2009) 46 Cal.4th 539, 612). Although it is not necessary to show the prosecutor acted in bad faith, a defendant asserting misconduct must show, " ' "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' [Citation.] If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

Defendant Mendoza at trial did not object to the alleged instances of misconduct he now mentions on appeal, nor did he request that the jury be admonished. "A defendant generally ' " 'may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—[he] made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' " [Citation.]' [Citation.] A defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 679-680 (*Fuiava*).)

Mendoza asserts that we should excuse his failure to preserve the misconduct claims because objections would have been futile and no admonishment could have cured the harm, i.e., "the bell could not be unrung." He cites *People v. Hill* (1992) 3 Cal.4th 959, 984-985 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13. But this case is not on a par with the circumstances of *Hill*. As was the case in *Fuiava, supra*, 53 Cal.4th 622, "defense counsel here was not faced with a ' "constant barrage of [the prosecutor's] unethical conduct" ' and counsel's objections did not provoke ' "the trial court's wrath." ' Unlike in *Hill*, the trial court in this case did not suggest before the jury that counsel was ' "an obstructionist," ' and was merely ' "delaying the trial with 'meritless' objections." ' ([Citation]; see *People v. Friend* (2009) 47 Cal.4th 1, 29 [defense counsel's failure to object to alleged misconduct is excused 'when the "misconduct [is] pervasive, defense counsel [has] repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so

poisonous that further objections would have been futile" ']; *People v. Dykes* (2009) 46 Cal.4th 731, 775 [exception to forfeiture rule does not apply when the case 'did not involve counsel experiencing—as did counsel in *Hill*—a "constant barrage" of misstatements, demeaning sarcasm, and falsehoods, or ongoing hostility on the part of the trial court, to appropriate, well-founded objections'].)" (*Fuiava, supra*, 53 Cal.4th at p. 680.) "Here, the record does not establish that properly framed objections would have been in vain or provoked any 'wrath' on the part of the trial court; rather, all indications are that the court was reasonably responsive to defense objections throughout the trial," and was courteous and succinct in ruling on the objections of both parties. (*Ibid.*; see *Friend, supra*, at p. 30 [in light of defense counsel's frequent objections and the trial court's having sustained several of them, exception to the forfeiture rule did not apply because the record established "the trial court kept a firm hand on the actions of the attorneys and maintained a fair proceeding"].) "There is no reason to suspect the trial court was predisposed to overrule objections to the prosecutor's deeds (i.e., that an objection would have been futile), or that corrective actions, such as appropriately strong admonitions, would not have been able to cure any prejudicial effect on the jury had defendant requested them. [Citation.]" (*Fuiava, supra*, at p. 680.)[37] Accordingly, we do not excuse the failure to preserve prosecutorial misconduct claims below. Those claims were forfeited.

Mendoza also observes that appellate courts have authority to reach the merits of prosecutorial misconduct claims though a litigant has not preserved them for review. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) In this he is correct. (*Ibid.*) Our

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[37] Defendant Mendoza also cites a footnote in *People v. Bolton* (1979) 23 Cal.3d 208, for the proposition that objecting to improper prosecutorial argument, and any admonishment to the jury to ignore it, "often serve[] but to rub it in." (*Id.* at p. 215, fn. 5.) In *Bolton*, the court was merely discussing the alternatives for effectively addressing misconduct; ultimately, the court expressed the view that the trial court must give a cautionary instruction on request. (*Ibid.*) Additionally, the court in *Bolton* was not considering forfeiture because, unlike here, defense counsel in that case repeatedly had objected. (*Id.* at pp. 212 & fn. 1, 215 & fn. 5.)

Supreme Court also has emphasized, however, that " 'discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue.' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; see, e.g., *People v. Connors* (2016) 3 Cal.App.5th 729, 810 [after noting the court's admonition in *In re Sheena K, supra,* declining to exercise discretion to excuse forfeiture].) The legal issues presented here do not meet this description. Accordingly, his claims are forfeited. Even if this were not the case, however, we reject the claims on the merits, as discussed below.

b. Prosecutorial Vouching

Mendoza claims the prosecutor improperly vouched for Tony Martin's and George Hellums' credibility both in her questioning of gang expert Detective Stenger and in her closing argument. "A 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," her comments cannot be characterized as improper vouching.' [Citations.] Misconduct arises only if, in arguing the veracity of a witness, the prosecutor implies she has evidence about which the jury is unaware. [Citation.]" (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 561.) Mendoza alleges four instances of improper vouching, which we address below.

(i) Detective Stenger's testimony

Mendoza first cites the prosecutor's examination of gang expert Detective Stenger in the following exchange:

"Q. When you have an informant that is given consideration for a case -- or even money, is there anything you do or did to determine whether or not this person's credible?

"A. Yes.

"Q. What did you do?

"A. I mean, there's a number of ways to determine if somebody's credible. Some of the easier ways is they will tell you where people are that have warrants, they'll tell you where stolen vehicles are, who's driving stolen vehicles. There's just a different way – different ways that you make these people credible before you can trust their information."

Defendant Mendoza asserts that the prosecution improperly elicited this testimony, while questioning Detective Stenger about his law enforcement qualifications and experience, to suggest he and colleague Detective Bittner independently took steps to confirm Tony Martin's and George Hellums' truthfulness. The exchange, defendant Mendoza maintains, suggested Martin and Hellums gave the police information not included in the record, which the police subsequently were able to verify. Stenger thus indirectly was vouching for their credibility to the jury, he submits.

But Detective Stenger did not mention Martin or Hellums at this juncture in his testimony, and did not at any point express a personal opinion regarding their truthfulness. Although the excerpted testimony conceivably could support the claimed inference, we think the jury equally well could have understood it in context as generally describing Detective Stenger's broad experience in law enforcement, supporting his qualification as an expert.

