

APPENDICES

Alexander Javier Jasso v. Greg Lewis, Warden,
No. 15-17234, 717 Fed. Appx. 729 (9th Cir. Apr. 2, 2018)Appendix A

Alexander Javier Jasso v. Greg Lewis, Warden,
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Appendix A

FILED**NOT FOR PUBLICATION**

APR 02 2018

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

ALEXANDER JAVIER JASSO,

Petitioner-Appellant,

v.

GREG LEWIS, Warden,

Respondent-Appellee.

No. 15-17234

D.C. No. 3:14-cv-00802-JD

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, PresidingArgued and Submitted March 13, 2018
San Francisco, California

Before: PAEZ and IKUTA, Circuit Judges, and VITALIANO,** District Judge.

California state prisoner Alexander Jasso appeals the district court's denial of his habeas petition challenging his conviction for attempted murder. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253.

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

** The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

Even assuming that the prosecutor's reference to California case law in his closing statement was a constitutional error, the state court of appeal's determination that the error was harmless beyond a reasonable doubt was not contrary to, or an unreasonable application of, *Chapman v. California*, 386 U.S. 18 (1967). See 28 U.S.C. § 2254(d)(1). The state court reasonably relied on the strength of the evidence against Jasso, see *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991), which included evidence of Jasso's gang membership¹ and his perception that Alejandro Muñoz was in a rival gang, that Jasso initiated the confrontation with Muñoz and pulled out a gun, and that Jasso chambered a round in the gun. Given that Jasso's only explanation was that he had fired the gun accidentally, the state court was not objectively unreasonable in concluding that the strength of the evidence rendered the prosecutor's references to California Supreme Court and Court of Appeal decisions on intent harmless beyond a reasonable doubt, particularly in light of the trial court's subsequent clarifying instructions to the jury on the relevant legal standards for intent.

¹ Although Jasso contests the strength of the evidence of gang membership on appeal, we note that the jury found Jasso guilty of gang-benefit enhancements and gang-related street terrorism, and both the state courts and district court rejected Jasso's sufficiency of the evidence challenges to those findings. The district court and this Court likewise denied a certificate of appealability on those claims. See 28 U.S.C. § 2253(c)(2).

Nor has Jasso established that the state court's harmlessness analysis was based on an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2). First, even if the state court incorrectly characterized Jasso's "self-serving statements" about where he intended to fight Muñoz, the state court's decision was not "based on" a misstatement of fact because the court discounted those statements as being self-serving. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). Second, the state court's statement that Jasso "fired a round with sufficient accuracy that it penetrated a window" was factually correct, as it was undisputed that the bullet hit the window. Third, to the extent that the state court made a factual finding that the evidence showed that Jasso was motivated by gang rivalry, rather than a dispute between Muñoz and Jasso's neighbor, an appellate panel could "reasonably conclude that the finding is supported by the record." *Id.* (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated in part on other grounds*, *Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014)). Finally, the state court was not "required to address every jot and tittle of proof suggested to [it], nor . . . 'make detailed findings addressing all the evidence before [it].'" *Taylor*, 366 F.3d at 1001 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003)). Here, the fact section of the state court's opinion sets out the very

evidence that Jasso contends it omitted, and there is no indication that the state court did not consider this evidence in its analysis.

Because Jasso has not shown that the state court's decision was objectively unreasonable under 28 U.S.C. § 2254(d)(1) or (d)(2),² Jasso is not entitled to habeas relief, and we need not reach the question whether Jasso "can establish that [the claimed trial errors] resulted in actual prejudice." *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (internal quotation marks omitted) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

AFFIRMED.

² To the extent that Jasso argues that the cumulative effect of additional alleged prosecutorial errors "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted), we deny the request made in his reply brief to expand the certificate of appealability, because Jasso has not made a "substantial showing" that the state court's decision was contrary to, or an unreasonable application of *Darden*. See *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting 28 U.S.C. § 2253(c)(2)).

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER JAVIER JASSO,

Petitioner,

v.

GREG LEWIS,

Respondent.

Case No. [14-cv-00802-JD](#)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS AND
DENYING CERTIFICATE OF
APPEALABILITY**

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The Court ordered respondent to show cause why the writ should not be granted. Respondent filed an answer and a memorandum of points and authorities in support of it, and lodged exhibits with the Court. Petitioner filed a traverse. The petition is denied.

BACKGROUND

A jury found petitioner guilty of attempted first degree murder, assault with a semiautomatic firearm, willfully shooting at an occupied building, and gang-related street terrorism. *People v. Jasso*, 211 Cal. App. 4th 1354, 1356 (Cal. Ct. App. 2012). The jury found that petitioner attempted to murder Alejandro Muñoz, but acquitted him of attempted first degree murder of Rafael Muñoz Flores. *Id.* The jury also found true various enhancements that petitioner committed the offenses for the benefit of a street gang. *Id.* The California Court of Appeal affirmed the judgment in a published opinion. *Id.* at 1378. The California Supreme Court denied a petition for review. Resp. Exs. G, H.

The California Court of Appeal summarized the facts of the crime as follows:

I. Prosecution Case

The prosecution presented the following facts at trial. On the night of March 29, 2009, defendant, accompanied by his girlfriend Tara Meehan and his friend Robert Hornbeak, drove to a McDonald's restaurant in the Monterey County town of Prunedale. Defendant

1 looked toward the well-lit interior of the restaurant and saw Muñoz
2 and his brother Flores. Defendant was a member of the Norteño
3 criminal street gang and recognized Muñoz as a member of the
4 Sureño criminal street gang. He recognized Muñoz personally; in
5 addition, Muñoz was wearing a blue sweatshirt, and blue is a color
6 that Sureño gang members use to identify themselves.

7 Defendant reacted negatively to Muñoz's presence. Hornbeak
8 wanted him to ignore Muñoz and let the car's occupants get
9 something to eat elsewhere, but defendant, according to Hornbeak's
10 testimony, said, "I'm gonna get this fool" or "I gotta get this guy."
11 Defendant maneuvered his large vehicle out of the restaurant's
12 drive-through lane, circled around in the parking lot, and parked by
13 one of the restaurant's windows. He racked the slide of a gun he
14 had in the car and fired one shot. It passed through the restaurant
15 window, causing Muñoz, Flores, and a woman identified in court as
16 Jane Doe to duck or drop to the floor. The restaurant manager, who
17 was Muñoz's wife, called 9-1-1. She would later identify
18 defendant as the vehicle driver in a photographic lineup and in court.
19 Sheriff's deputies arrested defendant at his residence. On the
20 premises they found a gun, which was hidden in defendant's
21 bedroom. The deputies also found a quantity of ammunition in the
22 bedroom. They did not find defendant's vehicle on the premises,
23 but found it a few days later on property on which a friend lived. It
24 was "away from everything, out of sight" behind a tree and
25 concealed by a tarpaulin and plywood sheets.

26 A criminalist who testified as an expert on firearms answered yes to
27 the prosecutor's question whether the bullet recovered from the
28 crime scene was in "very poor condition." The authorities did not
attempt to match it to defendant's gun. The expert testified that the
gun could not be fired until its slide had been pulled back to
chamber a round. Because of a missing part, the gun could be fired
with about one-third of the normal trigger pulling force needed. The
"harder trigger pull [is] a safety measure," he explained, but this gun
lacked the needed part. As a result, some 4.25 to 4.5 pounds per
square inch of pulling force would discharge the weapon, whereas
ordinarily about 12 pounds per square inch would be required. In
general, however, the gun worked normally, and it was of
"reasonably high quality."

Because defendant was the subject of a gang-related charge and
numerous gang-related allegations, the prosecution presented
evidence of his ties to the Norteño gang. A witness qualified as an
expert in street gangs generally and the Norteños in particular
testified that gangs like the Norteños have an honor-based culture
and thus prize displays of dominance over other similar gangs and,
conversely, take harshly to insults or other acts that they perceive as
demeaning to them. The Norteños' archrival is the Sureño criminal
street gang. The Norteños use certain motifs to identify and
promote the gang. These include the number 14, the color red, the
logos of the San Francisco Giants professional baseball team, and
the iconic huelga eagle that is the symbol of the United Farm
Workers agricultural labor union. (Huelga is Spanish for a labor
strike.) Norteños also use tattoos and hand gestures to identify
themselves and to intimidate or ward off other gangs.

Defendant bore a one-dot tattoo on one arm and a four-dot tattoo on
the other, registering his identification with the Norteños' favored
number 14 (the letter "N" is the fourteenth letter of the alphabet). In

1 his bedroom sheriff's deputies found a red blanket with the logo of
2 the San Francisco 49ers professional football team, red bandanas, a
3 T-shirt with the huelga eagle, and CD-ROM covers with the title
4 "Northern Cali Killas" (Cali being an abbreviation of California),
5 and a man in red holding an Uzi machine gun. A cap modeled on
6 the uniform of the New York Yankees professional baseball team
7 was red instead of the Yankees' traditional blue. A San Francisco
8 Giants cap was white with red letters instead of the Giants'
9 traditional black and orange. Hornbeak testified that he was making
10 prideful Norteño gestures to Muñoz and Flores before defendant
11 fired his shot, and that Muñoz and Flores were laughing at Hornbeak
12 for doing so.

13 Inside defendant's vehicle, sheriff's deputies found CD-ROM
14 covers with the words "Northern Exposure," the huelga eagle, and
15 one dot followed by four dots. According to the testimony of a
16 sheriff's department detective, the CD-ROMs featured the
17 performances of gang-associated musicians who performed music
18 listened to by Norteño gang members. The friend who was hiding
19 defendant's vehicle for him was dressed in a red shirt and red tennis
20 shoes with red shoelaces when the deputies went to the property.
21 The same detective testified that as he prepared to book defendant
22 into jail, defendant "told me he was a Norteño" for the jail's housing
23 assignment purposes.

24 The prosecution's expert witness on gangs testified that in his
25 opinion defendant was an active member of the Norteños. The
26 witness testified that defendant, despite his youth, had a long history
27 of associating with the Norteños in various parts of California and
28 that he was an active Norteño on the day of the crimes. He also
testified that defendant fired the shot in the direction of Muñoz and Flores to promote the Norteños' interests.

Questioned by sheriff's investigators following his arrest, in an
interview that was recorded and played for the jury, defendant
acknowledged that his gun discharged toward Muñoz and Flores,
but insisted that he fired it "accidentally" and did not intend to shoot
at anyone. He claimed that he did not rack the gun's slide to load a
round into the chamber for firing. Defendant was acquainted with
Muñoz and did not like him but "wanted [only] to fight him ... [and]
not shoot him" after seeing him at the restaurant. He denied making
any gang gestures toward Muñoz and Flores.

II. Defense Case

The defense presented the following facts at trial, at which
defendant testified on his own behalf.

Before defendant shot at Muñoz, the two exchanged insults outside
the restaurant, although they were not gang-related. Nor did the two
exchange gang signals. However, defendant knew that "they called
him [Muñoz] a southerner," meaning a member of the archrival
Sureño street gang. Defendant parked his vehicle and could see
Muñoz, who was now inside the restaurant. Defendant and
Hornbeak, still in defendant's vehicle, gestured to Muñoz to come
outside, and Muñoz, who was seated and talking on a telephone,
started laughing at defendant. "I got kind of mad," defendant
testified, and so, in what was "the worst mistake of my life," "I got
the weapon" "to show it to him," meaning Muñoz. Defendant did
this to "kind of fit in, to look tough." "It went off," defendant
testified, but "I never meant for a bullet to be fired from that
weapon." "If I wanted to kill him, I could have kept shooting."

Defendant did not pull back the gun slide to chamber a round, so Hornbeak—who said he heard a semiautomatic gun being cocked from the area of the driver’s seat—must have misinterpreted the sound. Nor did defendant tell Hornbeak that he intended to “get this guy,” in the words of the prosecutor during cross-examination.

The reason defendant took his vehicle to another location, some three to four days later, was to have his friend’s father fix a damaged bumper.

