THE PEOPLE v. JORGE ALFONSO AYALA

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Court of Appeal, Second District, California.

THE PEOPLE, Plaintiff and Respondent, v. JORGE ALFONSO AYALA et. al.  Defendants and Appellants.

B216952

Decided: December 22, 2010

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Alfonso Ayala. Richard T. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant Oscar Camilo Escobar. Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Jorge Alfonso Ayala (Ayala), also known as Jorge Ayala Bribiesca, and Oscar Camilo Escobar (Escobar) appeal from the judgments entered upon their convictions by jury of first degree murder (Pen.Code, § 187, subd. (a), count 1),[1](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_1) kidnapping to commit another crime (robbery) (§ 209, subd. (b)(1), count 2), kidnapping for carjacking (§ 209.5, subd. (a), count 3), kidnapping (§ 207, subd. (a), count 4), and second degree robbery (§ 211, count 5).   As to both appellants, the jury found to be true as to count 1 the special circumstance allegations that the murder was committed (1) while engaged in a robbery (§ 190.2, subd. (a)(17)(A)), (2) while engaged in a kidnapping (§ 190.2, subd. (a)(17)(B)) and (3) while engaged in carjacking (§ 190.2, subd. (a)(17)(L)) and, as to counts 2 through 5, the allegations that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1) and appellants personally inflicted great bodily injury within the meaning of section 12022.7.   Ayala admitted the allegation that, at the time of the charged offenses, he was out of custody on bail within the meaning of section 12022.1.   The trial court sentenced Ayala to an aggregate state prison term of life without the possibility of parole, plus two consecutive life sentences, plus six years eight months and Escobar to an aggregate state prison term of life without the possibility of parole, plus two consecutive life sentences, plus four years eight months.

Each appellant joins in the contentions of the other to the extent applicable.  (Cal. Rules of Court, rule 8.200(a)(5);  People v. Stone (1981) 117 Cal.App.3d 15, 19, fn. 5.) They contend that (1) admission of testimonial hearsay violated their right to confrontation under the Sixth Amendment;  (2) if the claim in number (1) is forfeited, then they suffered ineffective assistance of counsel, (3) the trial court erred in allowing admission of (a) gang-related evidence, (b) speculative evidence of the location of the murder weapon, and (c) evidence of weapons and ammunition unrelated to the charged offenses, (4) they suffered ineffective assistance of counsel by reason of their attorneys' failure to object to (a) prosecutorial misconduct, (b) admission of evidence of unrelated weapons and ammunition, and (c) on constitutional grounds to testimonial hearsay, (5) the erroneous admission of evidence on rebuttal violated their rights to due process, (6) the trial court committed reversible error in finding a witness unavailable so as to allow into evidence his prior testimony, (7) admission of Ayala's incriminating statement constituted Aranda [2](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_2) /Bruton [3](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_3) error, violating Escobar's right to confront and cross-examine a key witness against him, (8) the cumulative effect of the combined errors prejudiced their right to a fair trial, (9) the matter must be remanded for several sentencing errors, including that (a) the kidnapping conviction must be reversed because it is a lesser included offense of kidnapping for robbery, (b) the trial court erred in failing to stay sentencing on counts 2 and 3 pursuant to section 654, (c) the parole revocation fine must be stricken, (d) the penalty under section 1464 was inappropriate, (e) the security fee must be recalculated, and (10) the abstract of judgment must be corrected to reflect the actual sentence imposed.   Escobar adds that (11) he is entitled to an extra day of presentence credit.

The judgments are modified and affirmed.

FACTUAL BACKGROUND

The prosecution's evidence

The charged offenses

On January 24, 2007, Pedro Soto (Soto), a drug dealer, received a telephone call from Susan Swancutt (Swancutt), a drug addict, wanting to purchase drugs.   She asked Soto to send Jose Macias (Macias), one of her regular “connect[s],” to meet her.   Soto telephoned Macias and told him to go to a doughnut shop in the 2600 block of Firestone Boulevard, in the City of South Gate, to make the drug sale.

At approximately 5:30 p.m., after receiving Soto's call, Macias left his house, wearing a gold necklace and crucifix, that he always wore.   His live-in girlfriend, Karina Medrano (Medrano), had given it to him.   The pendant had belonged to Medrano's ex-husband, and the chain had a distinctive thin area as a result of repairs.   Macias drove Soto's pickup truck (Soto's truck), with Soto's permission.

Swancutt asked Rebecca Fuller (Fuller) to go with her to meet Macias because Swancutt was suffering drug withdrawal symptoms and feared Macias would force her to perform sex acts in return for selling her drugs.   As they were leaving, they came across Ayala and Escobar, who Swancutt knew as “Trips” and “Listo,” respectively.   Swancutt gave them a ride and dropped them off near where she was to meet Macias.   She parked and, while Fuller remained in the car, walked to a white pickup truck in which Macias was waiting.   Swancutt was sick from drug withdrawal, had blurred vision, anxiety, depression, pain and was vomiting.   Fuller saw Swancutt get into the truck and saw someone she could not identify in the driver's seat, but she saw no one else because the truck had tinted windows.   She did not see appellants enter the truck.

According to Swancutt, appellants approached the van from both sides, each holding a gun.   One pointed a gun at the driver and the other at her, ordering her into the backseat.[4](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_4)  Escobar got into the front passenger seat and Ayala into the back, behind Macias, who was ordered to drive.   Macias told the men, “Take whatever you want[.]  [T]ake the car.   Just leave me.”   Swancutt saw appellants take a wallet and necklace from Macias.   She asked appellants to let her out.   At first they refused, but later did so, some blocks away.   Swancutt testified at trial that appellants, the same men to whom she had given a ride, were the robbers.[5](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_5)

Approximately 45 minutes later, in need of a fix, Swancutt ran back to her car and told Fuller that she and Macias had been robbed by appellants, with guns.[6](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_6)  Swancutt telephoned Soto and told him that she had been robbed of the $100 she brought with her for the drug purchase by two men with guns.[7](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_7)  Swancutt then drove Fuller home.

Discovery of Macias's body

On January 24, 2007, at approximately 7:45 p.m., a security guard on patrol at a dark, secluded pumping station saw a white truck with its back parking lights on and shattered front passenger window.   At 8:40 p.m., during a second round of the pumping station, the guard saw that the truck had been moved, the rear passenger door on the driver's side was open, and a person under a blanket inside, moved.   The reverse lights came on.   At 10:18 p.m., a second security guard saw the white truck with its brake lights on, and a dead “body thrown on the chair.”   The police were called.   Macias was in the truck, had been shot 20 times from a distance of one foot or less and died from his wounds.   The cluster of wounds appeared to be traveling from back to front, left to right, and upwards.

Investigation

Near 12:45, a.m., January 25, 2007, Detective Hugo Cortes and his partner, Detective Mark McGuire, arrived at the crime scene, an area that “is basically a dirt lot that's ․ used for the residents who own horses.”   Detective Cortes noticed “CVS” (Compton Varrio Segundo) gang graffiti in the area.   Approximately 20 bullet casings and one projectile were found in and around Soto's truck.   All of the casings were nine-millimeter.   The truck had been rifled through, the keys were still in the ignition, the truck was in drive, and the lights were on, but dim.   A pair of sunglasses was recovered from the rear floorboard of the truck, underneath the seat, on the driver's side, and a set of keys that included “two Dodger keys” was recovered from the rear right side of the truck's bench seat The detective tested the keys at a number of locations, including Ayala's grandmother's residence.   They did not open the doors at any of the locations.   Detective Cortes also recovered a cell phone in the street, near the truck, and another from inside the truck.

Within weeks after the murder, appellants were identified in photographic lineups.   Fuller identified Listo (Escobar) from a six-pack and selected two people.   Swancutt picked “Listo” from a photographic six-pack, stating, “I think its him, Listo, but I'm not 100 percent certain.”   She also picked “Trips” (Ayala) in another six-pack.   She said they were the robbers.

Ayala's phone calls from jail were monitored and recorded.   He placed four calls to his grandmother's house, speaking with different individuals each time.   In each call, he referred to a white sock in his green backpack.   In the first call, he told the person to remove it from the house and to get his pants “just in case.”   He was told that his mother had taken the clothes.   In the second call, he told someone to look in his green backpack, and was told that his mother had already taken care of it.   In the third call, he told “Kiki” to tell police they were at a club until 2:00 a.m. and to go to his mother's house and see if the sock was in his green backpack.   Ayala's aunt got on the line and said, “[W]e already found that.”   Ayala told her that Maria would pick it up.   In the final call, he told “Ana” to call Liz and tell her that if she speaks to the police to say they were together until 2:00 a.m. and that her father had given him a ride home.   He told Ana to find the green backpack with the white sock, and the “toy” would be inside the sock.   If Maria came over, Ana should give it to her.   Ana said that Gabino had the toy and “stash[ed] it.”

Ayala also placed a call to Maria Delvillar (Delvillar) and asked her to pick up a green backpack from his mother's house and to look for a white sock inside.   He told her to take it to her house and keep it until he got out of jail.   Delvillar never did.   She believed it held a gun.

Detective Cortes, believing that the gun used in the murder would be found in the white sock, searched Ayala's mother's home and found a green duffle bag that was not there during the previous searches.   It contained only male clothing.   A search of Delvillar's residence failed to yield any relevant evidence.

Phone records were obtained which showed that a call was made from Macias' cell phone to Escobar's stepfather's phone at 8:46 p.m., on January 24, 2007.

Appellants' arrest

On January 28, 2007, at approximately 11:00 a.m., Sergeant Chris Ferrari was on Orange Avenue and saw Ayala tagging a light standard and garbage can “CVS,” with a spray can.   The next day, Detective Abel Morales saw Ayala outside his grandmother's residence, wearing a blue Dodger jacket and blue and white scarf.   Escobar approached Ayala, and they spoke until they both entered a blue Chevy pickup truck and drove away.   Detectives followed and stopped the Chevy truck, which was being driven by Jose Camacho (Camacho), and arrested the three men.

Camacho testified that immediately before the arrest, Ayala told him that “we jacked” a “pisa” (meaning Mexican) “for his gold chain.”   Escobar said nothing in response to Ayala's statement.   After their arrest, Camacho saw a gold chain around Escobar's neck.

Searches of appellants' residences

After appellants' arrest, Detective Morales went to Ayala's residence on Orange Avenue, where Ayala lived some of the time with his grandmother, to await a search warrant.   On the porch, the detective noticed a steak knife and booked it.   Sergeant Ferrari, also standing on the porch, saw a potted plant with a black object in the leaves.   He pulled it out and saw that it was a nine-millimeter gun magazine, containing live ammunition.   Detective Kris Nelson assisted in the search of the perimeter of the house, and saw a junk-filled, inoperable car parked on the side of the house.   On top of the driver's side front tire, the detective found a baggie of ammunition, which appeared to be .357 Magnum.   Behind the driver's seat, the detective found a black pellet gun.

The same day as the search of the Orange Avenue address, a search of Ayala's mother's residence on San Luis Avenue was conducted and yielded, among other items, the lid to a box of ammunition for a nine-millimeter Luger, the same brand as some of the casings found at the crime scene, an unloaded magazine clip to a small-caliber handgun, papers with CVS graffiti and the name “Trips” on CD's. Ayala's mother tried to hide a black pouch containing a variety of different types of ammunition, when police searched the bedroom.   Nothing was found that could be traced to Soto's truck.

A few days later, a second search was conducted at Ayala's mother's residence.   Nothing was found except a white T-shirt, tennis shoes and a $100 bill, all with possible blood stains on them.