The case law that Mendoza cites to support his argument does not compel a different conclusion here. In *United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199, for example, an F.B.I. agent, "the government's first and most prestigious witness" (*id.* at p. 1205) and "a person whose position the jury might easily identify with the integrity of the United States" (*id.* at p. 1204), testified that two cooperating witnesses had supplied information proving to be "very" accurate and that the trial court had granted a prosecution motion to reduce their sentences. (*Id.* at pp. 1201-1202.) The Ninth Circuit Court of Appeals concluded this testimony directly implied "the government possessed extra-record knowledge and the capacity to monitor" whether the cooperating witness had been truthful. (*Id.* at p. 1204.) In our case, in contrast, Detective Stenger, a local

police officer and the eleventh witness to testify, expressed no personal opinion about the value of the information that Martin or Hellums had supplied and made no suggestion that a court previously had evaluated their credibility or assistance. The other two cases Mendoza cites are similarly distinguishable. (See *United States v. Ortiz* (9th Cir. 2004) 362 F.3d 1274, 1279 [argument in closing that the court and law enforcement can, have, and will monitor witnesses' truthfulness was improper vouching]; *United States v. Piva* (1st Cir. 1989) 870 F.2d 753, 760 [law enforcement officer's testimony that he told a cooperating witness "he had to tell [the officer] the truth whenever [the officer] asked him" to build trust in their relationship improperly vouched for the witness's credibility].)

(ii) Closing argument: Importance of Gang Member Testimony

Mendoza also contends that the prosecutor improperly vouched for Tony Martin's and George Hellums' credibility in her closing argument by suggesting that, in gang-related criminal cases, only other gang members were willing to tell what really happened, as other witnesses were too fearful of retribution. The prosecutor specifically argued: "[I]n a gang case, witnesses are afraid. . . . It's one of the purposes of . . . establishing fear. You can get away with committing . . . crimes with no one to come into court and point you out. So . . . that leads to other gang members who are present [and] know what happened . . . . Absolutely they can tell you, and that's what happens. That's what happened here."

Mendoza maintains this was improper argument because the prosecutor drew from her experience in other cases, rather than on the evidentiary record in this matter. We disagree. A prosecutor has wide latitude to argue reasonable inferences from the evidence, and may state matters that are common knowledge, even if not contained in the evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) In this case, a jury reasonably could infer from the record that community members would be reluctant to testify in gang-related cases.

Jurors heard expert testimony from Detective Stenger confirming that the Norteños and Sureños were engaged in a turf war in the area at the time; gang members used violence to promote their gangs, protect their turf, and instill fear in the community;

and community members could be beaten or shot at for speaking to law enforcement. Detective Bittner also testified that most of the 30 to 40 people whom he interviewed in this case were reluctant to give information, a point further underscored by Cristina Boggiano and George Hellums, both of whom testified they had been threatened in connection with the case, and by Guadalupe Sanchez, who expressly said she was reluctant to testify, that it was "nothing anyone wants to do." This evidence amply supports the inference that community members were reluctant to testify against gang members. The prosecutor did not act improperly in acknowledging the point.

(iii) Closing argument: Opinions about Witness Credibility

Mendoza contends that the prosecutor committed misconduct by giving her own personal opinions about witnesses' truthfulness "as fact." By doing so, he maintains, the prosecutor effectively placed her personal prestige behind Tony Martin in particular and George Hellums to a lesser extent. Mendoza cites the following italicized closing remarks, which we have placed in context:

(1) "Gregorio [Navarro], Janicett [Villegas], Erick [Tejeda], Edgar [Tejeda], [and] Cristina [Boggiano] . . . . These kids were afraid. They didn't have the courage. They didn't do it. . . . *They didn't tell you what they saw.*" (Italics added.)

(2) "*When [Tony Martin] was first interviewed, he absolutely – he lied.* Police are saying, 'What did you do?' [He told them,] 'I did not – I did not shoot outside.' [But] [h]e told you he did [shoot outside]." (Italics added.)

(3) After discussing Tony Martin's testimony that he shot at the car outside the garage with his Hi-Point firearm and the ammunition expert's testimony that the bullet fired outside the garage bore the distinctive marking of a Hi-Point firearm, while the bullet fired inside the garage did not, the prosecutor argued: "So Tony Martin's not protecting himself. He did not [fire a gun] inside [the garage], which would be the main motive for someone to lie. They're protecting themselves. They're the ones that pulled the trigger. *But he didn't. He's just telling you who did.*" (Italics added.)

(4) "*George [Hellums] was not as up-front as Tony [Martin].* . . . [Y]ou'll look back at all the witnesses and . . . at what they said, and you'll look at how they responded

to the questions, and you'll think about their demeanor, where they were evasive. Tony Martin told the truth. Not evasive. Not minimizing. . . . But let's talk about George." (Italics added.)

Here too we are unpersuaded. " '[C]losing argument presents a legitimate opportunity to "argue all reasonable inferences from evidence in the record." ' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1342.) Thus, a prosecutor "has broad discretion to state his or her views as to what the evidence shows and what inferences may be drawn therefrom." (*People v. Kelly* (1990) 51 Cal.3d 931, 967.) "Vigorous argument" is not misconduct so long as it is fair comment on the evidence, including reasonable inferences, or deductions to be drawn from the evidence. (*Peoples*, *supra*, 62 Cal.4th at p. 796.) " ' "Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie." ' " (*Id.* at p. 797 [the prosecutor may characterize a defense witness's testimony "as 'bull'"].) Although "a prosecutor may not express a personal opinion or belief in a witness's credibility when there is ' "substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial," ' [citation]" (*People v. Fauber* (1992) 2 Cal.4th 792, 822), the cited remarks did not present such danger. Nor does defendant Mendoza suggest they did. To the contrary, in each instance, the prosecutor tied her argument to evidence entered in the record. Viewed in context, the remarks were a fair comment on the evidence.

(iv) Closing argument: Tony Martin's plea deal

Finally, defendant Mendoza cites as error the following remarks of the prosecutor in her closing argument, on rebuttal: "If you're gonna call me unethical, you've stepped over that line. And defense counsel knows darn well that basing a plea on a verdict would be unethical. It would be wrong. *No judge would allow it.*" (Italics added.) Defendant contends the last remark suggested the trial judge here scrutinized and approved Tony Martin's plea deal and that this somehow put "the imprimatur of the government on Martin's testimony."