Defendant admitted to being a Norteño gang member “[a]t one point” and retaining a degree of interest in the Norteños’ lifestyle and imagery, as shown by the paraphernalia found at his residence and in his car (although he associated the huelga eagle with the late César Estrada Chávez, the well-known labor leader who co-founded the United Farm Workers union, rather than with the Norteños); he had called himself a Norteño earlier in his life. But he denied being actively involved with any gang after “maybe [age] 17 at the latest.” FN4 For example, he acquired his Norteño dot tattoos at age 14, and only to be “cool.” Even when he considered himself an active Norteño, his activities consisted of “just girls, weed, and partying,” but not gang-related crimes. He might own more blue clothing than red and in general he had “real plain tastes, so I’m used to wearing ... black shirts or white shirts and just regular jeans.” He also denied identifying himself as a Norteño during his jail booking. Instead, he had requested to be placed with the general population and not with the separate housing set aside for Norteños. In addition, he admitted to having juvenile delinquency adjudications and juvenile probation violations, and he acknowledged that a juvenile court judge had once imposed a gang-related probation condition “telling me that I had to stop hanging around with the group of friends that I [had].”

FN4. Defendant was 18 years old when he fired the shot into the restaurant.

Defendant did not consider his friend Hornbeak to be a Norteño, but he knew, and for a while had associated with, at least five people in Monterey County whom he considered to be gang members or probable gang members. He obtained his gun in Visalia (Tulare County) “for protection” and ammunition for it because he had once been shot at in Prunedale and, regarding the gun itself, because “I thought it was cool” to have it.

Defendant was evasive in answering his lawyer’s question whether his being fired upon had happened only shortly before his own gunplay at the restaurant, but he admitted that “it wasn’t that long” beforehand. He further testified on direct examination that he told the sheriff’s department detective who questioned him that he and the victim were rival gang members, and in his testimony he implied that he believed the victim was a Sureño: “I have some friends that ... live by him, so they know him real well” and “[t]hey said that he might be a southerner.” He amplified that he and the victim “just didn’t like each other,” and this was so “because a friend of mine that lives right next to him ... has problems with him.” He also testified that he had fired the gun before the fateful encounter at the restaurant and that it had not discharged accidentally before.

Hornbeak testified that he and defendant went to a residence after the shooting. Defendant handed him the gun but it started to fall from Hornbeak’s grasp. Hornbeak squeezed the trigger inadvertently and the gun discharged. Hornbeak did not testify about the amount of gripping strength it took for this accident to

happen.

Jasso, 211 Cal. App. 4th at 1357-61.

STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) 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). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." See *Miller-El*, 537 U.S. at 340; see also *Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). Moreover, in conducting its analysis, the federal court must presume the correctness of the state court's factual findings, and the petitioner bears the

burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The state court decision to which § 2254(d) applies is the "last reasoned decision" of the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005). When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion. *See Nunnemaker* at 801-06; *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000).

DISCUSSION

As grounds for federal habeas relief, petitioner asserts that: (1) his right to due process was violated when the prosecutor engaged in misconduct; and (2) there was insufficient evidence to support the gang enhancement findings.

I. PROSECUTORIAL MISCONDUCT

Petitioner argues that the prosecutor committed misconduct in closing argument by: (1) asserting that California higher courts had found defendants guilty under similar facts; (2) shifting the burden of proof to petitioner to prove that the gun fired accidentally; and (3) alleging that petitioner fabricated the claim that the gun fired accidentally after speaking with his attorney and incorrectly stating that petitioner never told police the shooting was accidental when petitioner did make such a statement.

Legal Standard

Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate standard of review is the narrow one of due process and not the broad exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Id.*; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir.

2005). A prosecutorial misconduct claim is decided “‘on the merits, examining the entire proceedings to determine whether the prosecutor’s remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995); *see Trillo v. Biter*, 769 F.3d 995, 1001 (9th Cir. 2014) (“Our aim is not to punish society for the misdeeds of the prosecutor; rather, our goal is to ensure that the petitioner received a fair trial.”).

Factors which a court may take into account in determining whether misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt, *compare United States v. Young*, 470 U.S. 1, 19 (1985) (finding “overwhelming” evidence of guilt) *with United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (in light of prior hung jury and lack of curative instruction, new trial required after prosecutor’s reference to defendant’s courtroom demeanor); (2) whether the misconduct was isolated or part of an ongoing pattern, *see Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987); (3) whether the misconduct relates to a critical part of the case, *see Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure to disclose information showing potential bias of witness especially significant because government’s case rested on credibility of that witness); and (4) whether a prosecutor’s comment misstates or manipulates the evidence, *see Darden*, 477 U.S. at 182. Moreover, “[o]n habeas review, constitutional errors of the ‘trial type,’ including prosecutorial misconduct, warrant relief only if they ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

A. Court Decisions Supporting Petitioner’s Guilt

1. Background

During closing argument the prosecutor stated to the jury:

The Defendant shot a gun at human beings who were in an occupied McDonald’s restaurant. The shooting alone, by itself, clearly proves the intent to kill [the victims]. Just that shooting alone. I’m not just saying that, the California Supreme Court says this. It says that the act of purposely firing a gun at another human being, at close range, provides the inference that the shooter acted with the intent to kill. The shooting alone proves the Defendant’s intent. That’s it. [¶] The Defendant’s shooting into an occupied McDonald’s at [the victims] proves his intent, proves that he wanted to kill [the victims].

Reporter's Transcript ("RT") at 2737-38. Later the prosecutor argued:

[H]e pulled that trigger while that gun was pointed at [the victims]. That proves intent to kill.

One shot, two victims, equals attempted murder. Based on the evidence that we had, that is enough. One shot, two victims, that's attempted murder for both those victims. [The] Supreme Court said, intent to kill two different victims can be inferred from evidence that the Defendant fired a single shot at the two victims, both of whom were visible to the Defendant. That's what we have here.

Another, appellate--California appellate court said: Defendant's act of firing a .22 caliber rifle, toward a victim, from approximately 20 yards away, and in a manner that could have inflicted a mortal wound, had the bullet been on target, was sufficient to support an inference of intent to kill. The fact that the defendant was unsuccessful in killing the victim, or abandoned his efforts after one shot, did not mean that he lacked the requisite intent. Kind of sums it up right there.

RT at 2740.

Petitioner's trial counsel objected during a break in the prosecutor's argument and moved for a mistrial. RT at 2766-67. The trial court noted the problem with the argument stating, "the Court's opinion of that has always been that those are the type of discussions that should take place at the time of instructions." RT at 2767. However, the trial court held that while the prosecutor's remarks were novel they did not warrant a mistrial. RT at 2767-68.

2. Discussion

The California Court of Appeal noted the unique nature of the claim and after discussing state law at length found the prosecutor had erred:

The parties did not cite any case, and we have found almost no case anywhere in the United States, that directly and substantively addresses the type of remarks the prosecutor made to the jury.

...

Defendant here argues that the prosecutor "improperly inject[ed] additional facts purportedly within his knowledge into the case, and usurp[ed] the court's function to instruct the jury on the law, and the jury's function to apply that law to the facts it determined." He is correct that the remarks ran the risk of committing the usurpation he discerns. The California Supreme Court and the California Court of Appeal are, respectively, the highest and second-highest echelons of the state court system. The prosecutor erred in invoking their authority. He should not have invoked the authority of any court that one or more jurors could surmise outranks the trial court. A fortiori, he should not have implied that the California Supreme Court would expect the jury to return a guilty verdict. This he did when he said: "The shooting alone, by itself, clearly proves the intent to kill [the victims]. Just that shooting alone. I'm not just saying that, the California Supreme Court says this. It says that the act of purposely firing a gun at another human being, at close range, provides the

inference that the shooter acted with the intent to kill. The shooting alone proves the Defendant's intent. That's it."

Although, as noted, we have found scant authority on this matter, we regard this problem as similar to the misconduct disapproved in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (*Caldwell*). In *Caldwell*, "a prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court." (*Id.* at p. 323, 105 S.Ct. 2633.) The prosecutor told the jury that "your decision is not the final decision" (*id.* at p. 325, 105 S.Ct. 2633) because it "is automatically reviewable by the [Mississippi] Supreme Court" (*id.* at pp. 325-326, 105 S.Ct. 2633). *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Id.* at pp. 328-329, 105 S.Ct. 2633.)

In sum, "*Caldwell* error occurs ... when the remarks to the jury concerning its role in the sentencing process are inaccurate or misleading in a way that allows the jury to feel less responsible than it should for the sentencing decision." (*People v. Elliott* (2012) 53 Cal.4th 535, 556, 137 Cal.Rptr.3d 59, 269 P.3d 494.) Our own Supreme Court reached the same conclusion many years before *Caldwell*. In a case that also considered capital jury sentencing verdict issues, the court stated that "argument misinform[ing] the jury as to the power of this court" (*People v. Morse* (1964) 60 Cal.2d 631, 650, 36 Cal.Rptr. 201, 388 P.2d 33, *italics deleted*) presents the risk that jurors would believe the high court "could substitute its judgment" (*ibid.*) for the jury's.

In this case, the risk is rather that jurors might believe the high court had already done the jury's work and made the jury's choice for it. Their commonality lies in the risk of telling the jury that its role is less significant than it is: in *Caldwell* because the Mississippi Supreme Court would reassess any decision the jury made to impose a death sentence, and here because the California Supreme Court or the California Court of Appeal would expect the jury to find defendant guilty under the facts the prosecution had presented.

Caldwell's holding was narrow inasmuch as the court's analysis rested on Eighth Amendment considerations that apply to the death penalty. (*See Caldwell, supra*, 472 U.S. at pp. 329-330, 105 S.Ct. 2633.) The same may also be true of *People v. Morse, supra*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33. Nevertheless, along with the main parallel between those cases and this one, other observations that the *Caldwell* court made also apply to the situation before us.

Caldwell mentioned the obvious: "jurors often might not understand" "the institutional limits on what an appellate court can do." (*Caldwell, supra*, 472 U.S. at p. 330, 105 S.Ct. 2633.) The jurors here may have thought that appellate courts are allowed to reverse jury verdicts of acquittal or are allowed to send messages telling juries what to do in particular cases.

Caldwell identified another risk: that a jury "might ... wish to 'send a message' of extreme disapproval for the defendant's acts." (*Caldwell, supra*, 472 U.S. at p. 331, 105 S.Ct. 2633.) Again, *Caldwell* had in mind the decision whether to impose a death

1 sentence, but the point remains valid in any case in which
 2 prosecutorial remarks create a risk that the jury will conclude that a
 3 high court is assuming some responsibility for the jury's decision.
 4 A witness testified in this case that there were some 6,000 Norteños
 5 in Monterey County and "in the neighborhood of" 120,000 Norteños
 6 or Norteño associates in northern California. Those are alarming
 7 and probably surprising statistics, which the witness soon followed
 8 by explaining that the Norteños' crimes include "robbery,
 9 carjacking, murder, weapons [possession], narcotic sales, identity
 10 theft, [and] kidnapping." Such dramatic testimony could help nudge
 11 jurors toward embracing the prosecutor's argument for convicting
 12 defendant even if they had misgivings about the state of the
 13 evidence, if they felt that the verdicts to be rendered had already
 14 been settled to some extent by the California Supreme Court or
 15 Court of Appeal.

16 The foregoing risk was made all the greater by the prosecutor's
 17 remark, in effect, that the state was just going through the motions in
 18 trying defendant because the case against him was so strong. He
 19 said, "We are here because the Defendant has this right to this
 20 process. And it's a right that everybody in this country has, and it's
 21 a right that should never be given up. And that is the only reason we
 22 are here, because he has this right." He reiterated shortly after the
 23 foregoing remark that "the only reason he was here [sic], is just
 24 because the Defendant has this right. The Defendant also has a right
 25 to an attorney.... [Defense counsel] is a very good attorney, and he's
 26 done the best he can ... with this case. But the fact is, you're only as
 27 good as your case. I even admit that as a prosecutor, we're only as
 28 good as the facts that we have. This was a very good case. We had a
 lot of evidence."

Still another risk *Caldwell* identified is that a "capital sentencing jury"—but this may be said of many juries considering serious felony charges—"is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die"—or, as in this case, another's penal fate short of a death sentence—"and they are asked to decide that issue on behalf of the community.... [¶] This problem is especially serious when the jury is told that the alternative decision-makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a 'right' to make such an important decision than has the jury." (*Caldwell, supra*, 472 U.S. at p. 333, 105 S.Ct. 2633.) Little more need be added to this observation except that the prosecutor's remarks about the California Supreme Court and Court of Appeal created similar risks here.