Escobar's residence on Ansmith Street, in the City of Paramount, was also searched.   His aunt Maria Luna resided there.   Nothing was found that related to the Macias murder.   There was, however, a sign on the fence at the residence with “CVS X3,” “Trips,” and “Listo” written in black marker.

Appellants' statements

When arrested, Ayala was wearing his Dodger blue gear.   He told police he was a Dodger fan.   He said that he had spent the evening of January 24, 2007, at Elizabeth Sanchez's (Elizabeth) house and that her father had driven him home at 2:00 a.m. He identified Elizabeth's father, whose name was David Sanchez, as “Pedro Sanchez.”   David Sanchez (Sanchez) testified that Elizabeth had dated Ayala but that he was not at their house on January 24, 2007.   Sanchez may have given him a ride home two months earlier, but not on January 24 or 25, 2007.

Escobar was wearing a crucifix on a chain when he was taken into custody.   He told police that he found them on the day after the shooting.   Medrano identified the crucifix and chain as the ones she had given Macias and which he wore on the night he was murdered.   Escobar said he was at a birthday party at his aunt's house on the night of the murder.   The detective saw a “Segundo” tattoo on Escobar's hand, which was related to “CVS.”

Forensic evidence

On January 27, 2007, Heather Galloway (Galloway), a forensic specialist for the City of Long Beach, examined Soto's pickup truck, swabbed the interior for DNA evidence, looked for fingerprints, and collected casings and bullet fragments.   She located bullet holes in the front passenger door and recovered prints from the inside and outside of the driver's door and from the front and back of a CD case found in the truck.   Galloway concluded that one of the prints from the outside of the driver's door matched Ayala's prints.   A print on the CD case matched Escobar's print.

Flynn Lamas (Lamas), a criminologist, analyzed the sunglasses that Detective Cortes had recovered from Soto's truck for DNA. Ayala and Macias could not be excluded as contributors to the DNA. Escobar's DNA was found on a gold chain necklace with a Jesus pendant, but Macias's DNA was not.

On January 27, 2007, Troy Ward (Ward), a ballistics expert, examined Soto's truck for ballistic evidence, bullet holes and impact marks.   The passenger window was shattered but still intact, with a bullet hole partially visible.   The passenger's side view mirror also had a hole.   There were a number of impact marks and bullet holes in the inside front passenger door panel.   There was a bullet hole in the floor board area of the passenger compartment.   Based on bullet trajectory analysis, Ward determined that the shooter was sitting in the rear passenger seat, behind the driver.   The casings and projectile recovered from the crime scene and from Macias's body were all fired from the same gun.   The casings and bullets were nine-millimeter in caliber, from several different manufacturers, and fired from a nine-millimeter Lugar.

The defense's evidence

Marc Scott Taylor, a defense forensic scientist, reviewed Lamas's DNA report.   He opined that Ayala was excluded as a contributor to the DNA extracted from the sunglasses.

Escobar presented several alibi witnesses who testified that he was at Joey Mendoza's birthday party on the night of January 24, 2007.   Escobar arrived between 5:30 and 6:00 p.m., left with his mother, Olga Silva (Silva),[8](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_8) and sister between 9:00 p.m. and 9:30 p.m. There was evidence that a call was placed from Escobar's prepaid cell phone to Silva's cell phone during the time that both were purportedly at the birthday party.

Rebuttal

Detective McGuire interviewed Silva, who told him that she had not seen her son on the night of January 24, 2007.

Detective Cortes interviewed Swancutt on February 2, 2007.   She told him that she had Listo's and Trips phone numbers programmed into her cell phone.   She also identified each of them in photographic six-packs.   She said she believed Listo was in the front passenger seat, and Trips was behind the driver.   They were the same two men to whom she had given a ride.

DISCUSSION

I. Right to confrontation

A. The challenged evidence

Detective Cortes testified that the keys on the Dodger keychain recovered from Soto's truck did not work at Ayala's grandmother's residence where Ayala sometimes resided.   Over a general “objection,” the detective testified that Ismael Alcoser (Alcoser), Ayala's uncle, told him the locks at that residence had recently been changed.  (Challenged Evidence No. 1)

Detective Morales found a nine-millimeter magazine in a planter box on the porch of Ayala's grandmother's residence.   Over a general “objection,” he testified that he spoke with Alcoser and others present at the residence, all of whom denied having seen or owning any weapons, magazines, or ammunition.   (Challenged Evidence No. 2)

Galloway, the fingerprint expert, identified a fingerprint lifted from the outside of the driver's door of Soto's truck as matching Ayala's fingerprints and a fingerprint lifted from a CD case inside as matching Escobar's.   She testified that her conclusions were reviewed by two reviewers more experienced than she.   She identified their reports, reviewing her work and checking for clerical mistakes.   Ayala's counsel, joined by Escobar's counsel, objected to admission of these fingerprint reports on the ground that “it's the written findings.”   The trial court overruled the objection and admitted the reports under the business records and past recollection recorded exceptions to the hearsay rule.  (Evid.Code, §§ 1237, 1271.)  (Challenged Evidence No. 3)

Lamas, the DNA expert, testified that a mixture of DNA from at least two people was detected on the sunglasses found in Soto's truck.   He opined that Ayala's and Macias' DNA could not be excluded.   He described that his conclusions were subject to technical review for accuracy by another analyst.   A supervisor then performed a second level of review.   Both reviewers generated a review checklist, the entries on which “are made when the report is issued, ․ sometimes it's very shortly after the analysis, sometimes it's a week, several weeks.”   Lamas and his colleagues use and rely on the checklists in their regular course of business, and the reviewers rely on them to determine the technical accuracy of the reports.   The checklists reflect the reviewers' confirmation that Lamas' work was correct and accurate.   Lamas' report was released after the reviews.   Ayala's counsel objected to admission of these checklists on hearsay grounds.  (Challenged Evidence No. 4)

B. Contentions

Ayala contends that Challenged Evidence Nos. 1 through 4 constitute testimonial hearsay, the admission of which violated his Sixth Amendment right to confront the witnesses against him.   He argues that that evidence is admissible only if the declarant is unavailable, and appellant had a prior opportunity to cross-examine him or her.

The People contend that Ayala forfeited his claims regarding Challenged Evidence Nos. 1 and 2, by making only a general objection to them, without specifying the specific grounds for the objection.

C. Forfeiture

Generally, objections to evidence on the specific grounds asserted must be made or the objection is forfeited.  (People v. Derello (1989) 211 Cal.App.3d 414, 428.)   To preserve a claim for appeal, a party must object in the trial court and “make clear the specific ground of the objection.”   (Evid.Code, § 353, subd. (a).)  Constitutional objections must similarly be interposed in the trial court in order to preserve them for appeal.  (See People v. Williams (1997) 16 Cal.4th 153, 250.)   Here, Ayala stated his “objection[s]” to the admission of Challenged Evidence Nos. 1 and 2, the statements to police officers, but failed to state any grounds.   Thus, he forfeited both hearsay and confrontation clause claims.

Ayala argues that because he stated at the beginning of trial that all objections would be made on both state and federal grounds, “[t]o now hold that the lack of a specific objection on Sixth Amendment grounds forfeited the issue on appeal is simply unfair.”   Without deciding whether such a pretrial statement preserves both state and federal claims, it does not eliminate the requirement that the ground be specifically stated.   Here, no state or federal ground for the objection was stated.

D. Crawford and its progeny

The confrontation clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ․ to be confronted with the witnesses against him.”  (U.S. Const., 6th Amend.)   The phrase “witnesses against him” is not limited to in-court witnesses, but also applies to the admission of hearsay statements.  (See Crawford v. Washington (2004) 541 U.S. 36, 50-51 (Crawford ).)

In Crawford, the United States Supreme Court concluded that nontestimonial hearsay remains subject to state hearsay law and may be exempted from Confrontation Clause scrutiny entirely.  (Crawford, supra, 541 U.S. at p. 68.)   But where testimonial hearsay is involved, “the Sixth Amendment demands what the common law required:  unavailability and a prior opportunity for cross-examination.”  (Ibid.) While the Supreme Court left for another day any effort to spell out a comprehensive definition of “ ‘testimonial’ ” (ibid ), it stated that it includes “ ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’ ”  (Id. at p. 52.)   This includes police interrogations.[9](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_9)  (Id. at p. 68.)

In Davis v. Washington (2006) 547 U.S. 813, the Supreme Court elaborated on what constitutes testimonial statements and “determine[d] more precisely which police interrogations produce testimony” subject to the confrontation clause.   (Id. at p. 822.)   It concluded that questioning by a 911 operator of a domestic violence victim regarding what had occurred during a domestic violence incident that was the subject of the call, including circumstances at the house at the time of the call, the identity of the perpetrator, what he was doing, why he was at the house, whether he was armed, and a description of the assault (id. at pp.   817-818) is not testimonial hearsay because it is not designed primarily to establish or prove some past fact but to describe current circumstances requiring police assistance to meet an ongoing emergency.  “They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”  (Id. at p. 822.)   Interrogations “solely directed at establishing the facts of a past crime, in order to identify (or produce evidence to convict) the perpetrator” are clearly testimonial.  (Id. at p. 826.)

In People v. Cage (2007) 40 Cal.4th 965, further elaborating on what constitutes testimonial hearsay, the California Supreme Court concluded that the victim's statements to police more than an hour after the incident that his mother slashed him with a piece of glass were testimonial but that essentially the same statements to the treating physician were not testimonial because primarily given to assist in the victim's treatment.  (Id. at pp.   970-973.)   The Supreme Court found that “sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses.”  (People v. Cage, supra, at p. 984.)

E. The hearsay statements to police

1. Crawford error

Even if we had not concluded that Ayala had forfeited his Crawford claims as to Challenged Evidence Nos. 1 and 2, we would nonetheless find that admission of that evidence, while erroneous, was not prejudicial.   Those statements were testimonial, as they were made to police officers in the course of serving a search warrant and investigating appellants regarding Macias's murder.   There was no emergency ongoing, and it would appear that the principal purpose for the questions was to generate information to aid in appellants' prosecution.   The People concede that these statements were testimonial, and there was no showing by the prosecution that the persons making the statements were unavailable or that appellants had a previous opportunity to cross-examine them.  (Crawford, supra, 541 U.S. at p. 68.)   As a result, it was constitutional error to have allowed admission of the evidence.

2. Harmless error

But the error was harmless beyond a reasonable doubt under Chapman v. California (1967) 386 U.S. 18, 24.  (Lilly v. Virginia (1999) 527 U.S. 116, 139-140;  Brown v. United States (1973) 411 U.S. 223, 231-232;  People v. Geier (2007) 41 Cal.4th 555, 608 (Geier );  People v. Song (2004) 124 Cal.App.4th 973, 982.)   To find these errors harmless, we must find that they did not contribute to the verdict, that is, they were unimportant in relation to everything else the jury considered on the issue in question.  (Yates v. Evatt (1991) 500 U.S. 391, 403, disapproved on other grounds in Estelle v. McGuire (1991) 502 U.S. 62, 72, fn. 4.)

There was overwhelming evidence to support appellants' convictions, including percipient witness identifications.   Swancutt apparently knew appellants as “Trips” and “Listo” and had their telephone numbers programmed into her cell phone.   She identified them to detectives in photographic six-packs and at trial as the individuals to whom she and Fuller had given a ride when she went to meet Macias and as the robbers.   Fuller corroborated Swancutt's testimony that she and Swancutt drove appellants to an alley near where Swancutt met Macias.