We disagree. The referenced remarks did not specifically mention the trial judge in this case, or make any assertion about that judge's conduct. Rather, the prosecutor focused here instead on making a legal point, rebutting defense counsel's insinuation in his closing argument that her office had promised Tony Martin a 10-year sentence in exchange for his testimony, conditioned on the jury's returning a guilty verdict against defendant Mendoza.[38] Unlike in the cases that defendant Mendoza cites, the prosecutor did not here suggest the trial judge was satisfied with Martin's testimony (compare with *United States v. Smith* (9th Cir. 1992) 962 F.2d 923, 934 ["prosecutor's statement that the [trial] court wouldn't allow him to do anything wrong was . . . clearly improper" because, among other things, it suggested the trial court was satisfied with an accomplice's testimony]), or that the trial court independently would determine Martin's truthfulness as part of the process of deciding the case (compare with *People v. Fauber*, *supra*, 2 Cal.4th at pp. 820-823 [improper for prosecutor to read to the jury portion of a witness's plea agreement requiring the trial judge to resolve any disputes about the witness's truthfulness].) The remark did not qualify as misconduct.

c. References to Matters Outside the Evidence

Defendant Mendoza next contends the prosecutor engaged in misconduct by improperly arguing facts not in evidence in her closing. He points particularly to the prosecutor's comments that (1) gang cases tend to rely on the testimony of gang members because other witnesses are afraid, (2) it would have been improper for the prosecutor to base Tony Martin's plea deal on Mendoza's conviction, and (3) "Tony Martin wasn't offered anything on that [other] homicide case" for his testimony in this matter.

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[38] On this point, defendant Mendoza's counsel argued in closing as follows: "So I asked [Tony Martin on cross-examination], 'What are you supposed to do here?' 'I'm here to testify.' If you remember, shortly thereafter [the prosecutor] gets up, 'You're here to testify truthfully.' . . . . Pretend, just pretend, Tony Martin does not wind up getting his 10-year deal because he didn't please the prosecution. And the way that happens is Ricky Mendoza's not convicted. If Ricky Mendoza's convicted, Tony Martin gets to walk."

"Argument is improper when it is neither based on the evidence nor related to a matter of common knowledge." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 702, superseded by statute on other grounds.) A prosecutor's reference to facts not in evidence constitutes misconduct "because such statements 'tend[ ] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' " (*Hill, supra*, 17 Cal.4th at pp. 827-828.)

We do not agree that the prosecutor engaged in such misconduct here. As noted in section II., A., 3., b., (ii), *supra*, there was evidence in the record that many community members were reluctant to cooperate with the police, reluctant to testify at trial, or had been threatened in connection with this case. Together with the gang expert's testimony, this supported the argument that there is reluctance on the part of witnesses to become involved in gang-related criminal cases.

Nor did the prosecutor err in responding to defense counsel's insinuation that her office had conditioned Tony Martin's plea agreement on a conviction. The prosecutor did not argue "facts" in her response. Rather, she made a fair legal point that the suggested condition is impermissible. (See *People v. Garrison* (1989) 47 Cal.3d 746, 769 [It is improper to condition a plea deal on testimony producing a conviction].) Given defense counsel's insinuation, the prosecutor's limited remark was not improper. (See, e.g., *People v. Reyes* (2016) 246 Cal.App.4th 62, 74 ["[r]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel"]; *People v. Cunningham, supra*, 25 Cal.4th at p. 1026 [prosecutorial arguments "that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel"].) Nor is it likely that the remark influenced the trial's outcome.

Finally, contrary to Mendoza's assertions, the record did contain evidence supporting the prosecutor's argument that Tony Martin was not offered anything in the

unrelated murder case for his testimony in this matter. On direct examination, the prosecutor posed the following questions and Tony Martin gave the following testimony:

"Q. Did you receive a deal in this case?

"A. Yes.

"Q. Was that deal 10 years to plead to a violent strike?

"A. Yes.

"Q. Other than that, did you receive anything else for your testimony today?

"A. No.

"Q. No other deals?

"A. No."

In addition, the jury heard stipulated facts confirming that, "[o]n May 14th, 2013, when Tony Martin was interviewed by the District Attorney's office, [he] was informed he was not being given any deal on his [other murder] case in exchange for his testimony in this case."

Although not entirely clear, it appears Mendoza is contending it was misconduct for the prosecutor to argue broadly that her office did not *ever* offer Tony Martin leniency in the other homicide case in return for his testimony here. Defense counsel notes that he "strenuously objected" to including this type of broad statement in the stipulation. The trial court resolved the issue by ordering the parties to word the stipulation more narrowly to confirm only what Martin was told in his May 2013 interview about the prospect of a deal in the second case, an exchange apparently confirmed in a recording provided to defendant Mendoza.

We do not agree that the prosecutor engaged in misconduct in stating broadly in her closing argument that Tony Martin was not offered a deal in the other murder case. Although it is misconduct to misstate facts in closing, "the prosecutor 'enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom.' " (*People v. Collins* (2010) 49 Cal.4th 175, 230.) Here, the evidence supported the inference that Martin had not been offered anything in the other murder case for his testimony, and the prosecutor did not act

improperly in making that argument. Defendant Mendoza did not concede the point, and his counsel was permitted to suggest in closing that Martin cooperated in this case in the hope it would benefit him in the other matter, even sarcastically insinuating that Martin perhaps had a secret deal with the prosecutor.[39] Defense counsel was free to make such an argument, but on the record before us the prosecutor's argument was neither inaccurate nor improper.

d. Impugning Defense Counsel's Integrity

Defendant Mendoza contends the prosecutor also engaged in misconduct by improperly impugning the integrity of his trial counsel. He relies on the prosecutor's previously noted remarks in her closing argument, on rebuttal, about the impermissibility of basing a plea agreement on a verdict.[40] In these remarks, he maintains, the prosecutor essentially accused defense counsel of unethical behavior.

