**PEOPLE v. FLORES**

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*THE PEOPLE, Plaintiff and Respondent, v. EDGAR FLORES et al., Defendants and Appellants.*

Court of Appeals of California, Second District, Division Seven.

Filed July 19, 2010.

***Attorney(s) appearing for the Case***

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

PERLUSS, P. J.

Following a lengthy joint jury trial, Rafael R. Fuentes was found guilty of the first degree murder of Juan Monsivais and the attempted premeditated murder of Manuel De La Rosa in a gang-related, drive-by shooting on September 6, 2003. Edgar Javier Flores, Bryan Sanchez and Jasmin Rossier were each found guilty of second degree murder and attempted premeditated murder in connection with the shooting. Sanchez and Pedro Aguilar were found guilty, but Fuentes was acquitted, of conspiracy to commit murder in connection with an incident two days later involving Marshall High School; and Fuentes was convicted of unlawfully carrying a loaded firearm as the result of another shooting that had occurred on August 29, 2003, several days before the drive-by shooting. Gang enhancement allegations were found true for each of the crimes; and some, but not all, firearm-use enhancement allegations were also found true. The issues on appeal primarily concern the trial court's denial of various motions to sever counts and/or defendants and the court's ruling that evidence of the August 29, 2003 shooting was admissible under Evidence Code section 1101, subdivision (b), to prove a fact other than disposition to commit the September 6, 2003 shooting. The appellants also contend the trial court committed other evidentiary, instructional and sentencing errors.[1](https://www.leagle.com/decision/incaco20100719009#fid1)

We reverse Sanchez's and Aguilar's convictions for conspiracy to commit murder and remand for a new trial on that count because the trial court failed to instruct the jury that conspiracy to commit assault with a firearm was a lesser included offense of conspiracy to commit murder as alleged in the accusatory pleading. We modify the judgment as to Flores to correct a sentencing error, acknowledged by the Attorney General, and order corrections in the abstracts of judgment for Flores and Rossier. In all other respects, the judgments are affirmed.

**FACTUAL AND PROCEDURAL BACKGROUND**

**1. *The 18th Street Gang***

The 18th Street gang is the largest Hispanic criminal street gang in the United States with, at the time of trial, as many as 30,000 members located in a number of different geographic cliques or subsets. Red Shield, Grandview and Hoover Locos are three such cliques of the 18th Street gang with adjacent territories in Los Angeles. Each clique had approximately 50 to 100 members. Fuentes (sometimes known as Sniper), Flores (Mosca or Little Mosca), Sanchez (Smiley), Rossier (Giggles) and Aguilar (Bouncer) were all 18th Street gang members. Fuentes, Sanchez and Rossier belonged to the Red Shield clique. Sanchez was considered to be the leader of the younger members of that clique; Payaso (a Spanish word for clown) was an adult leader of the clique. Flores was a member of the Grandview clique; Aguilar a member of Hoover Locos.

The three 18th Street cliques got along with each other, and their members were known to socialize together and cooperate in joint gang activities. The 18th Street gang's rivals include Temple Street, Silver Lake 13, White Fence and Mara Salvatrucha.

**2. *The Vendome Street Tagging and Shooting***[**2**](https://www.leagle.com/decision/incaco20100719009#fid2)

The Red Shield clique was centered near West 10th Place and Albany Street, just west of the Harbor Freeway, close to downtown Los Angeles. In the summer of 2003 members of the Red Shield clique (and perhaps other members of the 18th Street gang) wanted to expand the Red Shield territory into the Echo Park-Silver Lake area of Los Angeles. Payaso participated in the discussions with other Red Shield clique members, who specifically targeted an adjacent neighborhood in territory claimed by the Silver Lake gang.

On August 29, 2003 Sanchez called a meeting near the home of another Red Shield member. Sanchez, Fuentes, Rossier, Norberto Pacheco (also known as Mousey) and several others were present at the meeting. The group talked about being present and "tagging" (signing the name of the gang or a gang member in a public place with spray paint or a thick marker) more in the Silver Lake area, and Sanchez told the group they were going out to do some tagging that day.

After the meeting Sanchez and Rossier, who were in a dating relationship, together with Fuentes and Roxana Ramos (Nena), who were also in a dating relationship, left the meeting with Jamie Gutierrez in a white minivan stolen by Gutierrez. (Ramos testified that Gutierrez had used Rossier's keys to steal the minivan; how Rossier's keys were used is not clear from the record.) Before any tagging occurred, however, Gutierrez left the group; and Fuentes joined the others in the minivan. Sanchez, who was carrying a handgun, drove the minivan to the Vendome neighborhood in Silver Lake, parking the minivan on Silver Lake Boulevard near Vendome Street. Sanchez then used spray paint to cross out Silver Lake gang graffiti and to overwrite it with an 18th Street, Red Shield identifier.