There was also a mountain of circumstantial evidence.   Both appellants' fingerprints were found on and in Soto's pickup truck;  Ayala's on the outside of the driver's door and Escobar's on a CD case found inside the truck.   Further, with a high degree of probability, Ayala's DNA could not be excluded as a contributor to the DNA detected on the sunglasses found in Soto's truck.   When Macias went to meet Swancutt, he was wearing a distinctive chain and pendant given to him by Medrano, who identified the chain and pendant found on Escobar at the time of his arrest as the ones she had given to Macias.   Appellants were arrested along with Camacho, who was driving a pickup truck in which the three individuals were stopped by police.   Camacho testified that immediately before being stopped, Ayala told him, “We jacked [a] pisa for his gold chain.”   Escobar said nothing when the statement was made.

All of the bullets and casings recovered from inside Soto's truck, from the surrounding area and from Macias's body were from the same weapon using nine-millimeter rounds.   A magazine holding nine-millimeter bullets was found at Ayala's grandmother's house and a lid to an ammunition box manufactured by the same manufacturer who manufactured some of the bullets related to the murder was uncovered at Ayala's mother's house.

Soto's truck was driven to a poorly-lit and secluded area in Long Beach, near an equestrian center.  “CVS” graffiti was in the area where the vehicle was found, suggesting that it was a CVS gang hangout, or at least frequented by CVS gang members.   Appellants were members of CVS. There was a sign at Ayala's grandmother's house with “CVS” and “Trips” and “Listo” scrawled on it.   The CD case recovered in Soto's truck had “CVS” written on it.   A few days after the murder, Sergeant Ferrari saw Ayala tagging a light standard and garbage can with “CVS.” A Dodger key chain was found in Soto's truck.   Ayala had been seen wearing a Dodger jacket and said that he was a Dodger fan.

Additionally, appellants' alibi defenses were weak and convincingly contradicted.   Escobar introduced evidence that he was at a birthday party with his mother and sister on the evening of the murder, arriving between 6:00 and 6:30 p.m. and leaving between 9:00 and 9:30 p.m. But cell phone records revealed a call from Escobar's cell phone to his mother's cell phone during the time both were purportedly at the same party.   Ayala claimed that he was at his girlfriend's house on the evening of the murder until 2:00 a.m. when her father drove him home.   But her father testified that Ayala was not at his girlfriend's house, and her father did not drive him home that night.

Phone records indicated that a phone call was made from Macias's cell phone to Escobar's stepfather at 8:46 p.m., on January 24, 2007.   Nothing in the record suggests that Macias knew Escobar's stepfather, permitting the inference that Escobar had taken Macias's cell phone and made the call.   Appellants' phone calls from jail were monitored and recorded.   In them, Ayala attempted to get someone to locate his green backpack with a sock with a “toy” inside and remove it from his grandmother's house.   Ayala tried to have Delvillar pick it up and hide it at her house until he got out of jail.

Furthermore, the challenged evidence was unimportant and of little consequence in relationship to everything else (Yates v. Evatt, supra, 500 U.S. at p. 403), as it was substantially corroborative of other evidence.   The fact that the locks at Ayala's grandmother's house had been changed did not mean that the key on the Dodger keychain would have worked had they not been changed.   Moreover, if it would have worked in the lock before it was changed, that would only corroborate other evidence that Ayala was in Soto's truck, such as his fingerprint on the driver's door and the eyewitness identification.   The evidence that none of the people at the residence claimed to have seen or owned ammunition or guns reveals little about who did own the ammunition found and the location of the weapon used in Macias's murder, which was never found.

F. Nontestifying experts' reports

Ayala argues that the DNA checklists and fingerprint reports in Challenged Evidence Nos. 3 and 4 constitute testimonial hearsay and that the prosecution failed to establish that the declarants were unavailable and had been previously subjected to cross-examination.   In Geier, our Supreme Court held that a DNA report, testified to by the laboratory director, who did not conduct the DNA test but oversaw testing and supervised the laboratories' six analysts who did the testing, was not testimonial for Crawford purposes because the observations in the report were a “contemporaneous recordation of observable events rather than the documentation of past events.”  (Geier, supra, 41 Cal.4th at p. 605.)

In the recent case of Melendez-Diaz v. Massachusetts (2009) 557 U.S. \_ [129 S.Ct. 2527] (Melendez-Diaz ), the United States Supreme Court called into question the continued viability of Geier.   In Melendez-Diaz, as against a Crawford challenge, the Court considered the admissibility of three Certificates of Analysis, sworn to by State of Massachusetts chemical analysts before a notary public.   The certificates stated the results of chemical analyses of substances obtained in connection with a narcotics prosecution.   A bare majority of the United States Supreme Court concluded that “[t]here is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements' ” (Melendez-Diaz, supra, at p. \_ [129 S.Ct. at p. 2532] ) as outlined in Crawford.   Because the certificates contained facts sworn to before an officer authorized to administer oaths, they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’ ”   (Melendez-Diaz, supra, at p. \_ [129 S.Ct. at p. 2532].)   In reaching its conclusion, the Court resoundingly rejected the argument that “there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is ‘prone to distortion or manipulation,’ and the testimony ․ which is the ‘result[t] of neutral, scientific testing’ ” (Melendez-Diaz, supra, at p. \_ [129 S.Ct. at p. 2536] ), a core element of Geier's analysis.   On the other hand, as distinguished from the unsworn DNA report in Geier, Melendez-Diaz emphasized that the filed certificates were affidavits, sworn to under oath, a point Justice Thomas separately emphasized in his concurring opinion.

We need not speculate as to whether Melendez-Diaz will ultimately be determined to abrogate Geier or if it is distinguishable from Geier.   We conclude that, in any event, admission of the fingerprint reports and DNA checklists here were harmless beyond a reasonable doubt (Chapman v. California, supra, 386 U.S. 18;  Lilly v. Virginia, supra, 527 U.S. at pp.   139-140;  Brown v. United States, supra, 411 U.S. at pp.   231-232;  People v. Song, supra, 124 Cal.App.4th at p. 982), as they did not contribute to the verdict, that is, they were unimportant in relation to everything else the jury considered on the issue in question.  (Yates v. Evatt, supra, 500 U.S. at p. 403.)

As discussed in part IE2, ante, the evidence of appellants' guilt was overwhelming.   Furthermore, before admission of the respective reports and checklists now challenged, Galloway and Lamas each testified as to their findings and that their opinions were confirmed by reviewers.   Thus, the content of the reports and checklists was substantially cumulative of the experts' testimony that their opinions were confirmed by their colleagues.   It is doubtful that admission of sterile expert reports and checklists added anything to the testimony and impacted the jury.  (See People v. Houston (2005) 130 Cal.App.4th 279, 295 [significant in finding harmless Crawford error was cumulative nature of the evidence].)

II. Erroneous admission of evidence

A. The challenged evidence

1. Gang evidence

At trial, gang-related evidence was admitted.   Fuller and Swancutt both testified that they knew Ayala as “Trips” and Escobar as “Listo.”   Deputy Jorge Marchena testified that he also knew Ayala as Trips, a member of CVS. He observed the “Segundo” tattoo on Escobar, which was a reference to the CVS gang.   Joe Vidal, who resided near where Macias' body was found, testified that there was CVS gang graffiti near his home.   Sergeant Ferrari testified that he saw Ayala the day before his arrest spray-painting “CVS” on a light pole and trash can.   Detective Cortes testified that CVS gang graffiti was found on a pole near the murder scene, though there was also graffiti from other groups in the area, and the CVS graffiti was approximately 150 feet from Soto's truck.   A search at Ayala's mother's house uncovered papers with “CVS” written on them, a black CD case with “CVS” on it and six CDs inside, some with the moniker “Trips” written on them.

2. Missing gun evidence

Without objection, the prosecutor played recordings of Ayala's telephone calls from jail in which he referred to a “toy” in a sock, inside his backpack, which he wanted hidden.   Delvillar testified that Ayala telephoned her from jail on January 31, 2007, and asked her to go to his mother's house to pick up his backpack with the white sock inside and keep it at her house.   Delvillar did not pick up the backpack.   Counsel asked her, “Ms. Delvillar, based on your conversation with Mr. Ayala, what did you think was in the white sock?”   She responded, “[B]ecause if he is in jail, he is in trouble for a reason, so I thought it would be a gun.”   Ayala objected on the ground that the question called for speculation.   The trial court overruled the objection because the question was “based on what she believes, not what it is.”

3. Unrelated weapons and ammunition evidence

There was undisputed evidence that the casings and projectile recovered from the crime scene and Macias's body were all nine-millimeter and were all fired from the same firearm.   Nonetheless, the prosecutor introduced evidence regarding other ammunition and weapons that were not used in the charged offenses.   During the search of Ayala's mother's house, Detective Cortes found an unloaded magazine clip to a small caliber handgun and a black pouch with different calibers of ammunition.   Detective Nelson searched the perimeter of Ayala's grandmother's home and found a bag, with .357 magnum ammunition and a black pellet gun.   Detective Cortes also searched the house of Escobar's mother and found four live .38-caliber rounds from the bedroom.

B. Contentions

Appellants contend that the trial court erred in allowing irrelevant gang-related evidence, including evidence of gang graffiti, reference to “CVS” as a “group,” appellants' membership in that group, and appellants' monikers.   They argue that such evidence was highly inflammatory and prejudicial, and that the prejudice outweighed the probative value under Evidence Code Section 352 because the crimes were not gang related and there was no evidentiary link between the graffiti and the crime.   They were therefore deprived of due process.

Ayala also contends that the trial court erred in permitting testimony by Delvillar that she believed that a gun was in the sock in Ayala's green backpack.   He argues that her testimony was speculative, not based on personal knowledge and irrelevant, resulting in constitutional error by preventing him from having a fair trial.

Escobar contends that the trial court abused its discretion in allowing admission of irrelevant evidence regarding weapons and ammunition not used in connection with the charged offenses, thereby violating his rights to due process under the Fifth and Fourteenth Amendments.

The People contend that Ayala has forfeited his objection that Delvillar's testimony was irrelevant by objecting only on the ground that that testimony was speculative.

C. Standard of Review

We review the trial court's rulings on the admission and exclusion of testimony for abuse of discretion.  (People v. Harrison (2005) 35 Cal.4th 208, 230;  People v. Kipp (2001) 26 Cal.4th 1100, 1123 [relevance objection];  People v. Greenberger (1997) 58 Cal.App.4th 298, 352 [Evid.Code, § 352 objection].)   The trial court's discretion is as “ ‘broad as necessary.’ ”  (People v. Kwolek (1995) 40 Cal.App.4th 1521, 1532.)   “ ‘[I]n most instances the appellate courts will uphold its exercise whether the [evidence] is admitted or excluded.’ ”  (Ibid.) “ ‘A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice.’ ”  (Id. at p. 1533.)   Abuse occurs when the trial court “exceeds the bounds of reason, all of the circumstances being considered.”  (People v. Giminez (1975) 14 Cal.3d 68, 72.)   We find no abuse here.

D. Gang evidence

Before trial began, the prosecutor indicated that, although this was not a gang case, she would be referring to appellants by their monikers, “Listo” and “Trips,” because Swancutt referred to them by those names and items were recovered from Ayala's home with the names on them.   The monikers were therefore relevant to identify appellants.   The prosecutor also stated that there would be references to “CVS” and appellants' membership in CVS because CVS graffiti was found near the crime scene and at Ayala's mother's home, making it relevant to link appellants to the crime scene.

Ayala's counsel objected that the evidence of appellant's affiliation with CVS and CVS graffiti was irrelevant because this was not a gang case, the CVS graffiti was 50 to 100 feet from where Soto's truck was found, and the jury would presume that appellants were gang members.   He stated that he would be satisfied if the prosecution's evidence was limited to “tagging and nicknames” and the word gang was not used.   Escobar's attorney, on the other hand, argued that there was no gang allegation, the evidence was prejudicial, could not be sanitized because the jury would see it as a gang case anyway and was irrelevant.