" 'A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.' [Citations.] 'In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks' [citation], and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion [citation]." (*People v. Edwards* (2013) 57 Cal.4th 658, 738.)

Here, there is no reasonable likelihood the jury construed the prosecutor's argument as an attack on counsel's integrity. Although the prosecutor suggested defense counsel had "stepped over the line" by implying Tony Martin's plea deal could have been

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[39] See *supra*, section II., A., 2., a., at p. 33. We note that this suggestion, taken to its logical conclusion, essentially accused the prosecutor of knowingly allowing Tony Martin to give false testimony, an ethical violation. (See, e.g., *In re Alcox* (2006) 137 Cal.App.4th 657, 667 [attorneys have an ethical obligation "not to present perjured testimony or call a witness who would testify untruthfully"]; Bus. & Prof. Code, § 6077; Rules Prof. Conduct, rule 5-200.)

[40] See section II., A., 3., b., (iv), *supra* ("If you're gonna call me unethical, you've stepped over that line. And defense counsel knows darn well that basing a plea on a verdict would be unethical. It would be wrong. No judge would allow it").

conditioned on the jury's returning a guilty verdict, she then reminded the jury to focus on the evidence. Observing that a plea deal conditioned on a verdict would be "unethical" and "wrong," and "[n]o judge would allow it," the prosecutor continued: "But [defense counsel's] gonna make that argument anyways, right? That's nice. It's not about us. It's not about the defense attorneys. It's about Martin Navarro. It's about the victim that was murdered. It's about the evidence that you heard. And, absolutely, and I've said this from the beginning, Tony Martin was given 10 years. Consider that. Consider his actions. Scrutinize his testimony. See where there's corroboration." Most probably the jury viewed these remarks as "a fair response and not a personal attack on defense counsel." (*People v. Young*, *supra*, 34 Cal.4th at pp. 1189-1190 [repeated description of defense counsels' arguments as "improper" did not constitute prosecutorial misconduct; counsel was properly reminding the jury of its duty not to consider punishment during the trial's guilt phase].)

e. Exploiting Absence of Excluded Evidence

Finally, Mendoza contends the prosecutor committed misconduct in her closing argument by unfairly and misleadingly asserting that Tony Martin's testimony should be credited because, having been offered no deal and no use immunity in the other murder case, he nonetheless offered self-incriminating statements about his own actions immediately before and after Martin Navarro was shot (e.g., testifying that he jogged over to help defendant Moreno when he was punching Navarro, stood next to defendant Mendoza when he shot Navarro, and then himself shot five times into an occupied vehicle). Mendoza contends that even if the trial court properly precluded him from eliciting testimony from Martin that he nonetheless hoped to receive a benefit in his murder case from his testimony in this case, it was unfair and misleading for the prosecution to exploit the limitation by arguing it offered Martin no benefits in the other case for his testimony here. Mendoza contends this rendered his trial fundamentally unfair. And the injury was compounded, he maintains, when the prosecutor, in rebuttal, ridiculed the only theory his counsel could provide to explain Martin's self-incriminating testimony, in light of the limit on his cross-examination, i.e., that Martin knew there was

no evidence he actually had been present when Navarro was shot, and intended to retract his self-incriminating testimony if later questioned about it in the other case.

In presenting this argument, defendant Mendoza acknowledges both that the California Supreme Court essentially rejected his argument in *People v. Lawley* (2002) 27 Cal.4th 102, 156 (*Lawley*), and that we are bound to follow Supreme Court precedent (see, e.g., *People v. Lessie* (2010) 47 Cal.4th 1152, 1167, fn. 8). He nonetheless raises the issue to preserve it for later review. We agree that *Lawley* is on point and dispositive.

There, the Supreme Court rejected a prosecutorial misconduct argument in a murder case, ruling it was neither improper nor a miscarriage of justice for the prosecutor to argue in closing that there was no evidence supporting a particular proposition, after the trial court properly excluded evidence the defense had sought to introduce on that point. (*Lawley, supra*, 27 Cal.4th at p. 156.) The defendant in *Lawley* sought to present testimony from two witnesses to support his theory that another person had killed the victim, acting pursuant to a contract with a prison gang. (*Id.* at pp. 151-152.) After the trial court limited the testimony the two could provide, sustaining hearsay and other evidentiary objections, however, the defendant excused one witness and opted not to call the other. (*Id.* at p. 152.) The prosecutor then argued in closing there was no evidence anyone other than the defendant had a motive to commit the murder. (*Id.* at p. 156.) On appeal, the Supreme Court rejected the defendant's claims that the closing argument constituted misconduct and effected a miscarriage of justice, concluding the argument was a "fair comment on the evidence, following evidentiary rulings we have upheld." (*Ibid.*)

The same conclusion applies here. We do not agree the prosecutor was unfair or misleading in stating that Tony Martin was not offered anything in the other murder case for his cooperation in this matter. As stated previously, this was a reasonable inference based on the evidence. Moreover, unlike in *Lawley*, Mendoza here cannot even point to specific potentially helpful evidence that was excluded. The parties stipulated the prosecution advised Martin in an interview less than a month before he testified in this case that he "was not being given any deal" in the other murder case in exchange for his

testimony, and Mendoza's counsel read the stipulation to the jury, saying "there's no dispute as to these stipulated facts." The prosecutor then elicited testimony from Martin that he was only receiving a 10-year deal in exchange for testifying and nothing else. Despite these facts, defense counsel was permitted to argue that Martin hoped he would receive some benefit in the other case as a result of his cooperation. Given the potential life sentence for one convicted of murder, any reasonable person in his situation might have clung to the same hope, a fact presumably not lost on the jury.

Nor did it constitute misconduct for the prosecutor, on rebuttal, to dismiss as "silly" defense counsel's theory about Martin's willingness to make self-incriminating statements under oath. (See *Peoples*, *supra*, 62 Cal.4th at p. 793 ["Using colorful or hyperbolic language"—such as "ludicrous," "ridiculous," or "preposterous"—"will not generally establish prosecutorial misconduct"]; *People v. Stitely* (2005) 35 Cal.4th 514, 559-560 [no misconduct where prosecutor characterized defense counsel's argument as a "ridiculous" attempt to obtain an acquittal].)