The tagging was interrupted by the sound of a police siren. The gang members hid in the minivan and then drove a short distance and parked in a driveway off Vendome Street. Sanchez and Ramos walked down the driveway to the street while Rossier and Fuentes remained in the parked minivan. A car drove up; and Val Rangel, a Silver Lake gang member got out. Rangel confronted Sanchez and asked him for his gang affiliation. Sanchez replied, "Wicked Side 18th Street." Rangel laughed and pointed a gun at Sanchez, saying something about a funeral (perhaps "this is your funeral" or "prepare for your funeral"). Sanchez whistled to Rossier. She walked down the driveway, then ran back to the minivan. Rossier returned with Fuentes, who shot Rangel with a handgun. (The trial court issued a limiting instruction that the jury was not to be told Rangel was killed by the gunshot.)

After the shooting Rossier and Ramos ran back up the driveway in an unsuccessful effort to get into one of the nearby apartments. They then went to Gutierrez's home, which was located in the same neighborhood as the shooting. Fuentes and Sanchez left in the minivan, but shortly thereafter also went to Gutierrez's home. Fuentes made an effort to wash the gun powder from his hands. Following the Rangel shooting, Pacheco retrieved two guns (a rifle and a shotgun) from Sanchez's house and took them to his apartment, where they were kept in a laundry bag.

**3. *The September 6, 2003 Drive-by Shooting***

Brothers Santos and David Kuk, members of the Grandview clique of the 18th Street gang, lived on Bellevue Avenue near North Coronado Street, immediately north of the Hollywood Freeway in Temple Street gang territory. On the morning of Saturday, September 6, 2003 the Kuk brothers went to a Grandview meeting area, where they were joined by Flores and another 18th Street gang member, Eric Vasquez, and Vasquez's girlfriend, Dorma Pedro Mendez, who did not belong to the gang.

After some time the group walked to the Red Shield clique's territory at 10th Place and Albany Street. There they met Fuentes, Sanchez, Rossier, Pacheco and other gang members, including Benjamin Flores. The two groups spent most of the day together, drinking beer and smoking marijuana. In the evening, according to Santos Kuk, someone (Fuentes, Sanchez or Rossier) said Red Clique was trying to expand its territory to include a street in Silver Lake. It was then suggested (by Sanchez, according to Pacheco) that the group go on a mission or a "jale."[3](https://www.leagle.com/decision/incaco20100719009#fid3) The Kuk brothers said they knew where to find some members of the Temple Street gang, which controlled the street where they lived and had previously assaulted Santos Kuk because he belonged to 18th Street. Sanchez said he had access to a van. Fuentes, Sanchez and Pacheco apparently spoke to Payaso to let him know they were going on a jale. Rossier was close to the others during the conversation with Payaso, but did not actively participate in it.

The two Kuk brothers, Flores, Fuentes, Rossier, Vasquez, Mendez and Sanchez all got into a stolen blue minivan. Sanchez drove; Rossier was next to him in the front passenger seat. Sanchez drove the minivan to a business site off Silver Lake Boulevard where Pacheco, who had a family commitment and did not join the group in the minivan, gave them the laundry bag with the two guns and several boxes of ammunition previously kept at his home. Pacheco said there was a member of a rival African-American gang (the P-Stones) a couple of blocks away on Bellevue Avenue and told the gang members in the minivan they should kill him. According to Santos Kuk, Rossier held the bag while Fuentes removed the guns; Flores took the shotgun; Fuentes the rifle. Fuentes passed the bullets around inside the minivan before loading the guns. At this point Fuentes moved to the front passenger seat; Flores sat in the middle row by the minivan's sliding door.

Sanchez drove to Bellevue Avenue. They saw the rival gang member mentioned by Pacheco, but Sanchez said not to shoot because there was a woman with a baby nearby. Sanchez continued to drive in the neighborhood for a couple of hours, looking for "enemies" to shoot, and ended up once again on Bellevue Avenue. As the minivan drove past the Kuk brothers' home, several Temple Street gang members were seen drinking across the street. There was some discussion inside the minivan about shooting the Temple Street gang members. Sanchez drove up the street, turned around in a parking lot and returned to the Temple Street gang members. Fuentes pulled out the rifle, shouted a derogatory comment and fired repeatedly out the front passenger side window. Flores tried but was unable to get the shotgun to fire out the window of the minivan's side door. Sanchez then drove the minivan to the northbound Hollywood Freeway entrance, which was only a short distance away. While driving, there was some discussion about going to shoot members of the Mara Salvatrucha gang, but the evening eventually ended without more violence.