The trial court found the evidence relevant and that its relevance substantially outweighed its prejudice.   It ruled that the evidence of the gang names, “CVS” and “Compton Varrio Segundo,” were admissible on the issue of identification and to link appellants to the crime scene.   The trial court instructed the prosecutor to direct her witnesses not to use the term “gang” and to refer to the names “Trips” and “Listo” as nicknames, not monikers.

At a subsequent hearing, Escobar's counsel objected to evidence of his “Segundo” tattoo, which connected him to the CVS gang, on the grounds that such evidence was “extremely prejudicial,” based on state and federal grounds.   The prosecutor argued that she would be using the tattoo for identification purposes.   The trial court ruled that it was admissible as evidence of membership in an organization, was not unfairly prejudicial and its probative value far outweighed its prejudice.

At a later hearing, the prosecutor indicated her intention to call Deputy Marchena to testify that he had prior contacts with Ayala as “Trips,” a member of CVS, and that the “Segundo” tattoo on Escobar's hand was related to CVS. Ayala's attorney objected under Evidence Code section 352, claiming that prior contacts with law enforcement was prejudicial.   Escobar's counsel joined and further objected that the evidence would deny his client a fair trial and due process under the state and federal Constitutions because the gang evidence was “extremely prejudicial.”   The trial court ruled that the evidence was admissible with its previously stated limitations.   We conclude that the trial court did not abuse its broad discretion in admitting the gang-related evidence.

“Except as otherwise provided by statute, all relevant evidence is admissible.”  (Evid.Code, § 351.)   Relevant evidence is evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”  (Evid.Code, § 210.)   Evidence Code section 352 provides an exception to the rule that all relevant evidence is admissible, stating:  “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

Gang evidence is inflammatory in nature and tends to allow the jury to improperly infer that the defendant is criminally disposed and culpable of the charged offense.  (People v. Bojorquez (2002) 104 Cal.App.4th 335, 345.)   Consequently, in cases not involving the gang enhancement, like that now before us, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal (People v. Hernandez (2004) 33 Cal.4th 1040, 1049) or if merely tangentially relevant (People v. Tuilaepa (1992) 4 Cal.4th 569, 588).   Gang evidence is not admissible if its only purpose is to prove the defendant's disposition.   (People v. Ruiz (1998) 62 Cal.App.4th 234, 240.)

But gang evidence is not per se inadmissible.   It may be admitted if otherwise relevant.  (People v. Perez (1981) 114 Cal.App.3d 470, 477.)   While gang evidence is carefully scrutinized before admitting it because of its inflammatory capacity (People v. Williams, supra, 16 Cal.4th at p. 193;  People v. Carter (2003) 30 Cal.4th 1166, 1194) it is not insulated from the general rule that all relevant evidence is admissible if relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative.  (People v. Avitia (2005) 127 Cal.App.4th 185, 192;  see also People v. Hernandez, supra, 33 Cal.4th at p. 1049;  People v. Carter, supra, at p. 1194;  Evid.Code, §§ 210, 352.)   Such evidence is often relevant to, and admissible regarding, a charged offense, as evidence of identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt.  (People v. Hernandez, supra, at p. 1049;  People v. Martin (1994) 23 Cal.App.4th 76, 81 [motive];  People v. Champion (1995) 9 Cal.4th 879, 922 [identity], disapproved on another point in People v. Combs (2004) 34 Cal.4th 821, 860.)

Initially, we conclude that the trial court's efforts to sanitize the evidence by referring to the “CVS group,” rather than the “CVS gang,” and using the term “nickname” instead of “moniker” were insufficient to insulate the gang character of that evidence from the jury.   We agree with appellants that the efforts to sanitize the evidence had a very low probability of achieving its goal.   Given the prevalence and high visibility of gang violence in our communities, evidence of “nicknames” like “Trips” and “Listo” and of a “group” such as “CVS,” and tagging the words “CVS” were likely to be understood by the jury to be gang references.

Having so concluded, we must determine whether the evidence was admissible as gang evidence.   There were no witnesses to the actual shooting of Macias.   Swancutt was only a witness to the carjacking, kidnapping and robbery, but had gotten out of Soto's truck before Macias was murdered.   Thus, the central issue in this case, whether appellants were Macias's murderers, had to be proved exclusively by circumstantial evidence.

Appellants were CVS gang members.   CVS graffiti was found near the murder scene.   Evidence of Escobar's tattoo, CVS graffiti located in searches of appellants' residences and on items taken from Soto's truck linked appellants to the murder scene and identified them as the murderers.   Escobar argues that this evidence was irrelevant because the CVS graffiti was 50 to 100 feet from Soto's truck, and other gangs' graffiti was there as well.   But the distance of the graffiti from the truck and presence of other gang graffiti in the area were before the jury, which could assess its strength in deciding whether it adequately linked appellants to the murder scene.   Evidence of the nicknames “Trips” and “Listo” was relevant to identifying appellants, as the only eyewitness to the robbery and carjacking, Swancutt did not know their true names, but only their monikers.

Given the significance of the identity issue in this case, to which the gang evidence was directed, we conclude that the trial court did not abuse its broad discretion in finding that evidence relevant and that its relevance exceeded its prejudice.

Even if the trial court erred in admitting the gang evidence, we conclude that for the reasons set forth in part IE2, ante, the error was harmless under the Watson [10](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_10) standard in that it is not reasonably probable that a more favorable result for appellants would have been achieved had that evidence been excluded.  (People v. Scheer (1998) 68 Cal.App.4th 1009, 1018-1019.)

E. Missing gun evidence

The People contend that appellants forfeited their claim that the trial court erred in admitting Delvillar's testimony, that she thought a gun was in Aguilar's sock, by failing to properly object to it in the trial court.   We agree.   As previously stated, to preserve a claim for appeal, a party must object in the trial court and “make clear the specific ground of the objection.”  (Evid.Code, § 353, subd. (a);  People v. Derello, supra, 211 Cal.App.3d at p. 428.)   Ayala objected to Delvillar's testimony that she believed a gun was in the sock in Ayala's backpack on the sole ground that it was speculative, that is she lacked personal knowledge of the fact.  (See Alvarez v. State of California (1999) 79 Cal.App.4th 720, 733, disapproved on other grounds in Cornette v. Department of Transportation (2001) 26 Cal.4th 63.)   On that ground, the trial court correctly ruled that it was not speculative as to Delvillar's belief.   Ayala did not object on relevance grounds, to which the trial court might well have ruled differently.   That objection is therefore forfeited.

F. Unrelated weapons and ammunition evidence

As a basic proposition, “[w]hen the prosecution relies ․ on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons.”  (People v. Riser (1956) 47 Cal.2d 566, 577, disapproved on other grounds in People v. Morse (1964) 60 Cal.2d 631, 648-649, and in People v. Chapman (1959) 52 Cal.2d 95, 98;  People v. Barnwell (2007) 41 Cal.4th 1038, 1056.)  “Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that the defendant is the kind of person who surrounds himself with deadly weapons-a fact of no relevant consequence to determination of the guilt or innocence of the defendant.”  (People v. Henderson (1976) 58 Cal.App.3d 349, 360.)

But when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible.  (See People v. Cox (2003) 30 Cal.4th 916, 956-957, disapproved on other grounds in People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22.)   The critical question is whether the weapons evidence is being admitted simply as character evidence.   (People v. Prince (2007) 40 Cal.4th 1179, 1248-1249.)

Here, all of the bullets and casings found at the crime scene and removed from Macias's body were nine-millimeter rounds fired from the same handgun.   There was no evidence that a different weapon or ammunition was involved.   Hence, unless otherwise relevant to some issue besides appellant's character, evidence of the pellet gun, knife and ammunition found at Ayala's mother's residence were irrelevant and inadmissible, as there is no suggestion that this evidence was relevant to anything other than appellant's character.

The only ammunition evidence properly admitted was the lid to an ammunition box for a nine-millimeter Lugar that was the same brand as some of the casings found at the murder scene and the nine-millimeter magazine containing live ammunition that Sergeant Ferrari found in a plant on the porch of Ayala's grandmother's residence.   The rest of the ammunition and weapons evidence had no relevance because unrelated to the nine-millimeter casings found at the crime scene and removed from Macias's body

We conclude that the error in admitting evidence of the unrelated ammunition and weapons was harmless in that it is not reasonably probable had that evidence been excluded that a more favorable result for appellants would have ensued.  (People v. Watson, supra, 46 Cal.2d at p. 836;  People v. Williams (2009) 170 Cal.App.4th 587, 612;  People v. Carter, supra, 30 Cal.4th at p. 1171.)   As discussed in part IE2, ante, the evidence against appellants was overwhelming.   Further, the prosecutor did not emphasize the challenged weapons and ammunition evidence in closing argument to the jury, and, at no time did she argue that that evidence reflected on Ayala's character, making it more likely he committed the charged offenses.   Also, because the evidence of the ammunition lid to the brand of ammunition found at the crime scene and loaded nine-millimeter magazine recovered at Ayala's grandmother's residence were properly admitted, admission of the other ammunition evidence was cumulative and of little impact.

III. Ineffective assistance of counsel

A. Background

1. Prosecutor's failure to instruct witness not to say “moniker”

Appellants assert numerous instances of ineffective assistance of counsel.   One example is that at the beginning of trial, the trial court ruled that the prosecutor should not refer to appellants' gang names as “monikers,” but rather as “nicknames.”   It asked the prosecutor if she could instruct her witnesses not to use the term “moniker,” to which she responded that she would.   When Detective Cortes testified, he nonetheless referred to “Trips” and “Listo” as “monikers” on multiple occasions.   Defense counsel failed to object to these references.

2. The prosecutor's improper statements

When the prosecutor questioned defense forensic expert, Taylor, regarding his fees, the following colloquy occurred:  “Q [PROSECUTOR] I'm assuming even if we wrap up here under an hour, you still get your rate for [an] hour?   A [WITNESS] No, I charge by the tens of hours.   So ever[y] six minutes.   Q [PROSECUTOR] Oh, okay.   Great.  [THE COURT]:  So no more cross?  [PROSECUTOR] I won't over-cross because I don't want to spend taxpayers' money.”  (Italics added.)

During closing argument, the prosecutor argued to the jury, “Now, counsel, in their efforts to confuse you, they want you to ignore every piece of evidence in this case.   They want to cast some cloud or shadow over it and distort it in hopes that you will be so muddled that you will push it away.”

Defense counsel did not object to the questioning of Taylor or the argument to the jury.

3.  Unrelated weapons and ammunition evidence

Undisputed evidence established that the casings and projectiles recovered from the crime scene and Macias's body were nine-millimeter and were all fired from the same weapon.   Nonetheless, Detective Cortes testified that when police searched the bedroom of Ayala's mother's house, she tried to hide a bag containing ammunition for a .38 special revolver, super-X centerfire, rifle cartridges and 7.62 by 39-millimeter rounds.   The search also uncovered a magazine clip to a small caliber handgun.

During a search of Ayala's grandmother's residence, Detective Nelson found a bag containing .357 magnum caliber ammunition and a pellet gun on top of the driver's-side, front tire, of an inoperable car at the side of the house.   Detective Morales found a steak knife in a potted plant on the porch.   At Escobar's house, police found .38-caliber bullets.

Defense counsel did not object to the admissibility of this evidence.