In sum, even if defendant Mendoza had not forfeited his claims of prosecutorial misconduct by failing to preserve them below, our review of the entire record convinces us that they lack merit.

4. Jury Instruction

Using a standard instruction, CALCRIM No. 334, the trial court directed jurors to decide whether Tony Martin and George Hellums were accomplices and, if they concluded either was an accomplice, on the need for corroboration and caution in viewing that witness's testimony. Defendant Mendoza maintains the trial court violated section 1111 and his constitutional due process rights by using this instruction because it was incorrect and incomplete. It was incorrect to use CALCRIM No. 334 with respect to Tony Martin, he submits, because Martin was an accomplice as a matter of law and the trial court therefore was obligated sua sponte to instruct the jury with CALCRIM No. 335 instead. CALCRIM No. 334 also was incomplete, he submits, because it did not specifically inform jurors that Tony Martin and George Hellums were accomplices if they aided and abetted the assault on Martin Navarro, with murder being a natural and

probable consequence. Although the trial court gave standard instructions explaining aiding and abetting principles (CALCRIM Nos. 400, 401), and the natural and probable consequences doctrine (CALCRIM No. 403), Mendoza submits this was inadequate.

We begin with the second contention. As given here, CALCRIM No. 334 stated in pertinent part as follows: "Before you may consider the statement or testimony of Tony Martin and George Hellums as evidence against Ricky Mendoza and Leon Moreno, you must decide whether Tony Martin and George Hellums were accomplices to that crime. *A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant.* Someone is subject to prosecution if: [¶] 1. He or she personally committed the crime; [¶] OR [¶] 2. He or she knew of the criminal purpose of the person who committed the crime; [¶] AND [¶] 3. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;] [or] participate in a criminal conspiracy to commit the crime)." (See CALCRIM No. 334, italics added.)

Using CALCRIM No. 403, the trial judge also instructed: "To prove that the defendant is guilty of murder, the People must prove that: [¶] 1. The defendant is guilty of assault with force likely to cause great bodily injury or simple assault; [¶] 2. During the commission of assault with force likely to cause great bodily injury or simple assault a coparticipant in that assault with force likely to cause great bodily injury or simple assault committed the crime of murder; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of murder was a natural and probable consequence of the commission of the assault with force likely to cause great bodily injury or simple assault. [¶] A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator . . . . [¶] . . . [¶] *The People are alleging that the defendant originally intended to aid and abet assault with force likely to cause great bodily injury or simple assault.* [¶] *If you decide that the defendant aided and abetted one of these crimes and that murder was a natural and probable consequence of that crime, the defendant is guilty of murder. . . .*" (See CALCRIM No. 403, italics added.)

Defendant Mendoza submits that, notwithstanding the court's use of CALCRIM No. 403, the jury nonetheless could have understood CALCRIM No. 334 as meaning that Martin and Hellums were only accomplices if they committed, conspired to commit, or aided and abetted murder, i.e., jurors may not have understood the two were accomplices if they aided and abetted an assault, with murder being the natural and probable consequence. The trial court's failure, sua sponte, to modify or replace CALCRIM No. 334 to clarify this point, he maintains, was constitutional error. "This claim is not cognizable. It is merely a claim that an instruction that is otherwise correct on the law should have been modified to make it clearer. 'A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.' [Citation.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165.) If defendant Mendoza had been concerned that the jury would not understand CALCRIM Nos. 334 and 403, given separately, he should have requested a clarifying modification. He did not do so.[41] (See, e.g., *People v. DeSantis* (1992) 2 Cal.4th 1198, 1251 [trial court had no duty to modify accomplice instructions on its own motion; defendant forfeited the argument].)

In any event, we do not agree that CALCRIM No. 334 was inadequate, when viewed in the context of the instructions given as a whole. "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions

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[41] Although we agree with defendant Mendoza that the record does not suggest his counsel made a conscious and deliberate tactical choice in requesting CALCRIM No. 334 without modification, and the invited error doctrine, therefore, does not apply (see *People v. DeHoyos* (2013) 57 Cal.4th 79, 138), it does not necessarily follow that his claim of error is cognizable on appeal. (See, e.g., *People v. Townsel* (2016) 63 Cal.4th 25, 59 [defendant forfeited a claim of instructional error for appellate purposes even though the invited error doctrine did not apply].)

should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

In this case, the jury was fully and fairly instructed on the applicable law. CALCRIM No. 334 instructed that "[a] person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant." CALCRIM No. 403 then instructed, "The People are alleging that defendant originally intended to *aid and abet assault with force likely to cause great bodily injury or simple assault.* [¶] *If you decide that the defendant aided and abetted one of these crimes and that murder was a natural and probable consequence of that crime, the defendant is guilty of murder. . . .*" (Italics added.) Contrary to Mendoza's contention, we think intelligent jurors would be capable of understanding from these instructions that, if they concluded Tony Martin or George Hellums had committed the crime charged against the defendant, i.e., aiding and abetting assault with force likely to cause great bodily injury or simple assault, and that murder was a natural and probable consequence, they qualified as accomplices.

Defendant Mendoza's reliance on *People v. Felton* (2004) 122 Cal.App.4th 260, as support for the proposition that the trial court here had a duty, sua sponte, to modify CALCRIM No. 334, is misplaced. In *Felton*, the trial court had refused the defendant's request for accomplice instructions, relying on CALJIC No. 3.14, which addresses accomplice liability for one alleged to be an aider and abettor, and requires criminal intent. (*Id.* at p. 267.) After concluding the trial court had erred, the appellate court observed, in dicta, that giving CALJIC No. 3.14 in an unmodified form would have only replaced one error with another. (*Id.* at p. 271.) CALJIC No. 3.14 was "legally incorrect" as applied to that case, the appellate court explained, because it did not instruct that a coperpetrator could be an accomplice, as the evidence suggested was the case for the witness there in question, or that the person's alleged crime (there, child endangerment) might not include a specific intent requirement. (*Id.* at pp. 269-271; but see CALJIC No. 3.10.) *Felton* did not address the adequacy of CALCRIM No. 334, or

establish that a party may pursue such a challenge on appeal having failed to raise it in the trial court.