In one respect, the prosecutor's remarks posed a greater risk than did the remarks that *People v. Morse, supra*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33, disapproved. In *Morse*, the court could take comfort in its reflection that "[w]ords of instruction of the trial judge are more likely to effect prejudice than the words of argument of the prosecutor." (*Id.* at p. 650, 36 Cal.Rptr. 201, 388 P.2d 33; *see also, e.g., People v. Thornton* (2007) 41 Cal.4th 391, 441, 61 Cal.Rptr.3d 461, 161 P.3d 3.) But that axiom can be carried only so far and remain meaningful. If one or more jurors knew that the California Supreme Court and Court of Appeal outrank the trial court, that

axiom would lose its vigor, because they might understand the prosecutor's argument as inviting them to follow higher authority, as he interprets it, rather than the trial court's instructions.

In sum, invoking the authority of the higher courts as the prosecutor did constituted error.

Jasso, at 1364-69.

After concluding that the prosecutor's statements constituted error, the California Court of Appeal held that the error was harmless:

As stated, the prosecutor committed misconduct in arguing that the California Supreme Court and the California Court of Appeal had affirmed convictions on facts similar to those of this case The prosecutor's actions were, however, harmless under any standard—under that of *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705, applying to infringement of federal constitutional guaranties, and which requires that the state show that the error was harmless beyond a reasonable doubt, and that of *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243, applying to errors under state law, in which a defendant must show that there is a reasonable probability that, but for the asserted error, the outcome would have been more favorable to him or her. The case against defendant was strong. There was no obvious reason for defendant to fire a gunshot at another person merely because that individual and a neighbor whom defendant knew did not get along. Rather, the evidence was that defendant, a Norteño street gang member, knew that Muñoz, one of the three victims, was a rival Sureño street gang member. Defendant told his passengers that he was going to confront Muñoz. Instead of entering the restaurant to fight Muñoz, as defendant's self-serving statements about intent would have it, defendant parked his car, looked through the restaurant window at Muñoz and his brother Flores, and fired a round with sufficient accuracy that it penetrated the window, although it failed to wound either man.

The prosecutor's references to higher courts ran the risk of being perceived as conveying instructions that conflicted with those given by the trial court. This possibility requires us to consider defendant's claim, at least in passing, as one of instructional error, even though the objectionable words came from the prosecutor and not the trial court.

We recognize that there was at one time, and may still exist, a view that even strong evidence can seldom overcome certain types of instructional error for purposes of prejudice analysis—at least those that “effectively prevent the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt.” (*People v. Flood* (1998) 18 Cal.4th 470, 491, 76 Cal.Rptr.2d 180, 957 P.2d 869.) Doing so would mean that the reviewing court, not the jury, was assessing the facts of the case and, in effect, improperly trying the defendant, thereby violating the defendant's Sixth Amendment right to jury trial. (*People v. Hagen* (1998) 19 Cal.4th 652, 682, 80 Cal.Rptr.2d 24, 967 P.2d 563 (conc. and dis. opn. of Kennard, J.); *People v. Concha* (2010) 182 Cal.App.4th 1072, 1086, fn. 9, 107 Cal.Rptr.3d 272.)

If we evaluate defendant's claim through the prism of instructional error, we must still find the error harmless, because the California

Supreme Court has held that, under United States Supreme Court precedent, sufficiently strong evidence may overcome the aforementioned types of instructional errors for purposes of prejudice analysis. (*Flood, supra*, at pp. 497–503, 76 Cal.Rptr.2d 180, 957 P.2d 869; *see Concha, supra*, at pp. 1085–1086, 107 Cal.Rptr.3d 272.) Thus, the prosecutor’s action in referring to the higher courts of California was harmless under *Chapman, Watson*, or *Flood*.

Jasso, at 1372-73.

In *Davis v. Ayala*, 135 S. Ct. 2187 (2015), the Supreme Court recently clarified the standard to be used on habeas review of a state court’s harmlessness analysis. If a state court finds an error harmless, that determination is reviewed under the deferential AEDPA standard. This means that relief is not available for the error “unless the state court’s harmlessness determination itself was unreasonable.” *Davis*, 135 S. Ct. at 2199 (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007)). In other words, a federal court may grant relief only if the state court’s harmlessness determination “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded agreement.” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). And if the federal court determines that the state court’s harmless error analysis was objectively unreasonable, it also must find that the error was prejudicial under *Brecht* before it can grant relief. *See Fry*, 551 U.S. at 119-20 (§ 2254(d)(1) did not displace *Brecht*).

The Ninth Circuit recently addressed the issue of prosecutorial misconduct on habeas review in *Deck v. Jenkins*, 768 F.3d 1015 (9th Cir. 2014). In *Deck*, the petitioner challenged a conviction of an attempted lewd act upon a child for which he had been arrested in a sting operation when he arrived at a location to meet an underage girl with whom he believed he had been exchanging online message when in fact he had been communicating with law enforcement. *Id.* at 1018-19. During closing argument the prosecutor stated that he did not have to prove that petitioner was going to commit a lewd act on the day he was arrested, rather even if he was just meeting the child to “break the ice” and follow up next week, or in two weekends or at some point in the future to commit a lewd act, then he was guilty. *Id.* at 1019. The California Court of Appeal found that the prosecutor committed misconduct by misstating the law, but that the misconduct was not prejudicial and denied relief. *Id.* at 1020-21. The district court denied

petitioner's habeas petition, but the Ninth Circuit reversed. The Ninth Circuit found that the argument that petitioner lacked the intent to commit a lewd act during the first meeting was central to his defense, and petitioner was prejudiced when the prosecutor made his improper arguments concerning the law. The Ninth Circuit also noted that the evidence of petitioner's temporal intent to commit the crime was not overwhelming and the trial court did not correct the prosecutor's misstatement. *Id.* at 1027, 1029. While the jury asked a question related to this issue, no answer was provided because a juror was excused for sickness requiring the jury to restart deliberations from the beginning. *Id.* All of these factors and especially the jury request for clarification that went unanswered left the Ninth Circuit with "grave doubt" regarding the prosecutor's comments and whether the error had a substantial and injurious effect or influence on the jury's verdict. *Id.* at 1031.

The Supreme Court's ruling in *Davis* was issued after the Ninth Circuit's decision in *Deck*, which used a slightly different standard. This Court must review the state court's harmless error determination under AEDPA and relief is not available for the error "unless the state court's harmless determination itself was unreasonable." *Davis*, 135 S. Ct. at 2199. The California Court of Appeal discussed the error and the overwhelming evidence presented against petitioner and found the error harmless. Petitioner is not entitled to habeas relief because the California Court of Appeal's harmless determination was not unreasonable.

There are some similarities between this case and *Deck* that raise concern regarding petitioner's conviction. In both cases the state courts found that the prosecutor committed misconduct in closing argument, and the improper statements concerned a key aspect of the petitioner's defense. In *Deck*, the Ninth Circuit was particularly concerned with a jury question that the trial court did not answer regarding the disputed issue.

In this case during deliberations, the jury asked, "Please clarify-does the act of firing a weapon in the direction of a person constitute 'intent to kill' under the law. Please define 'intent to kill.'" Clerk's Transcript ("CT") at 445. The trial court responded, "For counts 1 & 2, PC 664/187 the intent requirement for defendant is a specific intent to kill & the jury must decide the factual issues surrounding the act(s) of defendant." *Id.* While the trial court in *Deck* did not

1 answer the jury's question, the trial court in this case was clear that the jury must decide the
2 factual issue of whether petitioner had the specific intent to kill.

3 In addition, the jury was properly instructed that nothing the attorneys say is evidence,
4 including closing argument. CT at 450. There are no allegations that the jury instructions
5 regarding attempted murder or the intent requirement were improper. A review of these jury
6 instructions demonstrates that they were correct. CT at 456, 470-71. The jury is presumed to
7 follow the instructions given. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

8
9 The evidence against petitioner in this case was overwhelming which further undermines
10 his argument that the prosecutor's few statements had a substantial and injurious effect on the
11 verdict. As discussed above, there was a great deal of evidence that petitioner was in a gang,
12 observed the victims who were in a rival gang, and brandished his gun and fired one shot at them.
13 Petitioner's own testimony corroborates much of the prosecution's case. While petitioner denied
14 that he made gang gestures with his hands, he testified that he was waving his hand at the victims.
15 RT at 2177. Petitioner stated he was waving his hand so that the victims would come outside and
16 then they could fight. RT at 2178. When the victims did not exit the restaurant, petitioner
17 testified that he became mad and retrieved the gun to show it to them and communicate that he
18 was not scared. RT at 2180. Petitioner testified it was at this time the gun accidentally went off.
19 *Id.* Witnesses testified that the bullet hit the window of the restaurant. RT at 989-90. Plaintiff
20 also testified that he was involved with the gang from the ages of fourteen to seventeen, but not
21 when the incident occurred, when he was eighteen years old. RT at 2202-03. Petitioner also
22 testified that he believed that one of the victims was part of the rival gang. RT at 2226. Looking
23 at the overwhelming evidence presented against petitioner and at his own testimony, the Court is
24 not left with grave doubt that the prosecutor's statements affected the jury's verdict.

25 Based on the abundant evidence that petitioner intended to shoot at the victims for gang
26 reasons, that the jury was properly instructed, and that the trial court correctly and specifically
27 answered the jury's question, the Court finds that the state court's harmlessness determination was
28

not unreasonable.¹ This claim is denied.

B. Shifting Burden of Proof

i. Background

During closing argument the prosecutor stated to the jury:

Obviously, you know the defense. It was just an accident. I didn't mean to pull the trigger. It was just an accident. But when you start to go down the facts of everything that shows that he committed this crime, intentionally and personally. All of the decisions that he made versus an accident, you can compare the evidence of what happened to what he said - - the accident - - all you're left with is his self-serving, incredible, unreliable, unbelievable statement. That's it. There's no other evidence.

And when [defense counsel] gets up here and argues to you, you ask for him to fill in this part of it, ask for him to fill this in with the facts, with the evidence that proved that. It's not there, based on all of the evidence that was presented there.

RT at 2758.

Petitioner's counsel moved for a mistrial and outside of the jury's presence, the trial court denied the motion stating, "The Court is confident that the instructions that have been read to the jury emphasize and repeat, on a number of occasions, the fact that the burden is solely with the Prosecution." RT at 2766.

Later during his rebuttal argument the prosecutor again discussed petitioner's defense and stated, "We don't have any evidence showing that there's an accident. There is no issue. . . . where is the evidence? Where is the evidence for the column on the right-hand side[?]" RT at 2795. It appears that the prosecutor was referring to a display in the courtroom that summarized the evidence. *Jasso*, at 1370. Petitioner's counsel objected, and the trial court stated to the jury: The Court does want to, again, re-emphasize, as we have said

¹ The jury recessed to begin deliberations at 11:54 a.m. and were then excused for lunch. CT at 273. They returned with a verdict at 5:04 p.m. *Id.* The length of jury deliberation may be examined when assessing harmlessness. "Longer jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case." *United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007) (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001)); see, e.g., *Lopez*, at 846 (jury's deliberation for 2.5 hours on illegal reentry case suggested any error in allowing testimony or commentary on defendant's post-arrest silence was harmless); *Velarde-Gomez*, 269 F.3d at 1036 (jury deliberation for 4 days supported inference that impermissible evidence affected deliberations).

throughout the trial, that the Prosecution has the burden of proving each and every element, in this particular case, which includes intent and all the other elements. The Defense does not need to prove anything in this particular case.

RT at 2795.

Finally, petitioner's counsel objected unsuccessfully to the prosecutor's following statement:

Once again, if that evidence was there, if there actually was evidence of an accident, [defense counsel], as good an attorney as he is, would have presented it, but there is no evidence. . . . We [don't] hear any evidence that there was an accident, because it was not there, because it was not an accident.