4. Failure to object on Crawford grounds

As stated in part IC, ante, by his counsel's failure to object, Ayala forfeited his Crawford and hearsay objections to the testimony by Detectives Cortes and Morales regarding statements made to them by individuals at Ayala's grandmother's residence during the search of that location.

B. Contentions

Ayala, joined by Escobar, contends that he suffered ineffective assistance of counsel by virtue of his attorney's failure to object to (1) the prosecutor's misconduct in violating the trial court's order to instruct her witnesses not use the term “moniker,” (2) the prosecutor berating defense counsel by arguing to the jury that defense counsel was trying to confuse it, (3) the gratuitous comments set forth in part IIIA2, ante, about the defense expert's fees, (4) the detectives' hearsay testimony of out-of-court statements made to them, and (5) evidence of weapons and ammunition unrelated to the charged shooting.

C. General principles

The standard for establishing ineffective assistance of counsel is well settled.   The “ ‘defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms.   Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.’ ”  (People v. Hernandez, supra, 33 Cal.4th at pp.   1052-1053;  see also Strickland v. Washington (1984) 466 U.S. 668, 687, 694 (Strickland );  People v. Berryman (1993) 6 Cal.4th 1048, 1081, overruled on other grounds in People v. Hill (1998) 17 Cal.4th 800, 823, fn. 1.)

It is presumed that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.  (Strickland, supra, 466 U.S. at p. 689;  In re Andrews (2002) 28 Cal.4th 1234, 1253.)  “ ‘ “[W]e accord great deference to counsel's tactical decisions” [citation], and we have explained that “courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight” [citation].  “Tactical errors are generally not deemed reversible, and counsel's decision-making must be evaluated in the context of the available facts.”  [Citation.]’ ”  (People v. Jones (2003) 29 Cal.4th 1229, 1254.)   If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.  (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266;  People v. Scott (1997) 15 Cal.4th 1188, 1212.)

1. Failure to comply with trial court's order to instruct witnesses to use the term “moniker”

Ayala argues that he received ineffective assistance of counsel by reason of his attorney's failure to object to the prosecutor's misconduct in failing to instruct Detective Cortes to use the term “nickname,” rather than “moniker.”   However, nothing in the record indicates that counsel failed to give that instruction to Detective Cortes.   The record only indicates that the detective used the proscribed term, not the reason he did so.

In any event, there was no ineffective assistance of counsel because the failure to object could well have been a tactical decision not to call undue attention to the use of the term.   Whether to object to evidence is a strategic decision of counsel to which deference is given and which rarely affords a basis for reversal for ineffective assistance of counsel.  (People v. Lucas (1995) 12 Cal.4th 415, 444.)   Furthermore, there is no evidence that trial counsel was asked for an explanation of the failure to object and failed to provide one.  (People v. Mendoza Tello, supra, 15 Cal.4th at p. 266.)

Finally, in order to establish ineffective assistance of counsel in failing to object to the prosecutorial misconduct, a “ ‘defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.’ ”  (People v. Hernandez, supra, 33 Cal.4th at pp.   1052-1053.)   That is not the case here.   A few errant references to “moniker” in a comparatively lengthy trial, with no suggestion that it was a gang reference, likely had little impact on the jurors, if they even noticed it and understood its meaning.   Escobar's counsel even argued in the court below that sanitizing the gang evidence by the use of “nickname,” rather than “moniker” would not prevent the jury from knowing the gang nature of the evidence.   By that logic, the use of the term “moniker” had no adverse effect on appellants, for the jury already understood appellants to be gang members.   Further, as discussed in part IE2, ante, the evidence supporting the convictions was overwhelming.

2. Prosecutor's improper statements

Ayala complains that the prosecutor's statements about the defense expert's fees and defense counsel's efforts to confuse the jury constituted misconduct, the failure to object to which was ineffective assistance of counsel.   The challenged comments here did not constitute misconduct.

Comments by prosecutors are generally treated by juries as words of an advocate in an attempt to persuade.  (See People v. Clair (1992) 2 Cal.4th 629, 663, fn. 8.) The prosecution is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it.  (People v. Collins (2010) 49 Cal.4th 175, 213.)   Conduct during closing argument rarely affords a basis for reversal for ineffective assistance of counsel.  (People v. Moore (1988) 201 Cal.App.3d 51, 57.)   Reversal for things said during closing argument have generally been the result of counsel conceding his client's guilt, withdrawing a crucial defense or relying on an illegal defense.  (Ibid.)

The prosecutor's argument to the jury that defense counsel was trying to confuse it was not so much a direct personal attack on counsel as it was an attack on defense counsel's evidence and argument.   The prosecutor further explained that defense counsel was ignoring evidence in hopes that the jury would ignore it.   We find this argument to be comfortably within the broad scope of permissible argument.   Similar arguments have been found to be permissible.  (See People v. Goldberg (1984) 161 Cal.App.3d 170, 190-191 [statements that defense counsel was “ ‘trying to get you confused’ ” and trying to “ ‘sidetrack you’ ” not improper].)   Furthermore, the prosecutor's statement to the jury is no more disparaging of defense counsel than defense counsel's permissible statement to the jury that, “The drug nature of these transactions the prosecutor doesn't want you to think about.   Doesn't want you to talk about.”  “The prosecutor wants to have you believe that they are not significant.”   Because the prosecutor's argument is permissible, any objection to it by defense counsel would have been overruled, and, hence, the failure to object had no impact on the result.

Similarly, the prosecutor's comment in questioning Taylor regarding his fees is not misconduct.   The prosecutor's apparent effort at banter with the trial court by stating that she would not “over-cross [Taylor] because I don't want to spend the taxpayers' money,” was an effort to highlight for the jury that Taylor was being paid for his testimony.   Taylor had testified that he was being paid by Los Angeles County as the defense's expert, already supporting the inference that it was the taxpayers who were ultimately paying him for his services.   Thus, the brief comment about spending the taxpayer's money merely highlighted that which was already in evidence.   It is unlikely to have impacted the result, particularly in light of the strong evidence in support of the convictions.   Further, the jury was instructed that it was to determine the facts from the evidence and that statements by attorneys during trial are not evidence.  (CALJIC Nos. 0.50;  1.02;  1.03.) We assume that the jurors followed these instructions.  (See People v. Horton (1995) 11 Cal.4th 1068, 1121.)

3. Unrelated weapons and ammunition evidence

With respect to defense counsel's failure to object to the introduction of evidence of ammunition and weapons unrelated to the charged murder, for the reasons set forth in part IE2, ante, we conclude that there was no ineffective assistance of counsel as there was no reasonable probability that had the evidence been excluded, appellants would have obtained a more favorable verdict.

Further, to constitute misconduct, the behavior must “ ‘ “comprise a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process,’ ” ' ” must render a criminal trial fundamentally unfair or involve the use of “ ‘ “ ‘deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” ' ”  (People v. Samayoa (1997) 15 Cal.4th 795, 841.)   In the context of this trial, we do not find this evidence so pervasive.

4. Failure to object to Crawford violation

As we have concluded in part IE2, ante, that the Crawford errors were harmless beyond a reasonable doubt, it follows a fortiori that there is no reasonable probability that had Ayala's counsel objected on those grounds a different result would have ensued.

IV. Improper rebuttal

A. Background

At trial, on direct examination by the prosecutor, Swancutt testified that she recognized Ayala and Escobar as the two men to whom she had given rides on January 24 2007, and who later entered Soto's truck at gunpoint.   But she claimed not to recall much about the incident that she had described before trial.   She testified that she did not recall appellants' nicknames.   She described how the men entered Soto's truck, their seating inside and their conduct, but did not recall seeing either perpetrator take anything from Macias or previously stating that a chain was “probably ripped” from Macias's neck or a wallet taken.   She did not recall having appellants' phone numbers programmed in her cell phone or receiving a call from Escobar at approximately 9:54 p.m., on January 24, 2007, though phone records established that she did.

On cross-examination by Ayala's counsel, Swancutt testified that she was then experiencing withdrawal symptoms during trial, which were affecting her recollection and testimony.   When she spoke with police in February 2007, she told them she was unsure who the men were who entered Soto's truck.   Defense counsel inquired as to why she originally said it was not appellants who entered the truck and then testified at trial that it was.   She stated that she felt pressure from law enforcement and the district attorney's office to say it was appellants in order for her to be released from jail.

On cross-examination by Escobar's counsel, Swancutt explained that she was under the influence of heroin on January 24, 2007, but was lucid “on and off.”   She said she might or might not have been able to take in the reality of what was happening.   She reiterated that when she spoke with detectives in February 2007, she was not 100 percent certain appellants were the gunmen and, at the preliminary hearing, she did not identify them.   When withdrawing from heroin, she was willing to say anything to get out of the “situation.”

On redirect, Swancutt testified that she knew Ayala as “Trips” and Escobar as “Listo.”   She did not recall programming their phone numbers in her cell phone, but must have done so if the records so indicate.   The prosecutor then read to her portions of the police interview in which she said that Listo and Trips were the two men she had given a ride to and whose numbers were programmed into her phone.   She did not recall making those statements.   She feared that her testimony would result in appellants putting a “green light” on her.   She identified appellants from photographic lineups when shown by police but was not absolutely certain of her identifications.   When interviewed by detectives on February 6, 2007, outside of the presence of appellants, she said appellants were the men who held up Macias and her.   She did not identify them at the preliminary hearing because she was afraid for her life.   At trial, she was not afraid for her life.

Detective Cortes testified during the prosecution's case-in-chief.   The prosecutor did not seek to clarify with him Swancutt's testimony or introduce the inconsistent statements she made to the detectives.

Over Ayala's objection that it constituted improper rebuttal, Detective Cortes was allowed to testify about his February 6, 2007, interview with Swancutt.   Swancutt identified Escobar as Listo and Ayala as Trips from photographic six-packs.   Over a similar objection, this time joined by Escobar's counsel, Detective Cortes testified that Swancutt said that she let appellants out of her car first and then they approached the truck and ordered her into the back.   Escobar got into the front passenger seat and Ayala got into the back, behind the driver.   She saw them take a chain and wallet and afterward called Listo to find out where they were going and what was going on.   Swancutt told Detective Cortes that the two men who committed the robbery were the same men to whom she had given a ride and whose numbers were programmed into her phone.   According to the detective, Swancutt expressed fear for her life several times during the interview.

B. Contentions

Ayala contends that his convictions must be reversed because Detective Cortes's testimony regarding his interview of Swancutt was erroneously introduced in rebuttal, violating Ayala's due process rights.   He argues that this testimony belonged in the prosecution's case-in-chief, as it was probative of Ayala's guilt and was not responsive to evidence presented by the defense.   Detective Cortes's testimony strengthened and clarified Swancutt's testimony, which had not been impeached by witnesses in the defense case-in-chief, and its admission was an abuse of discretion.   This “gave the People an unfair advantage over appellant.”   This contention is meritless.

C. Propriety of rebuttal

Section 1093 provides that after the People and the defense have presented their evidence, “[t]he parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.” (§ 1093, subd. (d).)  This rule is “to assure an orderly presentation of evidence so that the trier of fact will not be confused;  to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial;  and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence.”  (People v. Carter (1957) 48 Cal.2d 737, 753 (Carter ).)   Thus, proper rebuttal testimony does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime.  (People v. Kaurish (1990) 52 Cal.3d 648, 682.)  “It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.”  (Carter, supra, 48 Cal.2d at pp.   753-754.)