In any event, as was the case in *Lawley*, *supra*, "the jury was made keenly aware of the inconsistencies [of Tony Martin's and George Hellums's] various in-court and out-of-court statements, as well as the prosecutor's acknowledgement that [they were] not always truthful and that it was up to the jury to determine [their] credibility." (*Lawley*, *supra*, 27 Cal.4th at p. 161.) In this case, the parties also stipulated that Tony Martin had been positively identified as the shooter in a separate murder case. Under these circumstances, it is not reasonably probable the jury would have reached a result more favorable to defendant Mendoza had the trial court instructed it with a modified CALCRIM No. 334. (*Ibid.*, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

We reach the same conclusion with respect to defendant Mendoza's remaining instructional argument, i.e., that the trial court erred in not giving CALCRIM No. 335, because Tony Martin was an accomplice as a matter of law. It was not reasonably probable jurors would have reached a result more favorable to defendant Mendoza if the trial court had instructed them, using CALCRIM No. 335, that Martin was an accomplice and corroboration of his testimony was required. Further, as discussed in section II., A., 1., c., *supra*, there was sufficient evidence corroborating Martin's testimony. Accordingly, any error was harmless. (See, e.g., *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303-304 [A court may conclude that omission of accomplice instructions is harmless either because sufficient evidence corroborated the witness's testimony, or because it is not reasonably probable that a result more favorable to the defendant would have been reached].)

5. Cumulative Prejudice

Defendant Mendoza contends the cumulative effect of the various errors committed during the guilty phase requires reversal of his conviction. As we have rejected the individual claims of error, we conclude there is no cumulative error requiring reversal.

B. Moreno's Appeal

1. First Degree Murder and Accomplice Liability

Defendant Moreno contends the trial court erred by instructing the jury that he could be guilty of first degree murder as an aider and abettor under the theory of natural and probable consequences. We agree, and accordingly reverse his conviction for first degree murder.

Generally, a defendant may be guilty as an aider and abettor either directly or through a theory of natural and probable consequences. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) In this case, the trial court instructed the jury with respect to both theories, pursuant to CALCRIM Nos. 401 and 403.[42] An aider and abettor has direct liability if he or she "acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*Chiu, supra*, 59 Cal.4th at p. 161.) Alternatively, a defendant may be guilty of aiding and abetting even if he did not intend to aid a perpetrator in committing that offense. " ' "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." ' [Citations.]" (*Ibid.*)

In *Chiu, supra*, decided after the trial in this case, our Supreme Court rejected the natural-and-probable-consequences theory of aiding and abetting for first degree murder. It held, "[A]n aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu, supra*, 59 Cal.4th at pp. 158-159.) The court reasoned that the mental state required for first degree murder "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice

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[42] At the People's request, the trial court also instructed the jury on conspiracy liability.

to kill before he or she completes the acts that caused the death." (*Id.* at p. 166.) The court accordingly held that, when a defendant was guilty of "aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine," he could be convicted only of second degree murder. (*Ibid.*)

The Attorney General concedes the trial court erred under *Chiu*. We must therefore determine the prejudice flowing from that error. As *Chiu* explained, "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra*, 59 Cal.4th at p. 167.) Defendant Moreno's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory, i.e., that he directly aided and abetted the premeditated murder or conspired to commit it. (*Ibid.*)

The Attorney General further concedes that this standard cannot be met here and our review of the entire record leads us to agree. The jury's verdict found defendant Moreno guilty of first degree murder, without specifying a theory. The verdict itself does not demonstrate harmlessness, therefore, and there is nothing in the remaining verdicts suggesting the jury focused on any other theory to the exclusion of natural and probable consequences. The jury did not highlight its theory by asking revealing questions during deliberations. Nor did the trial court have occasion to interview jurors as in *Chiu*, where a juror substitution occurred during deliberations. (See *Chiu, supra*, 59 Cal.4th at pp. 167-168 [error not harmless beyond a reasonable doubt as information gleaned from juror interviews prior to a substitution suggested jury may have been focusing on the natural and probable consequence theory of aiding and abetting].) The Attorney General acknowledges the prosecution focused its closing on the natural and probable consequence theory, making it reasonable to conclude the jury relied on this theory. We cannot conclude beyond a reasonable doubt the jury relied on a different theory.

Although in *Chiu*, the court reversed the first degree murder conviction, allowing the People to accept a reduction of the conviction to second degree murder or to retry the

greater offense under a direct aiding and abetting theory (*Chiu, supra*, 59 Cal.4th at p. 168), in this case the Attorney General submits (and defendant Moreno agrees) the conviction should simply be reduced to second degree murder. Accordingly, we will reduce the conviction to second degree murder, obviating the need for a retrial (see § 1260; *People v. Rivera* (2003) 114 Cal.App.4th 872, 879), and direct the trial court to issue an amended abstract of judgment reflecting the appropriate sentence for that charge in a case not involving murder of a peace officer, i.e., 15 years to life. (§ 190, subd. (a); see, e.g., *Lawley, supra*, 27 Cal.4th at pp. 171-172 [vacating unauthorized death sentence, and directing the trial court to issue an amended abstract of judgment reflecting the proper sentence (imprisonment for 25 years to life)].)

2. *Trial Court's Refusal to Instruct on Involuntary Manslaughter*

Defendant Moreno also contends the trial court erred in refusing to give a requested instruction on involuntary manslaughter as a lesser included offense to the charge of murder. He contends the trial court's refusal to instruct on that offense deprived him of his federal and state rights to a fair trial and to have a jury determine his guilt or innocence beyond a reasonable doubt.