Juan Monsivais, who had been drinking outside his home on Bellevue Avenue with several of his cousins and a friend (at least one of whom was a Temple Street gang member) was shot and killed by a single gunshot wound to the back. Manuel De La Rosa was hit by bullets in the chest and hand and spent several days in the hospital after the shooting. Albert Hernandez told police officers immediately after the shooting that he had seen two male Hispanics in a blue Toyota van and heard someone yell at the group on the street; the front passenger had then fired 6 to 10 gunshots from what sounded to Hernandez like a small caliber semiautomatic firearm.

That night Fuentes called Pacheco and told him they had "gone to the hood of Temple Street" and "they had shot at them." Fuentes told Pacheco he had used the rifle. According to Pacheco, the following day Sanchez reported that the shotgun had jammed and said he would ask Payaso to check it. Rossier and Flores also both told Pacheco the shotgun had not worked on the mission, and Rossier said she had tried to help Flores unjam it. Payaso and Pacheco subsequently tested the shotgun, which Pacheco retrieved from the blue minivan parked near Sanchez's house, and were able to fire it without any problems.[4](https://www.leagle.com/decision/incaco20100719009#fid4)

A small caliber bullet recovered from Monsivais's body was matched to the rifle recovered from the stolen blue minivan two days after the shooting. Similarly, 10 of 12 shell casings recovered at the Bellevue Avenue crime scene were determined to have been fired from the rifle. Shell casings recovered from the front passenger seat of the minivan were also fired from the rifle.

**4. *The Marshall High School Incident***

Beginning several months before September 2003, Carlos Marroquin, an 18th Street gang member associated with the Red Shield clique who attended John Marshall High School, had conversations with Sanchez about ensuring respect for the gang in the neighborhood and at the high school. During the first week of September 2003 members of the White Fence gang had come to Marshall High looking for 18th Street gang members and claiming White Fence's dominance of the school. This angered Sanchez, who also attended Marshall High and wanted the 18th Street gang to control the school. (According to Marroquin, there had previously been several hostile encounters between Marroquin and Sanchez, on the one hand, and members of White Fence, on the other hand.) Sanchez intended to do something to send a message and to earn respect for his gang and told Pacheco he was going to "bust a jale" at the school.

At lunchtime on Monday, September 8, 2003 Sanchez told Marroquin to come with him "to go get the homies" because after school "we are going on a jale to Marshall." Marroquin and Sanchez left school together. Sanchez called a taxi on his cell phone and had the driver take them to Echo Park. While riding in the taxi, Sanchez made several cell phone calls. Sanchez and Marroquin were dropped off by the taxi about two blocks from Sanchez's home, near where Sanchez had parked the blue minivan used in the September 6, 2003 drive-by shooting. Sanchez told Marroquin the minivan was stolen and had weapons inside it. Marroquin opened the laundry bag and saw the rifle and shotgun.

Sanchez used his cell phone again, apparently calling Aguilar, and then drove to Aguilar's home. Marroquin subsequently told the police Sanchez had told Aguilar on the phone he was going to "do some shit to White Fence at Marshall and to come down." Aguilar got in the minivan, and Sanchez told him they were going to "pick up some homies." Sanchez then told Marroquin to take the guns out of the bag. On the way back to Marshall, Sanchez saw James Felix, a member of the Hoovers clique of the 18th Street gang. Sanchez stopped and told Felix, "we are going to do a jale." Aguilar added that they were going to Marshall to find "the fools from MS, Mierdas [derogatory names for the Mara Salvatrucha gang, a rival of 18th Street]," that they were "gonna go hit the Mierdas" and that they had an assault rifle and a shotgun. Felix declined the invitation to join them.

Shortly thereafter two Los Angeles police officers stopped the minivan after it ran through a stop sign. A computer check disclosed the minivan had been stolen. The rifle, shotgun and ammunition were found inside the vehicle. Officers also recovered a cell phone, which Sanchez said belonged to his girlfriend. When the phone was activated, the words "Bryan and Jazmin" appeared on the screen. It was later determined that Rossier's father was the subscriber for the cell phone.

Sanchez, Aguilar and Marroquin were immediately arrested and handcuffed. After a backup unit arrived at the scene, Sanchez and Aguilar were placed in the back of a police car; and their conversation was recorded. Sanchez asked Aguilar, "What do we say fool?" and suggested "we gotta blame it on somebody . . . . Like say some names or something." However, both Sanchez and Aguilar were concerned that they not be perceived as informing on other gang members. Aguilar responded that Sanchez could tell the police another "homie" had given him the weapons without identifying the individual. Aguilar also suggested that Sanchez could say he had been asked to deliver the minivan to someone and was not told about the guns. Sanchez agreed he could do this but was worried that his fingerprints were on "the straps [guns]."