RT at 2795-96.

ii. Discussion

The California Court of Appeal denied this claim:

This comment did not amount to prosecutorial misconduct. There is "[a] distinction ... between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Thomas* (2012) 54 Cal.4th 908, 939, 144 Cal.Rptr.3d 366, 281 P.3d 361.) The former is permissible because a prosecutor generally is permitted to remark on the state of the evidence at closing argument. (E.g., *People v. Weaver* (2012) 53 Cal.4th 1056, 1077, 139 Cal.Rptr.3d 355, 273 P.3d 546.) "[T]he prosecutor may comment "on the state of the evidence, or on the failure of the defense to introduce material evidence or call logical witnesses...." (*People v. Carter, supra*, 36 Cal.4th at p. 1277, 32 Cal.Rptr.3d 838, 117 P.3d 544.)

Under these principles, the Supreme Court rejected a claim similar to defendant's, including a reference to blanks on a chart, in *People v. Redd* (2010) 48 Cal.4th 691, 108 Cal.Rptr.3d 192, 229 P.3d 101. There, the prosecutor repeatedly challenged the basis for the defense theory. He remarked: "I have a blank paper because I'm not sure exactly what the defense is yet. I'm going to sit here like you and listen to [defense counsel]. I don't know what he's going to say." (*Id.* at p. 739, 108 Cal.Rptr.3d 192, 229 P.3d 101.) Later, the prosecutor jibed that he was "waiting to hear what the defense was." (*Ibid.*)

Redd rejected a claim that the foregoing remarks shifted the burden of proof to the defendant. "[T]he prosecutor's comments merely highlighted his observation that there seemed to be no coherent defense to the charges" (*People v. Redd, supra*, 48 Cal.4th at p. 740, 108 Cal.Rptr.3d 192, 229 P.3d 101), which, although *Redd* did not say so explicitly, was a permissible comment on the state of the evidence.

To be sure, the prosecutor's argument at one point that there was no evidence that defendant's discharge of the gun was accidental was belied by defendant's testimony and his statement to police, in which he maintained he did not intend to fire the gun. But at the

outset the prosecutor acknowledged defendant's testimony that the shooting was accidental, while dismissing it as "self-serving, incredible, [and] unreliable." In our view, the prosecutor was arguing that there was no evidence of accident beyond defendant's self-serving statements, including the one that the prosecutor had acknowledged earlier in the argument. There was no misconduct under the circumstances as far as this claim is concerned.

Jasso, at 1370-71.

Petitioner has failed to demonstrate that the denial of this claim was an unreasonable application of Supreme Court authority. The prosecutor's statements were acceptable in light of petitioner's testimony that firing the gun at the victims was an accident. "A prosecutor may, consistent with due process, ask a jury to convict based on the defendant's failure to present evidence supporting the defense theory." *Menendez v. Terhune*, 422 F.3d 1012, 1034 (9th Cir. 2005); *see also United States v. Garcia-Guizar*, 160 F.3d 511, 521-22 (9th Cir. 1998) (prosecutor did not shift the burden of proof in commenting on defendant's failure to produce evidence). Indeed, as the Ninth Circuit has recognized, "a prosecutor may comment on the absence of evidence even when such evidence was available, but inadmissible, so long as there is sufficient evidence to support the prosecutor's version of events." *Menendez*, 422 F.3d at 1034. A constitutional problem may arise if the comment is phrased so as to call attention to the petitioner's own failure to testify, *Garcia-Guizar*, 160 F.3d at 522, but that is not an issue here. "Since [petitioner] did in fact testify at trial, the prosecutor's comment cannot be said to have shifted the burden of proof." *Id.* Because petitioner testified at trial and the prosecutor was questioning petitioner's testimony and defense, there was no misconduct, and this claim is denied.

C. Fabrication of Evidence after Speaking with Counsel and Prosecutor's Misstatement

The California Court of Appeal set forth the background and denied this claim:

Defendant's argument that the prosecutor implicitly accused defense counsel of helping defendant change his story in order to render a false account of events also does not rise to the level of prosecutorial misconduct. The prosecutor argued, over defendant's objection, that defendant "wouldn't tell [the authorities] where he got" the gun but then "his attorney comes forward and he says[,] Well, I'd better tell you, I got it from Casper...." He also argued, over defendant's objection, that "[w]e know it wasn't an accident." "[H]e gets up there and tells you on the stand" that he fired the weapon accidentally but "[n]ot once did he say to the police it was an accident. He doesn't say that once."

To the extent that the garbled reference to "Casper" communicated anything to the jury at all, the prosecutor was not accusing defense

1 counsel of encouraging defendant to make false statements, but
2 rather was attempting to comment that defendant changed his story.
3 The same is true of the prosecutor's statement that defendant's claim
4 that he accidentally discharged the gun was a newfound assertion.
5 "The prosecutor did not directly accuse defense counsel of
6 encouraging defendant to lie, but even to the extent the statements
7 swept counsel up in defendant's asserted lies, this was not an
8 improper comment in the context of this case, in which defendant's
9 story changed drastically during trial preparations." [Citations
10 omitted.]

11 *Jasso*, at 1371-72.

12 The state court opinion was not objectively unreasonable. The state court noted that the
13 prosecutor did not directly accuse trial counsel of encouraging petitioner to lie, rather it was noted
14 that the story changed, which was an accurate reflection of the evidence. Even assuming that the
15 prosecutor erred, petitioner has not shown that this minor statement had a substantial and injurious
16 effect or influence in determining the jury's verdict.

17 Petitioner also argues that the prosecutor committed misconduct when he argued that
18 petitioner never told police that the gun discharged by accident. The California Court of Appeal
19 noted that this was prosecutorial misconduct because it was an erroneous description of the
20 evidence. *Jasso*, at 1372. Petitioner did tell police in an interview that the gun fired accidentally.
21 Petitioner testified at trial that he originally told the police he was not involved, but then told them
22 repeatedly that it was an accident. RT at 2192-94. *Id.*

23 Despite being misconduct, this misstatement did not have a substantial and injurious effect
24 on the jury's verdict. In closing argument, petitioner's trial counsel noted on several occasions
25 that petitioner told the police officers it was an accident. RT at 2782-83. Petitioner's trial counsel
26 stated to the jury, "[the prosecutor] says that nowhere did [petitioner] ever tell the officers that it
27 went off accident[ally]. And you saw the video. [Petitioner] repeatedly says it was [an] accident.
28 I didn't mean to do it. I didn't mean to do it. And he said it over and over again" RT at
2771.

29 The jury was also properly instructed that nothing the attorneys say is evidence, including
30 closing argument. CT at 450. The jury is presumed to follow the instructions given. *Weeks*, 528
31 U.S. at 234. When the prosecutor made the misstatement, trial counsel objected, and the trial
32 court stated to the jury, "Ladies and gentlemen, the objection will be noted. Again, you are the

judges of the evidence and the evidence that's been presented." RT at 2746. The prosecutor's isolated misstatement did not rise to a due process violation to warrant habeas relief, especially in light of the evidence implicating petitioner. It was undisputed that the gun was fired towards the victims while petitioner was holding it. There was also a great deal of evidence that petitioner intended to fire at one of the victims because he was a rival gang member, and not that shooting was an accident, as petitioner asserts. For all these reasons, this claim is denied.

II. SUFFICIENCY OF THE EVIDENCE

Petitioner next contends that there was insufficient evidence to support the gang benefit allegations and the separate conviction for criminal street gang terrorism.

Legal Standard

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt therefore states a constitutional claim, *see Jackson v. Virginia*, 443 U.S. 307, 321 (1979), which, if proven, entitles him to federal habeas relief, *see id.* at 324.

The Supreme Court has emphasized that "*Jackson* claims face a high bar in federal habeas proceedings" *Coleman v. Johnson*, 132 S. Ct. 2060, 2062, 2064 (2012) (per curiam) (finding that the Third Circuit "unduly impinged on the jury's role as factfinder" and failed to apply the deferential standard of *Jackson* when it engaged in "fine-grained factual parsing" to find that the evidence was insufficient to support petitioner's conviction). A federal court reviewing collaterally a state court conviction does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt. *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992). The federal court "determines only whether, 'after 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.'" *Payne*, 982 F.2d at 338 (quoting *Jackson*, 443 U.S. at 319). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt

has there been a due process violation. *Jackson*, 443 U.S. at 324; *Payne*, 982 F.2d at 338.

Discussion

The jury found true that petitioner committed the offenses for the benefit of a criminal street gang, pursuant to California Penal Code section 186.22(b)(1). Section 186.22(b)(1) penalizes “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . .” Petitioner was also found guilty of criminal street gang terrorism in violation of Cal. Pen. Code § 186.22(a), which penalizes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang. . . .”

The California Court of Appeal set forth the relevant law and found sufficient evidence to support the jury’s findings:

A. Gang Benefit Allegations

There was ample evidence of defendant’s Norteño connections and of the value to the gang of his shooting at a member of the rival Sureños. Defendant picks at aspects of the testimony of the prosecution’s gang expert, identifying some of them as irrelevant, distracting, or otherwise substantially more prejudicial than probative (Evid.Code, § 352), and essentially calling the testimony conjectural and without evidentiary support. (*See People v. Moore* (2011) 51 Cal.4th 386, 405–406, 121 Cal.Rptr.3d 280, 247 P.3d 515.) But considering the testimony as a whole, which we must do for purposes of sufficiency-of-the-evidence analysis, even if defendant is correct about some aspects of the expert’s testimony, other aspects were valuable. The gravamen of the expert’s testimony was an explanation of the Norteños’ honor-based culture, their rivalry with the Sureños, and the motifs that active Norteño members use to identify themselves. This provided valuable background for other witnesses’ testimony about defendant’s possession of a wide variety of Norteño paraphernalia and his admission to the sheriff’s detective that he was a Norteño. In addition, as we have noted, defendant knew Muñoz to be a Sureño, Muñoz was dressed in the blue Sureño color when defendant shot at him, and there was no obvious reason for one person to shoot at someone he barely knew on the basis defendant gave for committing this crime, i.e., that Muñoz’s neighbor, who was a friend of defendant, and Muñoz did not like each other.

B. Criminal Street Gang Terrorism Conviction

As noted, defendant was convicted in count eight of criminal street gang terrorism in violation of subdivision (a) of section 186.22 “As the statutory text indicates, the gang crime has three elements: (1) ‘[a]ctive participation in a criminal street gang, in the sense of

participation that is more than nominal or passive,' (2) "'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,'" and (3) 'the person "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." [Citation.]' [Citation.]" (*People v. Mesa* (2012) 54 Cal.4th 191, 197, 142 Cal.Rptr.3d 2, 277 P.3d 743.)

There was sufficient evidence of the elements of the crime. We have described the ample evidence that defendant was active in the Norteños. Regarding the second element of the crime, defendant insists that his Norteño-related activities were not those of a full-fledged member and that there was no evidence he knew what the Norteños were about. The evidence that defendant knew about the nature of the Norteño organization, however, comes from the array of gang paraphernalia he possessed, his prior probation condition to avoid gangs, and, most stark of all, his willingness to shoot at a Sureño for no good reason. Regarding the third element, the gang expert's testimony sufficed to establish that defendant shot in the direction of Muñoz and Flores to promote the Norteños' interests.

Jasso, at 1376-78 (footnote omitted).

Petitioner is not entitled to habeas relief because he has not shown that the California Court of Appeal unreasonably applied Supreme Court authority in denying this claim. There was sufficient evidence for any rational juror to find the essential elements of the crime and the enhancements beyond a reasonable doubt. The gang expert testified about the nature of the gang rivalry between the Norteños and the Sureños and how shooting at a rival gang member is part of the gang culture. There was also sufficient evidence that plaintiff was associated with the gang. Plaintiff even testified that he was involved with the gang from the ages of fourteen to seventeen, but not when the incident occurred when he was eighteen years old. RT at 2202-03. Despite plaintiff's arguments to the contrary, there was sufficient evidence for the jury to believe that petitioner was still involved with the gang. Petitioner also testified that he believed one of the victims who was shot at, was part of the rival gang. RT at 2226. The California Court of Appeal's denial of this claim was not an unreasonable application of *Jackson*, therefore this claim is denied.²

² Petitioner is not entitled to an evidentiary hearing in this case. Petitioner has not alleged any material fact, which he did not have a full and fair opportunity to develop in state court, and which, if proved, would show petitioner's entitlement to habeas relief. See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (scope of record for 28 U.S.C. § 2254(d)(1) inquiry limited to record that was before state court that adjudicated claim on the merits).