"An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense. [Citation.] '[E]very lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury.' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) We review de novo a trial court's refusal to instruct on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) In doing so, we view the evidence in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

"Murder is defined as 'the unlawful killing of a human being, or a fetus, with malice aforethought.' (Pen. Code, § 187, subd. (a) . . . .) Malice aforethought 'may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable

provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' (§ 188.)" (*People v. Bryant* (2013) 56 Cal.4th 959, 964.) Our Supreme Court has " 'interpreted implied malice as having "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.' [Citation.]" [Citation.]' [Citations.]" (*Id.* at p. 965.)

"Both voluntary and involuntary manslaughter are lesser included offenses of murder. [Citation.] When a homicide, committed with malice, is accomplished in the heat of passion or under the good faith but unreasonable belief that deadly force is required to defend oneself from imminent harm, the malice element is 'negated' or, as some have described, 'mitigated'; and the resulting crime is voluntary manslaughter, a lesser included offense of murder. [Citations.] [¶] Involuntary manslaughter, in contrast, [is an] unlawful killing of a human being without malice. (§ 192.) It is statutorily defined as a killing occurring during the commission of 'an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, [accomplished] in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).)" (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30-31.) Although the statutory language appears to exclude killings committed in the course of a felony, the Supreme Court has interpreted the language broadly to encompass an unlawful killing committed without malice in the course of a noninherently dangerous felony (*People v. Burroughs* (1984) 35 Cal.3d 824, 835 [unlicensed practice of medicine], overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; see also *People v. Bryant*, *supra*, 56 Cal.4th at pp. 966-968; *id.* at pp. 972-974 (conc. opn. of Kennard, J.)), and at least one Court of Appeal has concluded an unlawful killing without malice in the course of an aggravated assault also may be prosecuted as involuntary manslaughter. (*Brothers*, *supra*, 236 Cal.App.4th at pp. 33-34 [assault with a deadly weapon].)

Here, we need not address the question of whether a killing committed in the course of a felonious assault qualifies as involuntary manslaughter, because the trial court instructed the jury it could find Moreno liable for murder if he had aided and abetted, among other things, a simple assault—a misdemeanor (§§ 241, subd. (a), 17, subd. (a)) —and murder was the natural and probable consequence. As misdemeanor assault was included as one of the target crimes he allegedly committed, Moreno maintains, the trial court was obligated to instruct on involuntary manslaughter as a lesser included offense, allowing the jury to decide whether he had acted with malice when he assaulted Martin Navarro. We agree the court should have given an instruction on involuntary manslaughter provided there was sufficient evidence showing Moreno acted without malice when he assaulted Navarro. (See *People v. Evers* (1992) 10 Cal.App.4th 588, 596.)

But " 'the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense . . . .' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.' [Citation.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 50; see *People v. Wilson* (1992) 3 Cal.4th 926, 942 ["Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense"]; *People v. Evers*, *supra*, 10 Cal.App.4th at p. 596 ["minimal or insubstantial" evidence will not suffice].) "Malice is implied . . . when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life [citation]" (*People v. Cook* (2006) 39 Cal.4th 566, 596), a subjective standard. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1008-1009 [involuntary manslaughter, in contrast, involves criminal negligence, an objective standard, requiring only evidence that a reasonable person would have been aware an act posed a risk to life].)

Moreno acknowledges the evidence at trial adduced that he "approached" Martin Navarro, engaged in a "verbal confrontation" with him, and struck him "with his fists,"

after which "the melee . . . ensued," culminating in a shooting, which killed Navarro. He does not dispute that his assault on Navarro was intentional or that he initiated an incident, which quickly escalated into homicide. Courts have repeatedly held that a shooting is a natural consequence in gang-related fistfights. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376; *People v. Montano*, *supra*, 96 Cal.App.3d at p. 226.) The pivotal question, therefore, was whether there was sufficient evidence for a reasonable juror to find that defendant Moreno commenced the assault without consciously realizing the risk to Navarro's life.

A defendant's intent is rarely susceptible of direct proof, and may be inferred from the facts and circumstances surrounding the offense. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208; see, e.g., *People v. D'Arcy* (2010) 48 Cal.4th 257, 293-294 [whether a defendant intended to inflict extreme pain, proving murder by torture, may be inferred, among other things, from the circumstances of the crime].) Here the evidence indicated defendant Moreno was a loyal Norteño member, as he reportedly had helped initiate Tony Martin into the gang, sported gang tattoos on his hands, had posted photos of himself flashing gang hand signs on his social media account, and the day of the party had had the name of his Norteño subset ("Crazy Ass Latinos") embroidered on an A's hat he purchased.

This gang allegiance also was apparent from evidence that defendant Moreno spent the entire day of the party in the company of other Norteño members and their girlfriends, arriving at the party with the same group. At some point after the Norteños arrived together, Jessica Juarez, the girlfriend of another Norteño, pointed someone out to their group, apparently Martin Navarro. Navarro was dressed in clothing typical of Sureño gang members, the Norteños' primary rivals, with whom Norteños then were engaged in a turf war. Fellow Norteño George Hellums testified Juarez told their group Navarro was a "Scrap" (i.e., a Sureño) and had snitched on her boyfriend, another Norteño. Gang rules obligated Norteños to attack Sureños on sight, and a gang member who "snitched" could be punished by death.

Although defendant Moreno did not testify, others at the party at the time apparently worried that a dangerous incident was developing. Standing with his cousin, Martin Navarro, Gregorio Navarro noticed the Norteños had been staring in their direction, and he decided to leave the garage, ostensibly to fetch a sweater from a car, on an August evening in Antioch. Gregorio testified that he kept his eyes down as he left, purposefully avoiding eye contact with the Norteños, because he did not want to start any problems, suggesting he feared any exchange might lead to violence. George Hellums directly acknowledged he had a "bad feeling" and stepped outside of the garage around the same time.

In the meantime, Jessica Juarez spoke with defendant Moreno and other Norteños. Then, witnesses agree, defendant Moreno walked across the garage, with at least two other Norteños following. Brian Serrano saw defendant Moreno look back to check with Juarez, and then move on to a different person, apparently Martin Navarro, with two or three other gang members in tow. A crowd gathered, with gang members circling Navarro and his friends. Guadalupe Sanchez, a member of the Norteño group, acknowledged she "had a bad feeling" at this point and "knew something bad was about to happen."