**5. *The Charges***

In a second amended information Fuentes, Flores, Sanchez, Rossier and Pacheco were charged with one count of first degree murder (Pen. Code, § 187, subd. (a))[5](https://www.leagle.com/decision/incaco20100719009#fid5) (count 1) and one count of attempted willful, deliberate premeditated murder (§§ 664, 187, subd. (a)) (count 2) for the September 6, 2003 drive-by shooting. The information specially alleged with respect to these two counts that Fuentes personally and intentionally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (b)-(d)) and that a principal personally discharged a firearm within the meaning of this section. (§ 12022.53, subds. (b)-(e).) Fuentes, Sanchez and Aguilar were charged with conspiracy to commit murder (§ 182, subd. (a)(1)) (count 3) in connection with the September 8, 2003 Marshall High incident; five overt acts were alleged.[6](https://www.leagle.com/decision/incaco20100719009#fid6) The second amended information also charged Fuentes with carrying a concealed firearm (§ 12025, subd. (a)(2)) (count 4) and carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)) (count 5) arising out of the August 29, 2003 Vendome Street episode. It was specially alleged as to all counts that each of the defendants had committed the offenses to benefit a criminal street gang. (§ 186, subd. (b)(1).) The information also specially alleged that Sanchez and Aguilar each had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

All defendants initially pleaded not guilty and denied the special allegations. Pursuant to a negotiated agreement, prior to trial Pacheco pleaded guilty to voluntary manslaughter with a provisional sentence of 17 years in state prison, subject to his agreement to testify truthfully against the remaining defendants. Also prior to trial the court granted Fuentes's motion to dismiss count 4 (carrying a concealed firearm), and the parties stipulated count 5 (carrying a loaded firearm in a public place) would be renumbered as count 4.[7](https://www.leagle.com/decision/incaco20100719009#fid7)

**6. *Pretrial Motions***

**a. *Motions to sever***

Rossier and Aguilar each moved to sever his or her trial from that of the other codefendants. The court acknowledged its discretion pursuant to section 1098 to determine whether, in the interest of justice, there is good cause for severance: "The court recognizes the statutory reasons for joinder, but also recognizes that, in a given case, there may be justification based upon prejudice and extraneous factors to order severance." Nonetheless, the motions were denied.

As to Rossier, who argued she would be unduly prejudiced by a joint trial because of her limited, passive role during the Bellevue Avenue drive-by shooting, the court stated, "As far as I'm concerned, this is an overriding case which justifies maintaining joinder. The evidence in this case goes directly to Ms. Rossier as it relates to actions and activities of codefendants. Ms. Rossier's mental state and specific intent and knowledge are directly at issue in view of the charges in this case . . . . I do take seriously any claim that a defendant jointly charged with other defendants may be prejudic[ed] because it may cast the individual defendant in an unfair light in view of the overwhelming evidence as to other defendants. That is not the case here."

As to Aguilar, who was charged only with conspiracy to commit murder in connection with the Marshall High incident (count 3) and was not named in any count of the second amended information with either Flores or Rossier, the court explained, "I am of the opinion that we are dealing here with [a] crime in count 3 and series of crimes in [the] other counts which are all part and parcel of a single transaction within the meaning of [the cases concerning proper joinder when the defendant seeking severance is not joined in at least one count of the accusatory pleading with all other defendants with whom he or she will be tried[8](https://www.leagle.com/decision/incaco20100719009#fid8). Certainly, there are different charges, but one has to look at the contextual fabric of all of these charges, and what is happening here, and the theory of the People's case which I think is borne out by the evidence that it is all part and parcel of a single transaction of conspiracy . . . . I think it is appropriate that Mr. Aguilar remain joined with the other defendants in this case because of the fact that there is a single transaction of conspiracy in this case. And if there are going to be limiting instructions, that is, as far as I'm concerned, an appropriate way to deal with it."

**b. *Evidence of uncharged crimes (the Vendome Street shooting)***

On November 29, 2006 the People moved to admit uncharged crimes evidence relating to the August 29, 2003 Vendome Street shooting against Fuentes (charged in counts 4 and 5 with firearm offenses arising from that shooting), Sanchez and Rossier pursuant to Evidence Code section 1101, subdivision (b). Oppositions to the motion were filed, and Fuentes subsequently moved to exclude all Evidence Code section 1101, subdivision (b), evidence relating to that incident or, alternatively, to sever counts 4 and 5 from the trial of the other charges.