1 **III. CERTIFICATE OF APPEALABILITY**

2 The federal rules governing habeas cases brought by state prisoners require a district court
3 that issues an order denying a habeas petition to either grant or deny therein a certificate of
4 appealability. *See* Rules Governing § 2254 Cases, Rule 11(a).

5 A judge shall grant a certificate of appealability “only if the applicant has made a
6 substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and the
7 certificate must indicate which issues satisfy this standard. *Id.* § 2253(c)(3). “Where a district
8 court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c)
9 is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district
10 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.
11 473, 484 (2000).

12 Here, petitioner has made no showing warranting a certificate and so none is granted.

13 **CONCLUSION**

14 For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**. A Certificate
15 of Appealability is **DENIED**. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

16 **IT IS SO ORDERED.**

17 Dated: October 14, 2015

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19 _____
20 JAMES DONATO
21 United States District Judge
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SEE CONCURRING OPINION
CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Court of Appeal - Sixth App. Dist.
FILED

DEC 13 2012

MICHAEL J. YERLY, Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER JAVIER JASSO,

Defendant and Appellant.

H037099

(Monterey County
Super. Ct. No. SS091101)

By

DOCKETED	
SAN FRANCISCO	
DEC 17 2012	
By	MTD
No.	8F001202874

A jury convicted defendant Alexander Javier Jasso of attempted murder and other crimes arising from his shooting at people through a window at a McDonald's restaurant in Prunedale. On appeal he claims that the prosecutor committed misconduct during the trial, that the trial court erred in allowing the jury to hear certain evidence and denying his motion to let the jury visit the crimes' location, that there was insufficient evidence to punish him for his gang promotional activities, and that the trial was unfair when viewed as a whole.

We disagree and will affirm the judgment.

PROCEDURAL BACKGROUND

The jury convicted defendant of attempting to commit the first degree murder (Pen. Code, §§ 187, subd. (a), 189, 664)¹ of Alejandro Muñoz (Muñoz). The jury also

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

convicted him of three counts of assault with a semiautomatic firearm (§ 245, subd. (b)) and one count each of willfully and maliciously shooting at an occupied building (§ 246) and gang-related street terrorism (§ 186.22, subd. (a)). The amended information had also charged him with the attempted first degree murder of Rafael Muñoz Flores (Flores), but the jury acquitted him of that charge.

The jury found true various enhancement or alternate penalty scheme allegations: that defendant committed all of the offenses except the gang-related street terrorism crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)),² that in all of the offenses except the section 246 violation he personally used a firearm (§ 12022.5, subd. (a))³, and, with respect to his attempted murder conviction, that he intentionally discharged a firearm (§ 12022.53, subd. (c)). The trial court sentenced him to 35 years to life imprisonment.

FACTS

I. *Prosecution Case*

The prosecution presented the following facts at trial. On the night of March 29, 2009, defendant, accompanied by his girlfriend Tara Meehan and his friend Robert Hornbeak, drove to a McDonald's restaurant in the Monterey County town of Prunedale. Defendant looked toward the well-lit interior of the restaurant and saw Muñoz and his brother Flores. Defendant was a member of the Norteño criminal street gang and recognized Muñoz as a member of the Sureño criminal street gang. He recognized

² The information did not allege the gang-benefit enhancement with regard to the gang-related street terrorism charge. This may be because section 654 forbids double punishment on the substantive crime (§ 186.22, subd. (a)) and the enhancement (*id.*, subd. (b)) in any event. (*People v. Louie* (2012) 203 Cal.App.4th 388, 391-392, 400-402.)

³ This finding caused the relevant convictions to constitute serious felonies (§ 1192.7, subd. (c)(8)) and violent felonies (§ 667.5, subd. (c)(8)) by operation of law.

Múñoz personally; in addition, Muñoz was wearing a blue sweatshirt, and blue is a color that Sureño gang members use to identify themselves.

Defendant reacted negatively to Muñoz's presence. Hornbeak wanted him to ignore Muñoz and let the car's occupants get something to eat elsewhere, but defendant, according to Hornbeak's testimony, said, "I'm gonna get this fool" or "I gotta get this guy." Defendant maneuvered his large vehicle out of the restaurant's drive-through lane, circled around in the parking lot, and parked by one of the restaurant's windows. He racked the slide of a gun he had in the car and fired one shot. It passed through the restaurant window, causing Muñoz, Flores, and a woman identified in court as Jane Doe to duck or drop to the floor. The restaurant manager, who was Muñoz's wife, called 9-1-1. She would later identify defendant as the vehicle driver in a photographic lineup and in court.

Sheriff's deputies arrested defendant at his residence. On the premises they found a gun, which was hidden in defendant's bedroom. The deputies also found a quantity of ammunition in the bedroom. They did not find defendant's vehicle on the premises, but found it a few days later on property on which a friend lived. It was "away from everything, out of sight" behind a tree and concealed by a tarpaulin and plywood sheets.

A criminalist who testified as an expert on firearms answered yes to the prosecutor's question whether the bullet recovered from the crime scene was in "very poor condition." The authorities did not attempt to match it to defendant's gun. The expert testified that the gun could not be fired until its slide had been pulled back to chamber a round. Because of a missing part, the gun could be fired with about one-third of the normal trigger pulling force needed. The "harder trigger pull [is] a safety measure," he explained, but this gun lacked the needed part. As a result, some 4.25 to 4.5 pounds per square inch of pulling force would discharge the weapon, whereas ordinarily about 12 pounds per square inch would be required. In general, however, the gun worked normally, and it was of "reasonably high quality."

Because defendant was the subject of a gang-related charge and numerous gang-related allegations, the prosecution presented evidence of his ties to the Norteño gang. A witness qualified as an expert in street gangs generally and the Norteños in particular testified that gangs like the Norteños have an honor-based culture and thus prize displays of dominance over other similar gangs and, conversely, take harshly to insults or other acts that they perceive as demeaning to them. The Norteños' archrival is the Sureño criminal street gang. The Norteños use certain motifs to identify and promote the gang. These include the number 14, the color red, the logos of the San Francisco Giants professional baseball team, and the iconic *huelga* eagle that is the symbol of the United Farm Workers agricultural labor union. (*Huelga* is Spanish for a labor strike.) Norteños also use tattoos and hand gestures to identify themselves and to intimidate or ward off other gangs.

Defendant bore a one-dot tattoo on one arm and a four-dot tattoo on the other, registering his identification with the Norteños' favored number 14 (the letter "N" is the fourteenth letter of the alphabet). In his bedroom sheriff's deputies found a red blanket with the logo of the San Francisco 49ers professional football team, red bandanas, a T-shirt with the *huelga* eagle, and CD-ROM covers with the title "Northern Cali Killas" (Cali being an abbreviation of California), and a man in red holding an Uzi machine gun. A cap modeled on the uniform of the New York Yankees professional baseball team was red instead of the Yankees' traditional blue. A San Francisco Giants cap was white with red letters instead of the Giants' traditional black and orange. Hornbeak testified that he was making prideful Norteño gestures to Muñoz and Flores before defendant fired his shot, and that Muñoz and Flores were laughing at Hornbeak for doing so.

Inside defendant's vehicle, sheriff's deputies found CD-ROM covers with the words "Northern Exposure," the *huelga* eagle, and one dot followed by four dots. According to the testimony of a sheriff's department detective, the CD-ROMs featured the performances of gang-associated musicians who performed music listened to by

Nortefio gang members. The friend who was hiding defendant's vehicle for him was dressed in a red shirt and red tennis shoes with red shoelaces when the deputies went to the property. The same detective testified that as he prepared to book defendant into jail, defendant "told me he was a Nortefio" for the jail's housing assignment purposes.

The prosecution's expert witness on gangs testified that in his opinion defendant was an active member of the Nortefios. The witness testified that defendant, despite his youth, had a long history of associating with the Nortefios in various parts of California and that he was an active Nortefio on the day of the crimes. He also testified that defendant fired the shot in the direction of Muñoz and Flores to promote the Nortefios' interests.

Questioned by sheriff's investigators following his arrest, in an interview that was recorded and played for the jury, defendant acknowledged that his gun discharged toward Muñoz and Flores, but insisted that he fired it "accidentally" and did not intend to shoot at anyone. He claimed that he did not rack the gun's slide to load a round into the chamber for firing. Defendant was acquainted with Muñoz and did not like him but "wanted [only] to fight him . . . [and] not shoot him" after seeing him at the restaurant. He denied making any gang gestures toward Muñoz and Flores.

II. *Defense Case*

The defense presented the following facts at trial, at which defendant testified on his own behalf.

Before defendant shot at Muñoz, the two exchanged insults outside the restaurant, although they were not gang-related. Nor did the two exchange gang signals. However, defendant knew that "they called him [Muñoz] a southerner," meaning a member of the archrival Sureño street gang. Defendant parked his vehicle and could see Muñoz, who was now inside the restaurant. Defendant and Hornbeak, still in defendant's vehicle, gestured to Muñoz to come outside, and Muñoz, who was seated and talking on a telephone, started laughing at defendant. "I got kind of mad," defendant testified, and so,

in what was “the worst mistake of my life,” “I got the weapon” “to show it to him,” meaning Múñoz. Defendant did this to “kind of fit in, to look tough.” “It went off,” defendant testified, but “I never meant for a bullet to be fired from that weapon.” “If I wanted to kill him, I could have kept shooting.” Defendant did not pull back the gun slide to chamber a round, so Hornbeak—who said he heard a semiautomatic gun being cocked from the area of the driver’s seat—must have misinterpreted the sound. Nor did defendant tell Hornbeak that he intended to “get this guy,” in the words of the prosecutor during cross-examination.

The reason defendant took his vehicle to another location, some three to four days later, was to have his friend’s father fix a damaged bumper.

Defendant admitted to being a Norteño gang member “[a]t one point” and retaining a degree of interest in the Norteños’ lifestyle and imagery, as shown by the paraphernalia found at his residence and in his car (although he associated the *huelga* eagle with the late César Estrada Chávez, the well-known labor leader who co-founded the United Farm Workers union, rather than with the Norteños); he had called himself a Norteño earlier in his life. But he denied being actively involved with any gang after “maybe [age] 17 at the latest.”⁴ For example, he acquired his Norteño dot tattoos at age 14, and only to be “cool.” Even when he considered himself an active Norteño, his activities consisted of “just girls, weed, and partying,” but not gang-related crimes. He might own more blue clothing than red and in general he had “real plain tastes, so I’m used to wearing . . . black shirts or white shirts and just regular jeans.” He also denied identifying himself as a Norteño during his jail booking. Instead, he had requested to be placed with the general population and not with the separate housing set aside for Norteños. In addition, he admitted to having juvenile delinquency adjudications and

⁴ Defendant was 18 years old when he fired the shot into the restaurant.

juvenile probation violations, and he acknowledged that a juvenile court judge had once imposed a gang-related probation condition "telling me that I had to stop hanging around with the group of friends that I [had]."

Defendant did not consider his friend Hornbeak to be a Norteño, but he knew, and for a while had associated with, at least five people in Monterey County whom he considered to be gang members or probable gang members. He obtained his gun in Visalia (Tulare County) "for protection" and ammunition for it because he had once been shot at in Prunedale and, regarding the gun itself, because "I thought it was cool" to have it.

Defendant was evasive in answering his lawyer's question whether his being fired upon had happened only shortly before his own gunplay at the restaurant, but he admitted that "it wasn't that long" beforehand. He further testified on direct examination that he told the sheriff's department detective who questioned him that he and the victim were rival gang members, and in his testimony he implied that he believed the victim was a Sureño: "I have some friends that . . . live by him, so they know him real well" and "[t]hey said that he might be a southerner." He amplified that he and the victim "just didn't like each other," and this was so "because a friend of mine that lives right next to him . . . has problems with him." He also testified that he had fired the gun before the fateful encounter at the restaurant and that it had not discharged accidentally before.

Hornbeak testified that he and defendant went to a residence after the shooting. Defendant handed him the gun but it started to fall from Hornbeak's grasp. Hornbeak squeezed the trigger inadvertently and the gun discharged. Hornbeak did not testify about the amount of gripping strength it took for this accident to happen.