The crowd around Martin Navarro began arguing, shouting, and cursing. There was pushing and shoving, and some in the crowd made hand gestures or waved their hands. Defendant Moreno punched Navarro in the face, the two exchanged words, and defendant Moreno punched Navarro again at least one or two times. Without attempting to fight back, Navarro covered his face with his hands and ducked down. When Erick Tejeda attempted to stop the assault, Norteño Tony Martin put out his arm to stop him. When Janicett Villegas made a similar effort, a friend named Jairo—possibly Jairo Bermudez Robinson, one of the Norteños—pulled her aside. Then another Norteño came up and shot Navarro. Although no direct evidence confirmed Moreno knew Mendoza had a gun that day, the jury heard evidence from which it could have inferred such knowledge, as the two Norteños arrived at the party in the same car, with Moreno

driving, and only shortly before, Tony Martin testified, Mendoza had been sitting in the front passenger seat of the car showing him a revolver he had stowed in the car door.

The undisputed evidence, therefore, indicated that defendant Moreno, a loyal gang member, in consultation with other Norteños, launched a concerted and one-sided attack on Martin Navarro, whom he had reason to suspect was affiliated with a rival gang, and possibly also a snitch. An expert testified that gang members sought respect from rival gangs and others in their own gangs, in part, by committing violent crimes. Others at the party quickly realized the situation was dangerous. The jury had no reason to doubt defendant Moreno knew the same, or to doubt that he consciously disregarded the risk to Navarro when he commenced his assault.

In an effort to suggest to the contrary, on appeal, defendant Moreno notes the gang expert's testimony that a single gang member conceivably might just engage in a simple fist fight with another person who happened to be a member of a rival gang, without the altercation being gang-related. The evidence recounted above does not support that this was the case here, however, as no possible alternative motive for defendant Moreno's assault was suggested apart from gang affiliation. Although defendant Moreno points out that Jessica Juarez also told members of the Norteño group that Navarro was her ex-boyfriend, there is no indication in the record Juarez and defendant Moreno at any point had a romantic relationship, nor does defendant Moreno explain why having such information might have made him want to assault Navarro, independent of any gang affiliation. After arguing at some length about the relevancy of his mental state at the time of the assault, defendant Moreno simply notes the testimony on these two points, without clarifying how they showed lack of malice on his part, i.e., how they created an inference that he was unaware—when he crossed the garage accompanied by gang members, drawing a crowd that circled Navarro, and then began to beat Navarro—he was placing Navarro's life at risk by creating a situation that might quickly escalate. When viewed in context, the evidence defendant Moreno cites is marginal at best. It cannot be considered substantial evidence that he attacked Navarro without malice. Accordingly, the trial court had no obligation to instruct the jury on involuntary manslaughter.

In any event, we conclude there was no prejudice to defendant Moreno from any instructional error. When a trial court violates state law by failing to properly instruct the jury on a lesser included offense, in a noncapital case, the error " 'must be reviewed for prejudice exclusively under [*People v. Watson*, *supra*, 46 Cal.2d at p. 836]. A conviction of the charged offense may be reversed in consequence of this form of error only if, "after an examination of the entire cause, including the evidence" [citation], it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred [citation].' [Citation.]" (*People v. Lasko* (2000) 23 Cal.4th 101, 111.) Viewing the evidence as a whole, it is not reasonably probable the jury here would have found defendant Moreno acted without implied malice, convicting him of the lesser crime of involuntary manslaughter, had the trial court granted his request for an instruction on that offense. Moreover, by convicting defendant Moreno of first degree murder, the jury necessarily found he acted at least with implied malice, resolving the factual finding requisite to involuntary manslaughter against him, which means he cannot have been prejudiced by lack of instruction on that point. (*People v. Cook*, *supra*, 39 Cal.4th at pp. 596–597; see *People v. Manriquez* (2005) 37 Cal.4th 547, 587-588 [court not obligated to instruct on involuntary manslaughter absent substantial evidence of the elements].)

Moreno contends the failure to instruct regarding involuntary manslaughter was prejudicial, because it was a close case, as evidenced by the fact a jury deadlocked after the first trial, and the jury in the second trial found "not true" the firearm enhancement allegations with respect to him, although it found those allegations true with respect to his co-defendant. This discrepancy, he submits, indicates it is reasonably probable the jury believed he committed the assault but did not think he anticipated the shooting.

We are not persuaded. As the People note, the deadlock at the conclusion of the first trial could be explained by the broader original indictment, which charged more defendants and included more counts, and by the fact that Tony Martin did not testify there as he did in the second trial, providing an eyewitness account. Nor does the "not true" finding on the verdict form suggest to us uncertainty about whether defendant

Moreno knew and disregarded the potential for escalation when he launched his assault on Martin Navarro. It is more likely, we think, that jurors were signaling they did not think defendant Moreno personally intended to or did shoot the gun that killed Navarro. The suggestion it is reasonably probable jurors would have convicted him of involuntary manslaughter instead had they been instructed on that lesser offense, in particular, is unconvincing. As noted, the jurors ultimately convicted him of first degree murder, having been instructed this required a finding he acted deliberately having decided to kill, and thus, rejected the option of second degree murder, which required only the conscious disregard of a risk to life.

III. DISPOSITION

The judgment against defendant Leon Moreno is modified as follows: the conviction for first degree murder is reduced to second degree murder, and the sentence is reduced from 25-years-to-life to 15-years-to-life. The trial court is directed to send an amended abstract of judgment to the Department of Corrections reflecting these changes. As so modified, the judgment against defendant Moreno is affirmed. The judgment against defendant Ricky Mendoza is affirmed without any modification.

Rivera, J.

We concur:

Ruvolo, P.J.

Streeter, J.

People v. Ricky Angelo Mendoza (A139901)
People v. Leon John Moreno (A140431)