At the hearing on the motions the People argued the evidence of the shooting, arising out of the tagging mission on August 29, 2003, was admissible to show Fuentes's, Sanchez's and Rossier's knowledge and intent with respect to the murder and attempted murder on September 6, 2003 (and, of course, relevant to the gun charge against Fuentes). The court refused to exclude the August 29, 2003 evidence, explaining, "The incident of August 29 is inextricably intertwined with the charges in this case. . . . [T]he fact that a loaded firearm was involved, and a matter of days later, there is another violent type encounter. I believe that under 1101(b) of the Evidence Code, the actions of Mr. Fuentes and Ms. Rossier . . . set the stage for what happened afterwards and are relevant to any knowledge that Ms. Rossier may have had, any intent she may have had as an aider and abettor or co-conspirator, any motivation she may have had, her allegiance to Mr. Fuentes, her opportunity to be along as an aider and abettor, and go to her co-conspirator liability. They are relevant as to the liability of Mr. Fuentes and Mr. Sanchez as well. . . . [D]efense counsel may dispute the theory to expand the territory of 18th Street, but I think that theory has legs and it has legs, because on later dates the charged offenses demonstrate what can be characterized as co-conspirator liability. . . . I think that the evidence relates to the actions of the defendants in this case and relates to facts, including, but certainly not necessarily limited to, intent, motive, opportunity, preparation, plan, knowledge, identity, and are highly relevant to the underlying circumstances of the charged offenses. Under Evidence Code section 352 . . . the prejudicial impact does not substantially outweigh the probative value . . . ." The court stated, however, it would upon request give limiting instructions both as to the purpose for which the evidence could be considered and against whom it was admitted. The court also ruled the shooting of Rangel could not be referred to as "a murder." Fuentes's motion to sever was denied.[9](https://www.leagle.com/decision/incaco20100719009#fid9)

**c. *Other pretrial evidentiary issues***

In addition to his unsuccessful challenge to a joint trial with the other defendants, Aguilar moved for an order excluding as to him the tape recording of his conversation with Sanchez in the police car following their arrest on September 8, 2003. The court denied the motion, finding the tape recording highly relevant and ruling its relevance was not substantially outweighed by its prejudicial impact under Evidence Code section 352: "I don't see any constitutional or statutory impediment. And as far as I'm concerned, it is admissible under [Evidence Code] section 1223 [admission of co-conspirator], under adoptive admissions, under admissions, and under case and statutory law . . . [and] under 352, as well."

Also prior to trial the prosecutor and counsel for Rossier discussed the admissibility of several letters written by Rossier while she was in jail following her arrest. In the letters, which were discovered during a search of Fuentes's and Sanchez's residences, Rossier identified herself as a gang member, indicated her willingness to use violence against members of rival gangs, complained that Ramos had "ratted her out," but requested that her fellow gang members do nothing to Ramos at that time. According to the prosecutor the purpose of the letters, which would be introduced only as to Rossier, was to demonstrate her knowledge, intent and participation in the 18th Street gang in general and the September 6, 2003 drive-by shooting in particular. The court declined to exclude the letters under Evidence Code section 352. Addressing Rossier's counsel the court explained, "Mr. Hobson, you point out, well, this may be the scribbling of an immature, naive young lady. Well, they may be. They also may be the writings of a committed gangbanger who persists in identifying herself as that and uses language that may be characterized as indicative of violence and dissuading witnesses and threatening behavior and sophistication in the system. That is for the fact finder to decide. But under 352, I don't find this material substantially more prejudicial than probative. Quite the contrary."

**7. *Testimony at Trial***

Norberto Pacheco and Roxana Ramos provided the primary testimony for the People concerning the August 29, 2003 Vendome Street shooting. Los Angeles Police Detective James Erwin, who investigated the shooting, also testified for the People.

Evidence of the September 6, 2003 drive-by shooting was presented through the testimony of David and Santos Kuk and Dorma Mendez, who had been inside the stolen minivan when the shooting occurred, Pacheco and informant/gang member Felix. Manuel De La Rosa, the surviving victim of the shooting, and Albert Hernandez, who had been with De La Rosa and the decedent, Monsivais, also testified, as did the Los Angeles Police Department officers who had investigated the murder and attempted murder, including Detective Jeff Breuer.

Carlos Marroquin testified about the events of September 8, 2003 involving Marshall High School and Sanchez's intended mission or jale. Felix testified about his conversations that day with Sanchez and Aguilar. The police officers involved in the traffic stop of the stolen minivan and the subsequent arrest of Sanchez and Aguilar were also witnesses for the People. Two members of the Krazies gang testified—one for the defense and one as a prosecution rebuttal witness—concerning possible gang activities, including a threatened fist fight involving Marroquin, at Marshall High School on September 8, 2003.

Forensic evidence (concerning fingerprints and ballistic matches) was presented, as was testimony from a telephone company engineer regarding cell phone transmissions on September 6 and 8, 2003. Los Angeles Police Detective Magdaleno Gomez testified as a gang expert concerning the 18th Street gang.

Bryan Sanchez testified and presented an alibi defense for the night of September 6, 2003, as well as an explanation for his activities on September 8, 2003. None of the other defendants testified. Several additional witnesses, including Sanchez's father, testified to support Sanchez's alibi defense and to attest to his good character.