But the statutory order of proof is not mandatory.  (People v. Moore (1945) 70 Cal.App.2d 158, 162.)   The order of proof is for the trial court to control within its sound discretion.  (People v. Roybal (1998) 19 Cal.4th 481, 511;  Evid.Code, § 320.)   Allowing evidence out of order will not ordinarily justify reversal.  (People v. Arrighini (1898) 122 Cal. 121, 124, disapproved on other grounds in People v. Zerillo (1950) 36 Cal.2d 222, 229;  People v. Wong Hing (1915) 28 Cal.App. 230.)

Our Supreme Court in Carter disapproved of the prosecutorial tactic of intentionally withholding crucial evidence properly belonging in the case-in-chief in order to take unfair advantage of the defendant.  (People v. Friend (2009) 47 Cal.4th 1, 44.)   However, Carter applies only to “ ‘ “crucial” ’ ” or “ ‘ “material” ’ ” evidence that belonged in the case-in-chief.  (People v. Friend, supra, at p. 44.)  Carter has not been extended to evidence bearing only on a witness's credibility, which does not by itself establish and is not directly probative of the charged offenses (People v. Friend, supra, at p. 44) or to rebuttal evidence that fortifies a part of the People's case that was impeached by defense witnesses.  (People v. Young (2005) 34 Cal.4th 1149, 1199.)

Here, it does not appear that the prosecutor indulged in prosecutorial withholding of evidence properly belonging in her case-in-chief, nor is there a likely possibility that appellants were surprised by this allegedly improper rebuttal evidence.   The testimony of Detective Cortes was not evidence that by itself established guilt or was directly probative of the charged offenses.   Rather, it was collateral evidence bearing primarily on Swancutt's credibility.   On cross-examination, Swancutt testified that when she spoke with detectives in February 2007, she was unsure who the men were who came into Soto's truck with her and Macias.   In appellants' case, Escobar introduced alibi evidence that he was at a party at the time of the charged incident and not in Soto's truck.   This, at least indirectly, undermined Swancutt's testimony that appellants were the ones who held up Macias and her.   Detective Cortes testified in rebuttal to resuscitate Swancutt's credibility and testimony.

The challenged rebuttal did not raise anything that was not previously presented or foreshadowed in the questioning of Swancutt by the prosecutor.   It was clear in that questioning that she was being asked questions in anticipation of later introducing conflicting statements she had made.   It should therefore have come as no surprise that the prosecutor was going to call Detective Cortes to introduce Swancutt's inconsistent or consistent statements.   The defense was in possession of the police report of the interview of Swancutt, making none of her statements a surprise.   Furthermore, appellants did not request the opportunity to introduce further testimony in surrebuttal to refute any of Detective Cortes's rebuttal testimony.   It is hard to see how, without such a request and denial of it, appellants can now argue any injury from Detective Cortes's rebuttal testimony.

We find People v. Young, supra, 34 Cal.4th 1149 instructive.   There, a prosecution witness, Melva Fite, testified on direct examination that defendant exited the driver's side door holding a gun before he approached and shot the victim.   On cross-examination, Fite acknowledged that she had provided statements to the police that the passenger exited the car and did the shooting.   During the defense case, the officers to whom Fite had given the statements were called and testified that Fite told them that the shooter had exited the passenger side of the vehicle.   In rebuttal, the prosecution sought to call a witness to rehabilitate Fite's credibility by testifying that the witness observed the man who shot the victim exit the driver's side of the vehicle and that another man was in the passenger seat.   The defendant objected to the rebuttal because the defense had impeached Fite's credibility on cross-examination, and the witness had been available to the prosecution in its case-in-chief.   The prosecutor argued that the testimony rebutted evidence presented in the defense's case-in-chief that corroborated its impeachment of Fite. Our Supreme Court concluded that it was not error to admit the evidence in rebuttal because it corroborated the portion of Fite's testimony that had been impeached by the officers' testimony.  “The substance of [the witness's] testimony, therefore, had already been conveyed to the jury during the prosecution's case-in-chief.   Testimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal.”  (People v. Young, supra, 34 Cal.4th at p. 1199.)

Analogously here, Swancutt testified in the People's case that appellants were “Trips” and “Listo” and that they were the two men to whom she gave a ride and who kidnapped Macias and her.   In the defense's case-in-chief, appellants introduced alibi evidence that they were not at the scene of the offenses;  Ayala was with his girlfriend and Escobar was at a party with his mother and sister.   This impeached Swancutt's testimony that they entered Macias's truck and committed the kidnappings and murder.   The substance of Detective Cortes's testimony on rebuttal was to fortify the People's case that Swancutt had identified them as the perpetrators.   This “testimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence” was therefore properly admissible on rebuttal.  (Young, supra, 34 Cal.4th at p. 1199.)   The trial court did not therefore abuse its discretion in admitting the evidence.

D. Harmless error

Even if the trial court erred in admitting Detective Cortes's testimony in rebuttal, that error was harmless under even the most stringent beyond a reasonable doubt standard.   As previously pointed out in part IE2, ante, the evidence against appellant was overwhelming.   Further, much of Detective Cortes's testimony regarding what Swancutt told him was already testified to by her, as she identified appellants as the men who entered Soto's truck with guns.   While she testified that she did not recall them taking Macias's neck chain and pendant, or telling Detective Cortes that they did, she did testify at trial that she must have said that if it was contained in the transcript.

V. Admission of prior testimony

A. Background

On April 19, 2007, Soto was conditionally examined pursuant to section 1335, while he was in Immigration and Naturalization Service (INS) custody, awaiting deportation.   Before trial began, Escobar's attorney indicated that he objected to using that examination.

During trial, when the prosecutor stated her intention of introducing Soto's conditional examination, the trial court conducted an unavailability hearing, at which only Detective Cortes testified.   He stated that he contacted the INS when Soto was in detention pending exclusion.   The INS delayed exclusion until the conditional examination could be conducted.   Five days later, Soto was deported.   He returned to the United States and was again deported on June 13, 2008.   Detective Cortes did not know Soto's whereabouts at the time of trial, but determined that on April 9, 2009, the eve of trial, he had an “excluded” immigration status.

Other than determining Soto's excluded immigration status, Detective Cortes did nothing to determine whether Soto was back in the United States or his location in Mexico.   The detective had obtained an address for Soto in Phoenix, Arizona, which was listed on his vehicle registration, and a South Gate address, at which his cousin resided.   Detective Cortes did not check either address to see if Soto was there in the last six months.   He also failed to check jail bookings, prisons or hospitals in an effort to locate Soto. He did not run a driver's license with the DMV and ceased all efforts once he learned that Soto had been re-deported on June 13, 2008.   He did not know Soto's location in Mexico or try to serve him with a subpoena there.

Appellants' counsel argued that the People had failed to exercise due diligence in attempting to procure Soto's attendance at trial.   Because he had a known history of re-entering the United States after deportation, it was incumbent on the prosecution to check and see if he might have done so again.   Appellants were therefore deprived of their rights to due process and to confront adverse witnesses by use of the conditional examination.   The prosecutor argued that the People are not obligated to keep track of every witness.   The trial court found that Soto was unavailable within the meaning of Evidence Code section 240 and that there was a sufficient exercise of due diligence.   It denied the motion to exclude the video of Soto's conditional examination.

B. Contentions

Escobar contends that the trial court erred in concluding that the prosecutor had exercised due diligence in ascertaining that Soto was unavailable and therefore in ruling that Soto's conditional examination was admissible.   This contention has merit.

C. Due Diligence

Evidence Code section 1291 provides that former testimony is not inadmissible by the hearsay rule if the declarant is “unavailable as a witness,” and “[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.”

Section 1335 et seq. sets forth a procedure for taking a conditional examination of a witness, including a witness who is about to leave the country. (§ 1336, subd. (a).)  If the witness is unavailable at the time of trial, within the meaning of Evidence Code section 240, the transcript of the examination may be read to the jury, or if it was video-recorded, the video may be shown to the jury.[11](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_11) (§ 1345.)

Evidence Code section 240, subdivision (a)(4) provides that a witness is unavailable if “the court is unable to compel his or her attendance by its process,” and subdivision (a)(5) provides that a witness is unavailable where the witness is “[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.”   The term “reasonable diligence” or “due diligence” under Evidence Code section 240, subdivision (a)(5) “ ‘ “ ‘connotes persevering application, untiring efforts in good earnest, efforts of substantial character.’ ” ' ”  (People v. Friend, supra, 47 Cal.4th at p. 68.)   The proponent of evidence under Evidence Code section 240 bears the burden of proving unavailability by a preponderance of the evidence.  (People v. Winslow (2004) 123 Cal.App.4th 464, 471.)

We defer to the trial court's determination of historical facts of what the prosecution did to locate an absent witness, but independently review whether those efforts amount to due diligence sufficient to sustain a finding of unavailability.  (People v. Bunyard (2009) 45 Cal.4th 836, 851.)   Due diligence to secure the presence of a witness is determined by the facts of each case and is incapable of “ ‘mechanical definition.’ ”  (People v. Sanders (1995) 11 Cal.4th 475, 523.)   We assess due diligence by what has been done to effectuate the witnesses' attendance at trial, not by the suggestions of “Monday morning quarterbacks” as to what should have been done, but was not.  (People v. Diaz (2002) 95 Cal.App.4th 695, 706.)

Considerations relevant to determining whether due diligence was employed “include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.”  (People v. Wilson (2005) 36 Cal.4th 309, 341.)   While there is no universal formula to determine whether a prosecutor has exercised due diligence, courts look to the totality of the circumstances, including the character of the efforts made, whether the prosecutor reasonably believed the witness would appear willingly or if the prosecutor had reason to believe the witness would not, whether the search was timely begun, whether the witness would have been produced if reasonable diligence had been exercised (People v. Sanders, supra, 11 Cal.4th at p. 523) and how vital the witness's testimony is to the case.  (See People v. Hovey (1988) 44 Cal.3d 543, 564.)

The prosecution failed to exercise due diligence here.   Detective Cortes testified at the Evidence Code section 402 hearing that he learned that Soto was deported to Mexico days after his conditional examination.   Detective Cortes was also aware that Soto was excluded from the United States a second time in the middle of 2008.   After learning that Soto had been excluded from the United States, he did nothing to attempt to locate him other than to reconfirm his excluded status days before trial began.   Detective Cortes testified that he did not know Soto's whereabouts in Mexico.   But he failed to indicate what, if any, efforts he made to learn of Soto's location in Mexico.   Simply because Soto was out of the country did not end the prosecution's obligation to attempt to procure his attendance a trial.  “[U]navailability in the constitutional sense does not invariably turn on the inability of the state court to compel the out-of-state witness's attendance through its own process, but also takes into consideration the existence of agreements or established procedures for securing a witness's presence that depend on the voluntary assistance of another government.  [Citation.]  Where such options exist, the extent to which the prosecution had the opportunity to utilize them and endeavored to do so is relevant in determining whether the obligations to act in good faith and with due diligence have been met.”  (People v. Herrera (2010) 49 Cal.4th 613, 628.)   Various treaties with Mexico might have allowed the prosecution to procure Soto's attendance had his location there been investigated and efforts to procure his attendance from Mexico been undertaken.  (Id. at p. 626.)

Moreover, Detective Cortes knew that Soto had reentered the United States and was excluded for a second time in 2008.   We can also infer that as a law enforcement officer, he was aware that individuals who illegally enter the United States and are deported often return on multiple occasions.   He had leads on two locations with which Soto had previously been associated;  there was an address where Soto stayed when he was in Los Angeles and an address at which Soto's truck was registered.   It would have required minimal effort to determine if he was at either location.   Nonetheless, Detective Cortes made no attempt to do so, failed to check to see if he had been arrested and jailed in the United States or taken any other simple act to attempt to locate him.   Having determined that Soto was listed as “excluded” on INS records, he made no further efforts.   This conduct amounted to no diligence, not due diligence.[12](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_12)  We cannot agree that the failure to take even the easiest and most convenient efforts to locate Soto “ ‘ “ ‘connotes persevering application, untiring efforts in good earnest, efforts of substantial character.’ ” ' ”   (People v. Friend, supra, 47 Cal.4th at p. 68.)