DISCUSSION

I. *Claim of Repeated Instances of Prosecutorial Misconduct*

Defendant claims that the prosecutor repeatedly committed misconduct during his closing argument to the jury, in violation of state law and the due process guaranty

contained in the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, defendant asserts that the prosecutor, over defense counsel's repeated objections and despite admonitions from the trial court, committed misconduct as follows:

1. The prosecutor repeatedly stated that high-ranking California courts had found defendants guilty under facts similar to those here and implied that their decisions were a warrant for the jury to do the same.

2. The prosecutor improperly tried to shift the burden to defendant to prove that he fired the gun accidentally.

3. The prosecutor implied that, after speaking with his lawyer, defendant confabulated an account that he fired the gun accidentally. "This injected defense counsel's veracity and character into the trial, and denigrated [the defense lawyer] by implying he helped fabricate evidence." And the prosecutor made the same insinuation regarding accounts of how defendant obtained the gun.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] . . . [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Carter* (2005) 36 Cal.4th 1215, 1263, internal quotation marks omitted.)

Despite our quotation of this strong and morally freighted language, containing such adjectives as intemperate, reprehensible, egregious, and deceptive, the concept of

“prosecutorial ‘misconduct’ is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.” (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) No “showing of bad faith is required to establish prosecutorial misconduct in argument to the jury.” (*Ibid.*, italics deleted.) Thus, the rubric of prosecutorial misconduct embraces a prosecutor’s inadvertent and negligent objectionable statements to the jury as well as misstatements involving mental states more culpable than negligence.

The prosecutor’s closing arguments contained a number of unorthodox assertions:

1. The prosecutor repeatedly stated that the California Supreme Court and the California Court of Appeal had upheld guilty verdicts on facts similar to those before the jury;
2. The prosecutor implied that the case was not worth the bother of trying because it was open-and-shut, and that trying it was merely a formality legally required to obtain convictions that defendant obviously merited;
3. The prosecutor told the jurors that if any member of the jury failed to follow his or her oath, and, specifically, if a fellow juror failed to deliberate to the other jurors’ satisfaction, the dissatisfied jurors must report it to the trial court; and
4. The prosecutor argued to the jurors that because “the case continues to be investigated through trial” and the evidence now showed a charge of attempting to murder a third person, a customer at the restaurant, to be baseless, they should return a verdict of not guilty on that charge. This came as a surprise to the trial court, which mentioned during a break in the prosecutor’s argument that it had “denied . . . the motion to dismiss, under [section] 1118.1”—i.e., defendant’s motion for judgment of acquittal on that charge. The court granted a renewed motion to dismiss under section 1118.1, removing the question from the jury’s consideration.

A. *Presence or Absence of Prosecutorial Misconduct*

1. *Argument That Higher Court Decisions Counseled Defendant's Guilt*

We first consider the prosecutor's statements that the California Supreme Court and California Court of Appeal had upheld guilty verdicts on facts the prosecutor viewed as comparable to those of this prosecution.

The prosecutor first argued:

"The Defendant shot a gun at human beings who were in an occupied McDonald's restaurant. The shooting alone, by itself, clearly proves the intent to kill Alejandro [Múñoz] and Rafael [Flores]. Just that shooting alone. I'm not just saying that, the California Supreme Court says this. It says that the act of purposely firing a gun at another human being, at close range, provides the inference that the shooter acted with the intent to kill. The shooting alone proves the Defendant's intent. That's it. [¶] The Defendant's shooting into an occupied McDonald's at Alejandro and Rafael, proves his intent, proves that he wanted to kill Alejandro and Rafael. That's a low [*sic*]."

Soon afterward, the prosecutor argued:

"[H]e pulled that trigger while that gun was pointed at Alejandro and Rafael. That proves intent to kill.

"One shot, two victims, equals attempted murder. Based on the evidence that we had, that is enough. One shot, two victims, that's attempted murder for both those victims. [The] Supreme Court said, intent to kill two different victims can be inferred from evidence that the Defendant fired a single shot at the two victims, both of whom were visible to the Defendant. That's what we have here.

"Another, appellate—California appellate court said: Defendant's act of firing a .22 caliber rifle, toward a victim, from approximately 20 yards away, and in a manner that could have inflicted a mortal wound, had the bullet been on target, was sufficient to support an inference of intent to kill. The fact that the defendant was unsuccessful in

killing the victim, or abandoned his efforts after one shot, did not mean that he lacked the requisite intent. Kind of sums it up right there.”

Defense counsel did not object to these remarks when the prosecutor made them. During a break in the prosecutor’s argument counsel stated, outside the jury’s presence: “Judge, I wanted [*sic*] to make an objection, at this time, and, move for a mistrial, based on counsel’s referring to the Supreme Court and the courts of appeal, and stating language from those cases, as if they are part and parcel of this case. And I didn’t object at the time. [¶] It just caught me by surprise”⁵

The trial court responded to the mistrial motion at length. It acknowledged that “the Court’s opinion of that has always been that those are the type of discussions that should take place at the time of instructions,” and stated that it found this aspect of the prosecutor’s argument surprising, but it denied the mistrial motion, concluding that the prosecutor’s remarks were novel but ultimately dismissing the objection with the remark, “You learn something new every day.”

The parties did not cite any case, and we have found almost no case anywhere in the United States, that directly and substantively addresses the type of remarks the prosecutor made to the jury.

⁵ “As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety.” (*People v. Carter, supra*, 36 Cal.4th at p. 1263.) Defense counsel’s objection, though not immediate, was timely, because it came in time for the trial court to cure any harm made by the remarks. Hence, this is not a case in which a “defendant . . . forfeited his appellate claims of prosecutorial misconduct . . . by failing to object on those grounds in the trial court and by failing to seek an admonition to cure any harm caused by the alleged misconduct.” (*People v. McDowell* (2012) 54 Cal.4th 395, 436.) Thus, we need not address defendant’s contingent claim that if counsel’s objections were not timely, then he rendered ineffective assistance of counsel. Defense counsel fully protected defendant’s rights with respect to the instances of alleged prosecutorial misconduct he identifies on appeal.

We recognize that in *People v. Rich* (1988) 45 Cal.3d 1036, our Supreme Court “fail[ed] to see how [a prosecutor] committed misconduct by reading this passage” (*id.* at p. 1092) to the jury: “ ‘Our Supreme Court at one time made a statement about the felony murder rule which I think is appropriate. “The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker” ’ ” (*Ibid.*)

But *Rich* is distinguishable because the prosecutor there did not attempt to apply a legal principle to facts in a way that the prosecutor here did. He only enunciated a legal principle. Here, by contrast, the prosecutor counseled the jury that higher-level legal institutions had considered *facts* similar to those here and applied the law to those facts in ways not favorable to criminal defendants.

In *Rich*, moreover, the appellant complained of the prosecutor’s act “without explanation” (*People v. Rich, supra*, 45 Cal.3d at p. 1092) of why it might constitute misconduct and the Supreme Court dismissed the claim in a perfunctory manner, as it has done in other death penalty cases presenting myriad claims. (*People v. Myles* (2012) 53 Cal.4th 1181, 1223, fn. 16 [“a matter asserted in a perfunctory manner is not properly raised”]; *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8 [“We need not consider such a perfunctory assertion unaccompanied by supporting argument.”].) The Supreme Court’s riposte appears in a number of capital cases, in which the appellant’s opening brief may be the size of a telephone directory and present a panoply of claims, some of which may be presented solely to preserve the defendant’s access to review in the federal courts. (See *People v. Tully* (2012) 54 Cal.4th 952, 1075.) Because our Supreme Court did not provide detailed reasons for rejecting the perfunctory claim in *Rich*, we think it fair to construe the decision narrowly.

For the foregoing reasons, we do not find *Rich* dispositive of this case. Because it is not, we must look to other court decisions to guide us further in addressing defendant’s claim.

Our Supreme Court has disapproved of a prosecutor's closing argument that included a statement by the late United States Supreme Court Justice Byron White, in a dissenting opinion, that prosecutors are obliged to present the truth to juries but defense counsel are not. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 59-61; but see *People v. Carter, supra*, 36 Cal.4th at p. 1265 [declining to criticize a prosecutor for quoting Justice White on this point].) In *Hawthorne*, the court warned: "The trial court should not have sanctioned the prosecutor's comments. The closing statements of counsel should relate to the law and the facts of the case as each side interprets them. Whether or not attributed, the views expressed in Justice White's dissent interject an extraneous generalization, potentially diverting the jury's attention from the specifics upon which they must focus." (*Hawthorne, supra*, at p. 60.)

Hawthorne found the prosecutor's action harmless. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 61.) *Hawthorne*, however, may be distinguishable with regard to prejudice, because the prosecutor's remarks in that case amounted to a jibe at defense counsel and not an implication that the California courts would expect the jurors to find defendant guilty under the evidence presented.

In *Prieto v. Adams* (E.D. Cal. Nov. 22, 2011, No. 2:10-CV-750-JAM TJB) 2011 U.S. Dist. LEXIS 134980 (nonpub. opn.), a United States District Court magistrate considered a California state prisoner's petition for writ of habeas corpus. The prisoner, representing himself, argued that the prosecutor committed misconduct when he told the jury: "I want you to see how the law treats the idea of natural and probable consequences. And this is based on a fact situation that is somewhat similar, but not quite. . . . [¶] . . . [H]ere is the word of the Supreme Court. . . . '[T]he nature of modern gang warfare is quite different. When rival gangs clash today verbal talking quickly give way to physical violence and gunfire. No one immersed in gang culture is [un]aware of this reality. And we see no reason the Courts should turn a blind eye to this. Given the great potential for escalating violence during gang confrontation it is immaterial whether

one gang member specifically knew another gang member had a gun.’ [¶] The words of our Supreme Court. In that case it was the same idea. The defense will say, I didn’t know he had a gun. We were just going there to fight. The Supreme Court said in that same situation things have changed, ladies and gentlemen.” (2011 U.S. Dist Lexis 134980 at pp. *18-*20.)

The magistrate in *Prieto* recommended to the district judge that the prisoner’s claim not be considered on the merits. The prisoner’s claim was a narrow one: he discerned misconduct in the prosecutor’s invocation of the California Supreme Court, because the prosecutor was reading from a less authoritative California Court of Appeal case, namely *People v. Montes* (1999) 74 Cal.App.4th 1050 (see *id.* at pp. 1054-1056). The magistrate opined that counsel had not rendered ineffective assistance for failing to object. (*Prieto v. Adams, supra*, 2011 U.S. Dist Lexis 134980 at pp. *27-*29.)

The foregoing cases provide useful analogies or information, but the closest case we have found is an Indiana case called *Fritz v. State* (1926) 198 Ind. 229 [153 N.E. 408]. There, “the prosecuting attorney was permitted, over [the defendant’s] objection, to read to the jury and comment upon the opinion of the [Indiana] Supreme Court reversing the judgment in a former appeal of this identical case.” The Indiana Supreme Court concluded that this statement by the prosecutor “would present a very serious question if it were properly brought to our attention.” (*Ibid.*) But the court found the claim to be procedurally barred and declined to consider it on the merits. (*Ibid.*)

Defendant here argues that the prosecutor “improperly inject[ed] additional facts purportedly within his knowledge into the case, and usurp[ed] the court’s function to instruct the jury on the law, and the jury’s function to apply that law to the facts it determined.” He is correct that the remarks ran the risk of committing the usurpation he discerns. The California Supreme Court and the California Court of Appeal are, respectively, the highest and second-highest echelons of the state court system. The prosecutor erred in invoking their authority. He should not have invoked the authority of

any court that one or more jurors could surmise outranks the trial court. A fortiori, he should not have implied that the California Supreme Court would expect the jury to return a guilty verdict. This he did when he said: "The shooting alone, by itself, clearly proves the intent to kill Alejandro [Múñoz] and Rafael [Flores]. Just that shooting alone. I'm not just saying that, the California Supreme Court says this. It says that the act of purposely firing a gun at another human being, at close range, provides the inference that the shooter acted with the intent to kill. The shooting alone proves the Defendant's intent. That's it."