**8. *The Verdicts and Sentencing***

The jury convicted Fuentes of first degree murder (count 1), attempted willful, deliberate and premeditated murder (count 2) and carrying a loaded firearm in a public place (count 4) and found true the allegations he had personally discharged a firearm causing death or great bodily injury as to both counts 1 and 2. In addition, the jury found true the allegation all three offenses had been committed for the benefit of a criminal street gang. Fuentes was found not guilty of conspiracy to commit murder (count 3). After the court denied Fuentes's motion for a new trial, he was sentenced to an aggregate state prison term of 90 years to life.

The jury found Flores not guilty of first degree murder but convicted him of second degree murder (count 1) and found true the allegation the offense had been committed by shooting a firearm from a vehicle within the meaning of section 190, subdivision (d). The jury also convicted Flores of attempted willful, deliberate and premeditated murder (count 2). The jury found both offenses had been committed for the benefit of a criminal street gang and also found true the allegation a principal had personally used a firearm in committing both offenses, but found not true the additional firearm-use allegations that a principal had intentionally and personally discharged a firearm and that the intentional discharge of a firearm by a principal had caused death or great bodily injury. Flores was sentenced to an aggregate state prison term of 55 years to life.

The jury found Sanchez not guilty of first degree murder but convicted him of second degree murder (count 1) and found the crime had been committed by shooting a firearm from a vehicle within the meaning of section 190, subdivision (d). The jury also convicted Sanchez of attempted willful, deliberate and premeditated murder (count 2) and conspiracy to commit murder (count 3). The jury found all three offenses had been committed for the benefit of a criminal street gang, but found not true the various firearm-use allegations. After denying Sanchez's motion for a new trial, the court sentenced him to an aggregate state prison term of 60 years to life.

The jury found Rossier not guilty of first degree murder but convicted her of second degree murder (count 1) and found the crime had been committed by shooting a firearm from a vehicle within the meaning of section 190, subdivision (d). The jury also convicted Rossier of attempted willful, deliberate and premeditated murder (count 2). The jury found both offenses had been committed for the benefit of a criminal street gang, but found not true the various firearm-use allegations. After denying Rossier's motion for a new trial, the court sentenced her to an aggregate state prison term of 20 years to life.

The jury convicted Aguilar of conspiracy to commit murder (count 3) and found true the special allegation the conspiracy was for the benefit of a criminal street gang. Aguilar's new trial motion was denied. He was sentenced to an indeterminate state prison term of 25 years to life with a 15-year minimum parole eligibility date.

**DISCUSSION**

**1. *Evidence of Uncharged Misconduct; the Vendome Street Incident***

**a. *Governing law***

California law has long precluded use of evidence of a person's character (a predisposition or propensity to engage in a particular type of behavior) as a basis for an inference that he or she acted in conformity with that character on a particular occasion. Evidence Code section 1101, subdivision (a), "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) [7 Cal.4th 380](https://www.leagle.com/cite/7%20Cal.4th%20380), 393 (*Ewoldt*).)[10](https://www.leagle.com/decision/incaco20100719009#fid10)

Evidence Code section 1101, subdivision (b), clarifies, however, that this rule "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*Ewoldt, supra,* 7 Cal.4th at p. 393, see *People v. Falsetta* (1999) [21 Cal.4th 903](https://www.leagle.com/cite/21%20Cal.4th%20903), 914 [historically "the rule against admitting evidence of the defendant's other bad acts to prove his present conduct was subject to far-ranging exceptions"].) "`[E]vidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes . . . if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. . . .'" (*People v. Carter* (2005) [36 Cal.4th 1114](https://www.leagle.com/cite/36%20Cal.4th%201114), 1147.) "As Evidence Code section 1101, subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*People v. Roldan* (2005) [35 Cal.4th 646](https://www.leagle.com/cite/35%20Cal.4th%20646), 705, disapproved on another ground by *People v. Doolin* (2009) [45 Cal.4th 390](https://www.leagle.com/cite/45%20Cal.4th%20390), 421, fn. 22; see also *People v. Walker* (2006) [139 Cal.App.4th 782](https://www.leagle.com/cite/139%20Cal.App.4th%20782), 796; Simons, Cal. Evid. Manual (2008-2009) § 6.10, p. 449.)