D. Harmless error

Even if admission of Soto's conditional examination constituted a violation of appellants' rights to due process and to confront the witnesses against him, the errors were harmless beyond a reasonable doubt under Chapman v. California, supra, 386 U.S. at p. 24.  (Lilly v. Virginia, supra, 527 U.S. at pp.   139-140;  Brown v. United States, supra, 411 U.S. at pp.   231-232;  Geier, supra, 41 Cal.4th at p. 608;  People v. Song, supra, 124 Cal.App.4th at p. 982.)   To find these errors harmless, we must find beyond a reasonable doubt that they did not contribute to the verdict, that is, they were unimportant in relation to everything else the jury considered on the issue in question.  (Yates v. Evatt, supra, 500 U.S. at p. 403.)

For the reasons set forth in part IE2, ante, the evidence against appellants was overwhelming.   Moreover, Soto's testimony was of little value.   First, he was testifying under use immunity, undermining his credibility.   Second, he was a drug dealer with prior convictions, who admitted having initially lied to police about what happened, further undermining his credibility.   Third, he was not a percipient witness to the charged offenses but simply provided collateral testimony.   Finally, most of his testimony was simply corroborative of the testimony of Swancutt or others.   Given these facts, it is doubtful that his testimony had any significant impact on the jury.

VI. Aranda/Bruton

A. Background

Appellants were apprehended in a car being driven by their friend, Camacho, who testified that just before the arrest, Ayala told him that “we jacked” a “pisa” (meaning Mexican) “for his gold chain.”   Escobar said nothing in response to Ayala's statement.   The radio was on at a “regular” volume, and not a high volume, and Ayala was talking in a “medium” voice.   After their arrest, Camacho saw a gold chain around Escobar's neck.

Before trial, the parties discussed the admission of Ayala's statement.   The prosecutor argued that Aranda was inapplicable because Escobar was present when Ayala made the challenged statement which was therefore an adoptive admission.   The trial court agreed with the prosecutor because Escobar had the opportunity to renounce the statement and did not do so.   It therefore became Escobar's admission and was not within Aranda/Bruton.

B. Contention

Escobar contends that the trial court erred in allowing the statement of Ayala to Camacho that “we jacked some pisa for his gold chain,” thereby depriving him of his right to confront and cross-examine Ayala.   This contention lacks merit.

C. Legal principles

In Aranda, dealing with out-of-court statements by codefendants, the California Supreme Court rejected the notion that the admission of a nontestifying defendant's confession inculpating a codefendant is rendered harmless to the nonconfessing defendant by an instruction that it should not be considered against him.  (Aranda, supra, 63 Cal.2d at p. 526.)  “When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures:  (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant.   By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established.  (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made.  (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible.”  (Id. at pp.   530-531.)

In Bruton, decided just a few years after Aranda, the United States Supreme Court held that introduction of an incriminating extrajudicial statement by a nontestifying codefendant violates the defendant's right to cross-examination, even if the jury is instructed to disregard the statement in determining the defendant's guilt or innocence.  (Bruton, supra, 391 U.S. at p. 137.)   The Supreme Court in Bruton reasoned that, even when so instructed, jurors cannot be expected to ignore the statements of one defendant that are “powerfully incriminating” as to another defendant.  (Id. at pp.   135-136.)   As a result of Bruton, Aranda, which did not articulate a constitutional requirement, is now recognized as a constitutionally based doctrine, at least in part.  (People v. Mitcham (1992) 1 Cal.4th 1027, 1045.)

A nontestifying codefendant's extrajudicial, self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right to confrontation and cross-examination, even if a limiting instruction is given.  (People v. Jennings (2003) 112 Cal.App.4th 459, 471, disapproved on other grounds in People v. Jennings (2010) 50 Cal.4th 616, 665, fn. 17.)   Nontestimonial hearsay does not present confrontation clause issues, if it comes within a firmly rooted exception to the hearsay rule.  (Crawford v. Washington, supra, 541 U.S. at p. 68.)   An adoptive admission is such an exception that does not offend the confrontation clause.  (People v. Jennings, supra, 112 Cal.App.4th at p. 472.)

The scope of Bruton was subsequently limited.   In Richardson v. Marsh (1987) 481 U.S. 200, the high court held that “the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when ․ the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.”   (Richardson v. Marsh, supra, at p. 211, fn. omitted.)   The court distinguished the redacted confession from the confession at issue in Bruton because the redacted confession was not incriminating on its face, but only when linked to other evidence.  (Id. at p. 208.)

The statement made by Ayala to Camacho was not testimonial, as it was not made in the course of a police investigation (Davis v. Washington, supra, 547 U.S. at p. 822) or with a reasonable expectation that it would be used in a subsequent prosecution (Crawford, supra, 541 U.S. at p. 51).   Ayala's statement was made during an informal conversation, among friends in a truck.

Evidence Code section 1221 provides:  “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.”   Admissibility of an adoptive admission is appropriate when “ ‘a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution․’ ”  (People v. Riel (2000) 22 Cal.4th 1153, 1189;  People v. Combs, supra, 34 Cal.4th at p. 843.)  “There are only two requirements for the introduction of adoptive admissions:  ‘(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement.’  [Citation.]”  (People v. Silva (1988) 45 Cal.3d 604, 623;  People v. Browning (1975) 45 Cal.App.3d 125, 143, disapproved on other grounds in People v. Williams (1976) 16 Cal.3d 663.)   The analytical basis for this exception is that the adopting party makes the statement his own by admitting its truth.

The test for admitting an accusatory statement against a defendant that the defendant failed to deny is not whether the defendant had the opportunity to deny the accusation, but whether the accusation was made under circumstances calling for reply.   Each case must be determined on the facts and circumstances presented.  (People v. McKnight (1948) 87 Cal.App.2d 89, 92.)

Given the context in which the challenged statement was made here, the trial court reasonably concluded that it inculpated Escobar.   He was the only other person in the pickup truck cab besides Camacho, to whom Ayala was talking.   Escobar was wearing a chain at the time of their arrest moments after Ayala's comment that “we” “jacked some pisa for his gold chain.”   Thus, the word “we” was a reference to Escobar, which is how Camacho understood the statement.

The remaining issue is whether the hearsay exception for adoptive admission was applicable.   We conclude that it was.   The trial court could reasonably have inferred the foundational facts necessary for admission of the statement.  (People v. Edelbacher (1989) 47 Cal.3d 983, 1011 [“To warrant admissibility [of an adoptive admission], it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation;  whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide”].)   While there was no direct evidence as to whether Escobar knew what was said, he was in the close quarters of a pickup truck cab with Ayala and Camacho when the statement was made.   Ayala was speaking in a “medium” voice and the radio was not blasting.   Escobar was wearing the chain that had belonged to Macias at the time reference was made to it.   Having heard the statement, it would have been expected that Escobar would have denied that the chain he was wearing was “jacked,” unless he agreed with, and was adopting, Ayala's statement.   In these circumstances, we cannot say that the trial court abused its discretion in allowing the admission of this evidence.   It was for the jury to determine whether Escobar's conduct actually constituted an adoptive admission.  (People v. Edelbacher, supra, at p. 1011.)

D. Harmless error

For the reasons set forth in part IE2, ante, we conclude that even if it was error to admit Ayala's statement to Camacho, that error was harmless beyond a reasonable doubt.  (People v. Leach (1975) 15 Cal.3d 419, 446;  Chapman v. California, supra, 386 U.S. at p. 24.)   Of particular significance here is that at the time of Escobar's arrest, he was wearing the distinctive chain and pendant that Macias was wearing on the day he was murdered.   Medrano identified the chain and pendant as Macias's.   This evidence was more compelling than Ayala's statement to Camacho.

VII. Cumulative error

Appellants contend that even if the errors they allege were not individually sufficient to require reversal, these errors cumulatively prejudiced their right to a fair trial and cannot be deemed harmless, mandating reversal.   This contention lacks merit.

“Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice.  [Citations.]”  (People v. Hill, supra, 17 Cal.4th at p. 844.)  “Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.”  (Ibid.) We have determined that there were several errors that occurred during trial that were not prejudicial.   We also find that even cumulating them, they were not collectively prejudicial given the inconsequentiality of the errors and overwhelming strength of the People's case.

VIII. Sentencing errors

A. Appellants' sentences

The trial court sentenced Ayala as follows:  on count 1, life without the possibility of parole, plus one year for the arming enhancement in section 12022, subdivision (a)(1) and two years for the out-on-bail enhancement in section 12022.1;  on count 2, a consecutive life term plus three years for the great bodily injury enhancement and one-third the midterm or four months for the arming allegation;  on count 3, life plus one-third the midterm or four months for the arming allegation.   It imposed and stayed sentences on the kidnapping and robbery convictions (counts 4 & 5) pursuant to section 654 and the great bodily injury enhancement as to counts 3 through 5. The trial court ordered Ayala to pay a $10,000 restitution fine pursuant to section 1202.4, subd. (b), a $100 ($20 per count) court security fee pursuant to section 1465.8, subdivision (a)(1), a conviction assessment fee of $150 ($30 per count) pursuant to Government Code section 70373 and a $1,000 penalty assessment pursuant to section 1464 and Government Code section 76000.

Escobar received a sentenced identical to Ayala's, except that Escobar did not receive the two-year term under section 12022.1.

B. Strike kidnapping as a lesser included offense

Ayala contends that his kidnapping conviction in count 4 must be reversed because kidnapping is a necessarily included offense of kidnapping for robbery, kidnapping for carjacking and murder with the special circumstance that it was committed while engaged in a kidnapping.   He argues that the kidnapping count should have been stricken and not stayed.   The People agree with Ayala, as do we.

Convictions of both a greater and a lesser included offense require reversal of the conviction of the latter if substantial evidence of both is in the record.  (People v. Ybarra (2008) 166 Cal.App.4th 1069, 1095;  People v. Moran (1970) 1 Cal.3d 755, 763.)   Convictions for both the lesser and greater offense are prohibited.  (People v. Medina (2007) 41 Cal.4th 685, 702.)   Simple kidnapping is a lesser included offense of aggravated kidnapping.   (People v. Jackson (1998) 66 Cal.App.4th 182, 189;  see People v. Medina, supra, at p. 700.)   Consequently, appellants' conviction for the lesser included offense of kidnapping must be reversed.[13](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_13)

C. Section 654

1. Contentions

Appellants contend that pursuant to section 654, the trial court was compelled to stay sentencing for their kidnapping to commit robbery (count 2) and kidnapping to commit carjacking (count 3) convictions.   They argue that those counts are indivisible from the special circumstances of murder in the commission of a kidnapping and a robbery.   In fact, they are “essential components underlying the special circumstances and the trial court should have stayed those sentences as well.”

Alternatively, Ayala argues that “[a]t the very least, ․ the sentence on count three must be stayed pursuant to Penal Code section 654” because a defendant convicted of kidnapping to commit carjacking and kidnapping to commit robbery was not subject to punishment for both offenses.

The People concede that appellants' sentences for count 3 must be stayed pursuant to section 654 but disagrees that count 2 for kidnapping for murder must also be stayed.   We agree with the People.