Although, as noted, we have found scant authority on this matter, we regard this problem as similar to the misconduct disapproved in *Caldwell v. Mississippi* (1985) 472 U.S. 320 (*Caldwell*). In *Caldwell*, "a prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court." (*Id.* at p. 323.) The prosecutor told the jury that "'your decision is not the final decision'" (*id.* at p. 325) because it "'is automatically reviewable by the [Mississippi] Supreme Court'" (*id.* at pp. 325-326). *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Id.* at pp. 328-329.)

In sum, "*Caldwell* error occurs . . . when the remarks to the jury concerning its role in the sentencing process are inaccurate or misleading in a way that allows the jury to feel less responsible than it should for the sentencing decision." (*People v. Elliott* (2012) 53 Cal.4th 535, 556.) Our own Supreme Court reached the same conclusion many years before *Caldwell*. In a case that also considered capital jury sentencing verdict issues, the court stated that "argument misinform[ing] the jury as to the power of this court" (*People v. Morse* (1964) 60 Cal.2d 631, 650, italics deleted) presents the risk that jurors would believe the high court "could substitute its judgment" (*ibid.*) for the jury's.

In this case, the risk is rather that jurors might believe the high court had already done the jury's work and made the jury's choice for it. Their commonality lies in the risk of telling the jury that its role is less significant than it is: in *Caldwell* because the Mississippi Supreme Court would reassess any decision the jury made to impose a death sentence, and here because the California Supreme Court or the California Court of Appeal would expect the jury to find defendant guilty under the facts the prosecution had presented.

Caldwell's holding was narrow inasmuch as the court's analysis rested on Eighth Amendment considerations that apply to the death penalty. (See *Caldwell, supra*, 472 U.S. at pp. 329-330.) The same may also be true of *People v. Morse, supra*, 60 Cal.2d 631. Nevertheless, along with the main parallel between those cases and this one, other observations that the *Caldwell* court made also apply to the situation before us.

Caldwell mentioned the obvious: "jurors often might not understand" "the institutional limits on what an appellate court can do." (*Caldwell, supra*, 472 U.S. at p. 330.) The jurors here may have thought that appellate courts are allowed to reverse jury verdicts of acquittal or are allowed to send messages telling juries what to do in particular cases.

Caldwell identified another risk: that a jury "might . . . wish to 'send a message' of extreme disapproval for the defendant's acts." (*Caldwell, supra*, 472 U.S. at p. 331.) Again, *Caldwell* had in mind the decision whether to impose a death sentence, but the point remains valid in any case in which prosecutorial remarks create a risk that the jury will conclude that a high court is assuming some responsibility for the jury's decision. A witness testified in this case that there were some 6,000 Norteños in Monterey County and "in the neighborhood of" 120,000 Norteños or Norteño associates in northern California. Those are alarming and probably surprising statistics, which the witness soon followed by explaining that the Norteños' crimes include "robbery, carjacking, murder, weapons [possession], narcotic sales, identity theft, [and] kidnapping." Such dramatic

testimony could help nudge jurors toward embracing the prosecutor's argument for convicting defendant even if they had misgivings about the state of the evidence, if they felt that the verdicts to be rendered had already been settled to some extent by the California Supreme Court or Court of Appeal.

The foregoing risk was made all the greater by the prosecutor's remark, in effect, that the state was just going through the motions in trying defendant because the case against him was so strong. He said, "We are here because the Defendant has this right to this process. And it's a right that everybody in this country has, and it's a right that should never be given up. And that is the only reason we are here, because he has this right." He reiterated shortly after the foregoing remark that "the only reason he was here [*sic*], is just because the Defendant has this right. The Defendant also has a right to an attorney [Defense counsel] is a very good attorney, and he's done the best he can . . . with this case. But the fact is, you're only as good as your case. I even admit that as a prosecutor, we're only as good as the facts that we have. This was a very good case. We had a lot of evidence."

Still another risk *Caldwell* identified is that a "capital sentencing jury"—but this may be said of many juries considering serious felony charges—"is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die"—or, as in this case, another's penal fate short of a death sentence—"and they are asked to decide that issue on behalf of the community. . . . [¶] This problem is especially serious when the jury is told that the alternative decision-makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a 'right' to make such an important decision than has the jury." (*Caldwell, supra*, 472 U.S. at p. 333.) Little more need be added to this observation except that the prosecutor's

remarks about the California Supreme Court and Court of Appeal created similar risks here.

In one respect, the prosecutor's remarks posed a greater risk than did the remarks that *People v. Morse*, *supra*, 60 Cal.2d 631, disapproved. In *Morse*, the court could take comfort in its reflection that "[w]ords of instruction of the trial judge are more likely to effect prejudice than the words of argument of the prosecutor." (*Id.* at p. 650; see also, e.g., *People v. Thornton* (2007) 41 Cal.4th 391, 441.) But that axiom can be carried only so far and remain meaningful. If one or more jurors knew that the California Supreme Court and Court of Appeal outrank the trial court, that axiom would lose its vigor, because they might understand the prosecutor's argument as inviting them to follow higher authority, as he interprets it, rather than the trial court's instructions.

In sum, invoking the authority of the higher courts as the prosecutor did constituted error. We will discuss prejudice *post*, at pages 21-23, where we conclude that this error was harmless.

2. *Argument Regarding Evidence of Accident*

With regard to the burden of proof about defendant's mental state, the prosecutor argued:

"Obviously, you know the defense. It was just an accident. . . . [But] all you're left with is his self-serving, incredible, unreliable, unbelievable statement. That's it. There's no other evidence.

"And when [defense counsel] gets up here and argues to you, you ask for him to fill in this part of it, ask for him to fill this in with the facts, with the evidence that proved that."

Defense counsel moved for a mistrial. The trial court reserved ruling on the objection and invited the prosecutor to "continue on with proper argument."

During a break in the argument and outside the jurors' presence, the trial court denied defendant's motion for a mistrial. The court stated: "The Court is confident that

the instructions that have been read to the jury emphasize and repeat, on a number of occasions, the fact that the burden is solely with the Prosecution.”

When argument resumed, the prosecutor argued: “[W]e don’t have any evidence showing that there’s an accident. [¶] There is no issue.” “[W]here is the evidence? [¶] Where is the evidence for the column on the right-hand side[?]” The prosecutor was referring to what appears to have been a display in the courtroom that showed the prosecution’s summation of the state of the evidence.

Defense counsel again objected and the trial court responded by telling the jurors that “as we have said throughout the trial, . . . the Prosecution has the burden of proving each and every element, in this particular case, which includes intent and all the other elements. The Defense does not need to prove anything in this particular case.”

The prosecutor resumed: “Once again, if that evidence was there, if there actually was evidence of an accident, [defense counsel], as good an attorney as he is, would have presented it, but there is no evidence. We [don’t] hear any evidence that there was an accident, because it was not there, because it was not an accident.” Defense counsel again objected, again unsuccessfully.

This comment did not amount to prosecutorial misconduct. There is “ ‘[a] distinction . . . between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.’ ” (*People v. Thomas* (2012) 54 Cal.4th 908, 939.) The former is permissible because a prosecutor generally is permitted to remark on the state of the evidence at closing argument. (E.g., *People v. Weaver* (2012) 53 Cal.4th 1056, 1077.) “[T]he prosecutor may comment ‘ ‘on the state of the evidence, or on the failure of the defense to introduce material evidence or call logical witnesses’ ” (*People v. Carter, supra*, 36 Cal.4th at p. 1277.)

Under these principles, the Supreme Court rejected a claim similar to defendant’s, including a reference to blanks on a chart, in *People v. Redd* (2010) 48 Cal.4th 691.

There, the prosecutor repeatedly challenged the basis for the defense theory. He remarked: “ ‘I have a blank paper because I’m not sure exactly what the defense is yet. I’m going to sit here like you and listen to [defense counsel]. I don’t know what he’s going to say.’ ” (*Id.* at p. 739.) Later, the prosecutor jibed that he was “ ‘waiting to hear what the defense was.’ ” (*Ibid.*)

Redd rejected a claim that the foregoing remarks shifted the burden of proof to the defendant. “[T]he prosecutor’s comments merely highlighted his observation that there seemed to be no coherent defense to the charges” (*People v. Redd, supra*, 48 Cal.4th at p. 740), which, although *Redd* did not say so explicitly, was a permissible comment on the state of the evidence.

To be sure, the prosecutor’s argument at one point that there was no evidence that defendant’s discharge of the gun was accidental was belied by defendant’s testimony and his statement to police, in which he maintained he did not intend to fire the gun. But at the outset the prosecutor acknowledged defendant’s testimony that the shooting was accidental, while dismissing it as “self-serving, incredible, [and] unreliable.” In our view, the prosecutor was arguing that there was no evidence of accident beyond defendant’s self-serving statements, including the one that the prosecutor had acknowledged earlier in the argument. There was no misconduct under the circumstances as far as this claim is concerned.

3. *Argument About Defense Counsel’s Role in the Case*

Defendant’s argument that the prosecutor implicitly accused defense counsel of helping defendant change his story in order to render a false account of events also does not rise to the level of prosecutorial misconduct. The prosecutor argued, over defendant’s objection, that defendant “wouldn’t tell [the authorities] where he got” the gun but then “his attorney comes forward and he says[,] Well, I’d better tell you, I got it from Casper” He also argued, over defendant’s objection, that “[w]e know it wasn’t an accident.”

“[H]e gets up there and tells you on the stand” that he fired the weapon accidentally but “[n]ot once did he say to the police it was an accident. He doesn’t say that once.”

To the extent that the garbled reference to “Casper” communicated anything to the jury at all, the prosecutor was not accusing defense counsel of encouraging defendant to make false statements, but rather was attempting to comment that defendant changed his story. The same is true of the prosecutor’s statement that defendant’s claim that he accidentally discharged the gun was a newfound assertion. “The prosecutor did not directly accuse defense counsel of encouraging defendant to lie, but even to the extent the statements swept counsel up in defendant’s asserted lies, this was not an improper comment in the context of this case, in which defendant’s story changed drastically during trial preparations.” (*People v. Rundle* (2008) 43 Cal.4th 76, 163, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

4. *Argument That Defendant Never Told Police the Shooting Was Accidental*

At oral argument, counsel for both parties observed that the prosecutor misspoke by arguing that defendant did not tell the police the shooting was accidental, when in fact he did, as the interview transcript shows. As noted, the prosecutor argued, “[n]ot once did he say to the police it was an accident. He doesn’t say that once.” This was an erroneous description of the evidence and by definition constituted misconduct, i.e., prosecutorial error (*People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1). Contrary to the prosecutor’s statement and as also noted, defendant maintained during the police interview that he did not intend for the gun to discharge and that he fired it “accidentally.”

B. *Prejudice*

As stated, the prosecutor committed misconduct in arguing that the California Supreme Court and the California Court of Appeal had affirmed convictions on facts similar to those of this case and that defendant did not tell the police he discharged the gun accidentally. The prosecutor’s actions were, however, harmless under any

standard—under that of *Chapman v. California* (1967) 386 U.S. 18, 24, applying to infringement of federal constitutional guaranties, and which requires that the state show that the error was harmless beyond a reasonable doubt, and that of *People v. Watson* (1956) 46 Cal.2d 818, 836, applying to errors under state law, in which a defendant must show that there is a reasonable probability that, but for the asserted error, the outcome would have been more favorable to him or her. The case against defendant was strong. There was no obvious reason for defendant to fire a gunshot at another person merely because that individual and a neighbor whom defendant knew did not get along. Rather, the evidence was that defendant, a Norteño street gang member, knew that Muñoz, one of the three victims, was a rival Sureño street gang member. Defendant told his passengers that he was going to confront Muñoz. Instead of entering the restaurant to fight Muñoz, as defendant's self-serving statements about intent would have it, defendant parked his car, looked through the restaurant window at Muñoz and his brother Flores, and fired a round with sufficient accuracy that it penetrated the window, although it failed to wound either man.

The prosecutor's references to higher courts ran the risk of being perceived as conveying instructions that conflicted with those given by the trial court. This possibility requires us to consider defendant's claim, at least in passing, as one of instructional error, even though the objectionable words came from the prosecutor and not the trial court.