In addition to its relevance to an issue other than predisposition or propensity, to be admissible under Evidence Code section 1101, subdivision (b), the probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) [18 Cal.4th 349](https://www.leagle.com/cite/18%20Cal.4th%20349), 371; *People v. Carter, supra,* 36 Cal.4th at p. 1149.) A trial court's determination of the admissibility of evidence of uncharged offenses is generally reviewed for an abuse of discretion. (*Kipp,* at p. 369 ["[o]n appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion"]; *Carter,* at p. 1149.)[11](https://www.leagle.com/decision/incaco20100719009#fid11)

**b. *The trial court did not abuse its discretion in failing to exclude evidence of the Vendome Street shooting***

Testimony that Fuentes possessed a loaded firearm during the Vendome Street tagging and shooting incident was, of course, directly relevant to count 4, which charged Fuentes with carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)). Additional evidence of conduct not charged in the case—that Fuentes may have engaged in tagging and that Sanchez and Rosser may have been present during the Vendome Street incident, as well as details of discussions preceding the event, the confrontation with Rangel and the participants' actions after the shooting—was also admitted, subject to a limiting instruction that it could be considered, if proved, only to decide whether Fuentes, Sanchez or Rossier had acted with the required specific intent to commit any of the charged or lesser included crimes or enhancement allegations, whether Fuentes had a motive to commit the charged or lesser included crimes or allegations and whether Sanchez or Rossier had acted with knowledge of the charged or lesser included crimes and allegations. The jury was additionally instructed not to consider this evidence of particular behavior of Fuentes, Sanchez and Rossier against any other defendant (that is, against Flores or Aguilar) and not to infer from the evidence that Fuentes, Sanchez or Rossier has a bad character or is disposed to commit crime.

Emphasizing what they insist are the significant differences between the tagging episode on Vendome Street and the drive-by shooting on Bellevue Avenue, Fuentes, Sanchez and Rossier each contend the trial court erred in determining that the evidence of the Vendome Street shooting was relevant to the issue of intent/motive/knowledge and that its probative value was not outweighed by the probability its admission would create a serious danger of undue prejudice.[12](https://www.leagle.com/decision/incaco20100719009#fid12) Yet as the prosecutor argued and the trial court found, this evidence was relevant to prove there was an overall plan by members of the 18th Street gang, including Fuentes, Sanchez and Rossier, to expand into Silver Lake gang territory and the charged crimes were part of that single conspiracy. To the extent the prosecution was able to persuade the jury of the existence of this common plan, the evidence of the circumstances of the tagging and shooting on Vendome Street also tended to prove Fuentes's, Sanchez's and Rossier's motive for and intent with respect to the drive-by shooting that occurred one week later. (See *Ewoldt, supra,* 7 Cal.4th at p. 401.)

To be sure, the evidence indicated the shooting on Vendome Street was prompted by the aggressive confrontation initiated by the victim Rangel, not by Sanchez or Fuentes, which is markedly different from the drive-by shooting on Bellevue Avenue the following week. However, both incidents were preceded by a meeting and discussion of expanding the 18th Street gang's influence or territory. In each incident a stolen minivan was driven by Sanchez to the ultimate crime scene. At least one of the 18th Street gang members was armed during each incident, and on each occasion the stolen vehicle was abandoned and the weapons hidden following the shooting. While the shooting of Rangel at Vendome Street may not have been planned, it was reasonable for the People to contend that those present at that incident, who were fully aware of what had occurred during the tagging episode but nonetheless embarked on another "jale" on September 6, 2003, not only reasonably knew, but also specifically intended that another shooting would occur.

"To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ewoldt, supra,* 7 Cal.4th at p. 403.) Moreover, the evidence need not demonstrate a "single, continuing conception or plot" of which the charged crimes are a part. (*Id.* at p. 401.) Rather, "such evidence is admissible to establish a common design or plan if the uncharged misconduct `shares sufficient common features with the charged offenses to support the inference that both the uncharged misconduct and the charged offenses are manifestations of a common design or plan.'" (*People v. Balcom* (1994) [7 Cal.4th 414](https://www.leagle.com/cite/7%20Cal.4th%20414), 418.) Even less similarity between the prior acts of misconduct and the charged offenses is needed for the evidence to be admissible to prove intent and knowledge. (*Ewoldt, supra,* 7 Cal.4th at p. 402; see *People v. Carter, supra,* 36 Cal.4th at p. 1147 [conduct need only be sufficiently similar to support a rational inference of intent]; *People v. Stitely* (2005) [35 Cal.4th 514](https://www.leagle.com/cite/35%20Cal.4th%20514), 532 ["the degree of similarity required to prove *mental state* is far less exacting" than required to provide identity].)

Considering the similarities as well as the differences between the August 29, 2003 Vendome Street tagging/shooting incident involving 18th Street gang members and the September 6, 2003 Bellevue Avenue drive-by shooting involving those same gang members, we cannot say the trial court abused its discretion in concluding Evidence Code section 1100 did not require the exclusion of the evidence of uncharged misconduct.

We similarly conclude the trial court did not abuse its discretion under Evidence Code section 352 in finding the evidence of the Vendome Street incident, accompanied by appropriate limiting instructions, would not be unduly prejudicial. "`Undue prejudice' refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: `The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is `prejudicial.'"'" (*People v. Walker, supra,* 139 Cal.App.4th at p. 806.)