2. Section 654 stay

Section 654 provides in part:  “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a), italics added.)   A defendant cannot be given multiple punishments for multiple statutory violations produced by the same act.   (People v. Harrison (1989) 48 Cal.3d 321, 335.)   A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment.  (People v. Butler (1996) 43 Cal.App.4th 1224, 1248.)  “If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.”  (People v. Perez (1979) 23 Cal.3d 545, 551.)   If, on the other hand, “the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.”  (People v. Beamon (1973) 8 Cal.3d 625, 639.)

Whether multiple convictions were part of an indivisible transaction is primarily a question of fact.  (People v. Avalos (1996) 47 Cal.App.4th 1569, 1583.)   We review such a finding under the substantial evidence test.  (See People v. Osband (1996) 13 Cal.4th 622, 730-731;  People v. Ratcliff (1990) 223 Cal.App.3d 1401, 1408.)   We consider the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence.  (People v. Holly (1976) 62 Cal.App.3d 797, 803.)   We must determine whether the violations were a means toward the objective of commission of the other.  (People v. Beamon, supra, 8 Cal.3d at p. 639.)

Appellants were sentenced to consecutive life-with-parole terms on counts 2 and 3, for kidnapping for robbery and kidnapping for carjacking, respectively.   Both sentences punished not a course of conduct, but a single undifferentiated act of kidnapping.   Appellants cannot be punished twice for the same act (People v. Harrison, supra, 48 Cal.3d at p. 335), and count 3 must be stayed.

The charge of kidnapping for robbery in count 2, however, stands on a different footing.   There was substantial evidence that the kidnapping for robbery and murder in count 1 were separate offenses with different objectives.   When appellants entered Macias's truck, Macias told them to take the truck and let him go.   They told him that they were going to take the truck.   They took Macias's wallet and necklace and, afterwards, allowed Swancutt to leave the vehicle.   They then forced Macias to drive them to a secluded location where they shot him, the robbery having been long since completed.[14](https://caselaw.findlaw.com/ca-court-of-appeal/1549390.html" \l "footnote_14)

D. Correction of abstract of judgment

Appellants contend that their abstracts of judgment must be corrected in the following respects:  (1) the abstracts of judgment erroneously reflect sentences of life without the possibility of parole on counts 2 and 3, though the trial court only imposed life sentences with the possibility of parole on those counts;  (2) Ayala's abstract of judgment reflects a consecutive sentence of one year eight months on count 4 and Escobar's abstract of judgment reflects a consecutive sentence of one year on that count, but the trial court stayed the imposed sentences on that count;  (3) the security assessment under section 1465.8, subdivision (a)(1) must be recalculated and the abstract corrected, and (4) the abstracts of judgment and minute order reflect the imposition of a $10,000 parole revocation fine, though the trial court specifically indicated that it was not imposing that fine because it had sentenced appellants on count 1 to life without the possibility of parole.

Rendition of judgment is an oral pronouncement.  (People v. Mesa (1975) 14 Cal.3d 466, 471.)   Entry of judgment in the minutes is a clerical function.   (Ibid.;  § 1207.)   An abstract of judgment is not the judgment of conviction and cannot add to or modify the judgment it purports to summarize.  (People v. Mesa, supra, at p. 471.)   The oral pronouncement of judgment controls over the abstract of judgment.  (People v. Crenshaw (1992) 9 Cal.App.4th 1403, 1416.)   If a minute order or abstract of judgment fails to reflect the judgment pronounced by the trial court, the error is clerical and the record can be corrected at any time to make it reflect the true facts.  (People v. Mitchell (2001) 26 Cal.4th 181, 185;  see also People v. Williams (1992) 10 Cal.App.4th 827, 830, fn. 3;  People v. Jack (1989) 213 Cal.App.3d 913, 915-916.)

The trial court did not sentence appellants to life without parole on counts 2 and 3, but rather to life sentences with parole.   Consequently, appellants' abstracts of judgment must be corrected to reflect that they were sentenced to life with the possibility of parole on counts 2 and 3.

Appellants contend that their abstracts of judgment incorrectly state that they received consecutive sentences on count 4, when that count was stayed.   While the abstract of judgments were erroneous in this respect, we need not correct this error because we have concluded that appellants' conviction on count 4 must be dismissed.   The abstracts of judgment must be amended to reflect the dismissal.

The trial court stated in its oral pronouncement of judgment that it was imposing a $10,000 restitution fine, but was not imposing a parole revocation fine because appellants had been sentenced to life without the possibility of parole on count 1. The abstracts of judgment nonetheless reflect that a $10,000 parole revocation fine was imposed.   They must be corrected to reflect that no parole revocation fine was imposed.

As a result of our determination in part VIIIB, ante, that count 4 must be dismissed, the court security surcharge (§ 1465.8) and criminal conviction fee (Gov.Code, § 70373), which are based on the number of convictions, must be recalculated.

E. Section 1464 penalty assessment

Ayala contends that the $1,000 penalty assessment was improperly imposed.   He argues that the trial court ordered the penalty assessment, but it is not included in the abstract of judgment.   He argues that there was no finding on which the penalty assessment could have been imposed and must be stricken.   The People agree with appellants as do we.

Section 1464 provides for a state penalty assessment, as follows:  “(a) Subject to Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, there shall be levied a state penalty, in an amount equal to ten dollars ($10) for every ten dollars ($10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses, ․ except parking offenses․”  But the state penalty does not apply to the following:  “(A) Any restitution fine.” (§ 1464, subd. (a)(3)(A).)

Government Code section 76000 provides for a county penalty assessment, as follows:  “(a) In each county there shall be levied an additional penalty of seven dollars ($7) for every ten dollars ($10) or fraction thereof which shall be collected together with and in the same manner as the amounts established by Section 1464 of the Penal Code, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses ․ except parking offenses․”  (Italics added.)

As agreed by the parties, the penalty assessment could not have been based on the restitution fine, for section 1462, subdivision (a)(3)(A) explicitly states that the penalty assessment is inapplicable to that fine.   Moreover, there are no other fines, penalties or forfeitures that could have resulted in a $1,000 penalty assessment.   This penalty must therefore be stricken from the judgment.

F. Escobar additional conduct credit

Escobar contends that the trial court erred in awarding him 862 days of presentence custody credit for the number of days actually spent in custody.   He argues that he is entitled to one additional day of custody credit.   The People agree.   We modify the judgment to an additional day of custody credit.

DISPOSITION

Appellants' convictions of robbery in count 4 (kidnapping) of the judgments are dismissed, the sentences on count 3 are stayed, the security assessments under section 1465.8, subdivision (a)(1) and the criminal conviction fee under Government Code section 70373 must be recalculated in light of the dismissal of count 4, the $1,000 penalty assessments under section 1464 are dismissed, and the judgments are otherwise affirmed.   On remand, the trial court is directed to correct the abstracts of judgment (1) to reflect the dismissal of count 4, (2) to reflect the staying of execution on count 3, (3) to reflect that the sentence on count 2 is life, rather than life without the possibility of parole, and (4) to reflect the recalculated court security and conviction fees.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ASHMANN-GERST

We concur:

FOOTNOTES

FN1. All further statutory references are to the Penal Code unless otherwise indicated..  FN1. All further statutory references are to the Penal Code unless otherwise indicated.

FN2. People v. Aranda (1965) 63 Cal.2d 518 (Aranda )..  FN2. People v. Aranda (1965) 63 Cal.2d 518 (Aranda ).

FN3. Bruton v. United States (1968) 391 U.S. 123 (Bruton )..  FN3. Bruton v. United States (1968) 391 U.S. 123 (Bruton ).

FN4. On January 24, 2007, at 7:14 p.m., Macias was on the telephone with Maria Aaron (Aaron).   Aaron heard a woman's voice in the background and then heard men's voices cursing and shouting in an aggressive manner, before the phone dropped and the call was disconnected..  FN4. On January 24, 2007, at 7:14 p.m., Macias was on the telephone with Maria Aaron (Aaron).   Aaron heard a woman's voice in the background and then heard men's voices cursing and shouting in an aggressive manner, before the phone dropped and the call was disconnected.

FN5. At the preliminary hearing, Swancutt testified that she could not identify the men who entered the truck.   But that was the first time she was in the room with appellants and did not want a “green light” taken out on her life.   At trial, she felt pressure from the prosecutor to identify appellants.   She testified it was possible she was just saying whatever it took to “get out of the situation.”.  FN5. At the preliminary hearing, Swancutt testified that she could not identify the men who entered the truck.   But that was the first time she was in the room with appellants and did not want a “green light” taken out on her life.   At trial, she felt pressure from the prosecutor to identify appellants.   She testified it was possible she was just saying whatever it took to “get out of the situation.”

FN6. Fuller denied that Swancutt identified the perpetrators..  FN6. Fuller denied that Swancutt identified the perpetrators.

FN7. At trial, Swancutt testified that she dropped the $100 bill that she had brought with her to pay for the drugs..  FN7. At trial, Swancutt testified that she dropped the $100 bill that she had brought with her to pay for the drugs.

FN8.  It appears that Escobar's mother is referred to as Olga Silva and alternatively as Olga Luna in the reporter's transcript..  FN8.  It appears that Escobar's mother is referred to as Olga Silva and alternatively as Olga Luna in the reporter's transcript.

FN9. Crawford also states that, “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not․  [¶] Various formulations of this core class of ‘testimonial’ statements exist:  ‘ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.’ ”   (Crawford, supra, 541 U.S. at p. 51.).  FN9. Crawford also states that, “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not․  [¶] Various formulations of this core class of ‘testimonial’ statements exist:  ‘ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.’ ”   (Crawford, supra, 541 U.S. at p. 51.)

FN10. People v. Watson (1956) 46 Cal.2d 818, 836..  FN10. People v. Watson (1956) 46 Cal.2d 818, 836.

FN11. Admitting Soto's conditional examination, if he was properly determined to be unavailable, did not present a confrontation clause issue despite its being testimonial hearsay.   It meets the Crawford requirements of “unavailability and a prior opportunity for cross-examination.”  (Crawford, supra, 541 U.S. at p. 68.).  FN11. Admitting Soto's conditional examination, if he was properly determined to be unavailable, did not present a confrontation clause issue despite its being testimonial hearsay.   It meets the Crawford requirements of “unavailability and a prior opportunity for cross-examination.”  (Crawford, supra, 541 U.S. at p. 68.)

FN12. Because we conclude that the People exercised insufficient effort in trying to locate Soto, we need not decide the more difficult issue of what obligations the prosecution had in procuring his attendance at trial if they had determined his whereabouts in Mexico..  FN12. Because we conclude that the People exercised insufficient effort in trying to locate Soto, we need not decide the more difficult issue of what obligations the prosecution had in procuring his attendance at trial if they had determined his whereabouts in Mexico.

FN13. Given the People's concession, we need not reach the issue of whether simple kidnapping is a lesser included offense of the special circumstance of murder in the commission of a kidnapping. (§ 190.2, subd. (a)(17)(B).).  FN13. Given the People's concession, we need not reach the issue of whether simple kidnapping is a lesser included offense of the special circumstance of murder in the commission of a kidnapping. (§ 190.2, subd. (a)(17)(B).)

FN14. Because the life without the possibility of parole sentence could be based on any one of the three special circumstances that the jury found to be true, the other two special circumstances were unnecessary in convicting appellants of first degree, special circumstance murder.   We therefore do not find that punishment for count 2 was double punishment that violated the double jeopardy clause..  FN14. Because the life without the possibility of parole sentence could be based on any one of the three special circumstances that the jury found to be true, the other two special circumstances were unnecessary in convicting appellants of first degree, special circumstance murder.   We therefore do not find that punishment for count 2 was double punishment that violated the double jeopardy clause.

\_, P.J. BOREN \_, J. DOI TODD