We recognize that there was at one time, and may still exist, a view that even strong evidence can seldom overcome certain types of instructional error for purposes of prejudice analysis—at least those that “effectively prevent the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt.” (*People v. Flood* (1988) 18 Cal.4th 470, 491.) Doing so would mean that the reviewing court, not the jury, was assessing the facts of the case and, in effect, improperly trying the defendant, thereby violating the defendant's Sixth Amendment right to jury trial. (*People*

v. *Hagen* (1998) 19 Cal.4th 652, 682 (conc. and dis. opn. of Kennard, J.); *People v. Concha* (2010) 182 Cal.App.4th 1072, 1086, fn. 9.)

If we evaluate defendant's claim through the prism of instructional error, we must still find the error harmless, because the California Supreme Court has held that, under United States Supreme Court precedent, sufficiently strong evidence may overcome the aforementioned types of instructional errors for purposes of prejudice analysis. (*Flood*, *supra*, at pp. 497-503; see *Concha*, *supra*, at pp. 1085-1086.) Thus, the prosecutor's action in referring to the higher courts of California was harmless under *Chapman*, *Watson*, or *Flood*.

II. *Admitting Ballistic Evidence and Refusing a Jury Visit to the Crime Scene*

Defendant claims that the trial court erred under state law by allowing the prosecution to introduce evidence regarding the gun's firing characteristics and the bullet's path, and by excluding his motion to have the jury view the crime scene. We disagree.

"On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence . . .'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

A. *Test-firing the Bullet*

An investigator testified that he test-fired appellant's pistol six times and made a video recording of one of the experiments. On the ground of irrelevance, defendant objected to the video's being considered at trial, but the trial court overruled his objection and the video was played in the courtroom and eventually admitted into evidence. After the verdicts came in, defendant filed a new-trial motion in which he contended that it was error to admit the video into evidence. The court denied the motion.

The purpose of playing the video recording was to provide evidence that the pistol was operable, despite evidence favorable to defendant of the modification that reduced

the force required to squeeze the trigger by two-thirds. The trial court did not abuse its discretion in allowing the video recording to be played and admitted into evidence. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 950.) Defendant's claim is without merit.

B. *Showing a Possible Bullet Path From Defendant's Vehicle*

Defendant also objected to the proposed admission of photographs showing his vehicle, the restaurant window, and orange tape leading from the former to the latter, thereby illustrating a possible path that the bullet could have taken. The trial court overruled his objection but told the jury: "[Y]ou do need to understand that this re-creation is merely a general re-creation. It is not the Court's impression that it is meant with any particular specificity, other than location of the vehicle and the general location according to testimony or statements previously made."

The trial court did not abuse its discretion in overruling defendant's objection. It was reasonable to permit the prosecution to introduce evidence that would help the jury understand the range of angles under which the bullet must have pierced the restaurant window. The defense was accident, and this evidence countered that defense by showing that the bullet went in a limited direction among all possible directions in which it could have gone if accidentally fired. The bullet did not go through the vehicle roof, into the ground, into a wall, or toward a remote location never to be found, but went through the window through which defendant could see Múñoz and Flores, broke the window, and was found inside the restaurant.

People v. Gonzales, supra, 38 Cal.4th 932, addressed and rejected a similar claim. There, the defendant contended that "the court should have excluded [a] photograph as irrelevant and, if relevant, unduly prejudicial under Evidence Code section 352 because it was misleading in three respects: (1) the location of the photographer was unknown, (2) Detective Rodriguez was taller than the gunman, and (3) the photograph was taken with a flash so it did not show the actual lighting conditions." (*Id.* at p. 950.) *Gonzales* explained that " '[t]he trial court has broad discretion both in determining the relevance

of evidence and in assessing whether its prejudicial effect outweighs its probative value.’” [Citation.] . . . As the trial court noted, the photograph was offered to show where the witnesses had said the gunman was standing. It was clearly probative on this point even if the exact position of the photographer was not known. It was not offered to show the height of the gunman or the lighting conditions. . . . Hence, the court acted within its discretion in admitting the photograph as illustrating where the witnesses placed the gunman.” (*Ibid.*)

C. *Denying Motion for Jury View*

Defendant filed a pretrial motion requesting a jury view of the shooting scene. Ultimately, near the end of trial and after discussing the motion with the parties, the trial court denied the motion, stating: “The Court has viewed all of the exhibits and the diagrams, the photographs, and everything that has been shown to the jury, at this time, to try to orient them and familiarize them with the area of McDonald’s, the surrounding area and the interior of McDonald’s, and the Court, at this time, does not feel that a site visit is warranted, based upon the nature and the number of photographs that the jurors have to use. Part of this decision is based upon the fact that that window—the window, in question, is no longer there, obviously.”

In the new-trial motion mentioned above, defendant reargued the issue, but as noted, the trial court denied that motion.

Penal Code section 1119 provides in pertinent part:

“When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred . . . it may order the jury to be conducted . . . to the place”

“Whether to permit the jury to view the scene of a crime falls within the court’s discretion, reviewable for abuse.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

No abuse of discretion occurred. The jury heard extensive testimony about the crime scene. It saw pictures showing the spatial relationship between defendant’s vehicle

and the restaurant window. The trial court noted this in support of its ruling, and given the accuracy of its statement, it cannot be said that its decision fell outside the bounds of reason. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 88.)

III. *Sufficiency of the Evidence for Gang Benefit Allegations and Conviction*

Defendant claims that the evidence was insufficient for the jury to find true the gang benefit allegation and to convict him of street terrorism. We disagree.

A. *Gang Benefit Allegations*

As noted, the jury returned true findings on allegations that defendant committed all of the offenses, except the gang-related street terrorism crime, for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains 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. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ [Citation.]” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

The pertinent part of subdivision (b)(1) of section 186.22 penalizes “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members”

There was ample evidence of defendant’s Norteño connections and of the value to the gang of his shooting at a member of the rival Sureños. Defendant picks at aspects of

the testimony of the prosecution's gang expert, identifying some of them as irrelevant, distracting, or otherwise substantially more prejudicial than probative (Evid. Code, § 352), and essentially calling the testimony conjectural and without evidentiary support. (See *People v. Moore* (2011) 51 Cal.4th 386, 405-406.) But considering the testimony as a whole, which we must do for purposes of sufficiency-of-the-evidence analysis, even if defendant is correct about some aspects of the expert's testimony, other aspects were valuable. The gravamen of the expert's testimony was an explanation of the Norteños' honor-based culture, their rivalry with the Sureños, and the motifs that active Norteño members use to identify themselves. This provided valuable background for other witnesses' testimony about defendant's possession of a wide variety of Norteño paraphernalia and his admission to the sheriff's detective that he was a Norteño. In addition, as we have noted, defendant knew Muñoz to be a Sureño, Muñoz was dressed in the blue Sureño color when defendant shot at him, and there was no obvious reason for one person to shoot at someone he barely knew on the basis defendant gave for committing this crime, i.e., that Muñoz's neighbor, who was a friend of defendant, and Muñoz did not like each other.

B. *Criminal Street Gang Terrorism Conviction*

As noted, defendant was convicted in count eight of criminal street gang terrorism in violation of subdivision (a) of section 186.22. In pertinent part, this provision punishes "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" "As the statutory text indicates, the gang crime has three elements: (1) '[a]ctive participation in a criminal street gang, in the sense of participation that is more than nominal or passive,' (2) 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and (3) 'the person "willfully

promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” [Citation.]’ [Citation.]” (*People v. Mesa* (2012) 54 Cal.4th 191, 197.)

“In reviewing a criminal conviction challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]’ ” (*People v. Streeter* (2012) 54 Cal.4th 205, 241.)

There was sufficient evidence of the elements of the crime. We have described the ample evidence that defendant was active in the Norteños. Regarding the second element of the crime, defendant insists that his Norteño-related activities were not those of a full-fledged member and that there was no evidence he knew what the Norteños were about. The evidence that defendant knew about the nature of the Norteño organization, however, comes from the array of gang paraphernalia he possessed, his prior probation condition to avoid gangs, and, most stark of all, his willingness to shoot at a Sureño⁶ for no good reason. Regarding the third element, the gang expert’s testimony sufficed to establish that defendant shot in the direction of Muñoz and Flores to promote the Norteños’ interests.

IV. *Cumulative Error*

Finally, defendant claims that his due process right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution was violated because of the cumulative effect of the trial court’s errors and the prosecutor’s misconduct during closing argument.

⁶ As described, in his testimony defendant implied that he believed the victim was a Sureño.

A claim of cumulative error is in essence a due process claim and is often presented as such (see, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 911). “The ‘litmus test’ for cumulative error ‘is whether defendant received due process and a fair trial.’” (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Taking all of defendant’s claims into account, we are satisfied that he received a fair trial, although we agree that the prosecutor should not have invoked the authority of the California Supreme Court and the California Court of Appeal during closing argument and misstated the evidence at one point by arguing that defendant never told the police the shooting was accidental. “‘[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.’ [Citation.] The few errors that occurred during defendant’s trial were harmless, whether considered individually or collectively. Defendant was entitled to a fair trial but not a perfect one.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) We deny this final claim.

DISPOSITION

The judgment is affirmed.

Márquez, J.

I CONCUR:

Elia, Acting P. J.

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Mihara, J., Concurring in the Judgment.

I agree with my colleagues that the prosecutor's comments regarding the California Supreme Court and the California Court of Appeal were inappropriate and amounted to prosecutorial misconduct but did not prejudice defendant.

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.

[Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (People v. Rundle (2008) 43 Cal.4th 76, 157 (Rundle), disapproved on another ground in People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22.)

It is only where the trial was fundamentally unfair that we evaluate any error under the federal standard; otherwise, we apply the state law harmless error standard of review. (People v. Adanandus (2007) 157 Cal.App.4th 496, 514-515.) Under the state law standard, reversal is required "only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (Watson, supra, 46 Cal.2d 818, 836)." (People v. Breverman (1998) 19 Cal.4th 142, 178.)

Defendant takes issue with three comments by the prosecutor referring to the California Supreme Court and the California Court of Appeal. The first comment was the prosecutor's statement that the California Supreme Court had decided that an

inference of intent to kill arises from the act of firing a gun at another from close range. His second comment was that the California Supreme Court had decided that the intent to kill two different victims "can be inferred" from evidence that the defendant fired a single shot at two visible victims. The third comment was that the California Court of Appeal had decided that a defendant's act of firing a "rifle" toward a victim from 20 yards away in a manner that could have inflicted a mortal wound if the bullet had reached its target "was sufficient to support an inference of intent to kill."

The legal substance of the prosecutor's comments was not inaccurate. (*People v. Perez* (2010) 50 Cal.4th 222, 230, 233 (*Perez*); *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) The prosecutor was entitled to argue to the jury that the evidence was sufficient to support an inference of intent to kill. However, the prosecutor's attempt to characterize his arguments as holdings by the California Supreme Court and the California Court of Appeal was completely improper and had the potential to create a misimpression that these courts had signaled their agreement with the prosecutor's arguments about the facts of this case.

Although the prosecutor's comments in this regard were improper, they did not amount to federal constitutional error because they did not so infect the entire trial with unfairness that due process was violated. (*Rundle, supra*, 43 Cal.4th at p. 157.) The improper references were brief and were not inflammatory. Because they occurred during argument, and the jury was instructed that argument was not evidence, the improper comments had little potential to compromise the fairness of the trial as a whole.

Still, the prosecutor's comments were deceptive, and they therefore constituted state law error, which would merit reversal if it were reasonably probable that defendant would have fared better in their absence. Here, reversal is not merited. These brief, noninflammatory comments were unlikely to deceive a jury that was

given copious instructions on the burden and standard of proof and on its responsibility to determine whether defendant harbored the required intent to kill. Notably, the jury acquitted defendant of the second attempted murder count even though the prosecutor argued that the California Supreme Court had ruled that an intent to kill two victims could be inferred from evidence that a single shot was fired at two visible victims, as occurred here. Under these circumstances, and in light of the very strong evidence that defendant in fact harbored the requisite intent to kill, it is not reasonably probable that the prosecutor's comments influenced the result. For these reasons, I agree with my colleagues that these comments do not merit reversal.

Mihara, J.

People v. Jasso
H037099

Trial Court:

Monterey County
Superior Court No.: SS091101

Trial Judge:

The Honorable Stephen A. Sillman

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