The probative value of the evidence of the Vendome Street incident with respect to the Red Shield clique's plan to expand its territory was substantial. On the other side of the scale, the evidence of the uncharged conduct was neither stronger nor more inflammatory than the evidence of the charged offenses; to the contrary, although the evidence included testimony that Fuentes had shot Rangel, the jury also learned that this shooting, in marked contrast to the subsequent drive-by shootings, was in response to Rangel's threat to kill Sanchez. (See *Ewoldt, supra,* 7 Cal.4th at p. 405 [describing circumstances that decrease potential for prejudice].) On this record we cannot say the trial court abused its discretion in determining the substantial probative value of the evidence was not outweighed by the risk of undue prejudice. (*People v. Carter, supra,* 36 Cal.4th at p. 1149.)

**2. *Joinder of Charges and Defendants; the Motions To Sever***

Section 954 permits two or more offenses of the same class or connected together in their commission to be consolidated for trial against a single defendant. "[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by law." (*Alcala v. Superior Court* (2008) [43 Cal.4th 1205](https://www.leagle.com/cite/43%20Cal.4th%201205), 1220.)[13](https://www.leagle.com/decision/incaco20100719009#fid13) Similarly, "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly unless the court orders separate trials." (§ 1098; see *People v. Coffman and Marlow* (2004) [34 Cal.4th 1](https://www.leagle.com/cite/34%20Cal.4th%201), 40 ["[j]oint trials are favored because they `promote [economy and] efficiency' and "`serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts"'"].)

When a joint trial is authorized under sections 954 and 1098, the trial court retains discretion to order separate trials "`in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.'" (*People v. Turner* (1984) [37 Cal.3d 302](https://www.leagle.com/cite/37%20Cal.3d%20302), 312, overruled on another ground in *People v. Anderson* (1987) [43 Cal.3d 1104](https://www.leagle.com/cite/43%20Cal.3d%201104), 1115; accord, *People v. Box* (2000) [23 Cal.4th 1153](https://www.leagle.com/cite/23%20Cal.4th%201153), 1195; see also *People v. Carter, supra,* 36 Cal.4th at p. 1153 ["`[r]efusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a `weak' case has been joined with a `strong' case, or with another `weak' case, so that the `spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case'"]; *People v. Memro* (1995) [11 Cal.4th 786](https://www.leagle.com/cite/11%20Cal.4th%20786), 851 [same].)

A court's denial of a motion for severance is reviewed for an abuse of discretion, "judged on the facts as they appeared at the time of ruling." (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41; see *People v. Balderas* (1985) [41 Cal.3d 144](https://www.leagle.com/cite/41%20Cal.3d%20144), 171 [appellate court reviews trial court's denial of pretrial severance motion based on the facts known and the showing made at the time of the motion itself].) "Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (*Coffman and Marlow,* at p. 41.)[14](https://www.leagle.com/decision/incaco20100719009#fid14)

Fuentes, who was named as a defendant in all four counts actually tried, contends the trial court erred in denying his motion to sever the firearm charge (count 4) arising from the Vendome Street tagging incident from the murder and attempted murder charges based on the Bellevue Avenue drive-by shooting and the Marshall High School murder conspiracy charge. He argues the inflammatory nature of the facts surrounding the Vendome Street incident, the lack of cross-admissibility of the evidence and the association of that weaker charge with the stronger ones supported severance.

Rossier, who was present at the Vendome Street tagging/shooting but not charged in connection with the incident, and who was not charged with conspiracy to commit murder relating to the Marshall High School episode, similarly argues the trial court erred in denying her motion for severance, contending the court should have recognized that the strong evidence of her codefendants' guilt, which was largely inadmissible as to her, would inevitably (and impermissibly) spill over and create an unfounded impression in the jury that she, too, was guilty of murder and attempted murder during the drive-by shooting.

As just discussed, the evidence of the Vendome Street incident, directly relevant to the firearm possession charge against Fuentes, was also properly admitted pursuant to Evidence Code section 1101, subdivision (b), as to both Fuentes and Rossier with respect to the drive-by shootings on Bellevue Avenue as part of a common design or plan, as well as on the issues of the defendants' mental state (intent, knowledge and motive). The cross-admissibility of the evidence is itself sufficient to justify the joinder of the counts and the defendants involved. (*People v. New* (2008) [163 Cal.App.4th 442](https://www.leagle.com/cite/163%20Cal.App.4th%20442), 470; see *People v. Balderas, supra,* 41 Cal.3d at pp. 171-172 ["any inference of prejudice [from joinder] is dispelled" if evidence on each of the joined charges would have been admissible in separate trials].) Moreover, there was no incriminating confession, conflicting defenses[15](https://www.leagle.com/decision/incaco20100719009#fid15) or possibility that at a separate trial a codefendant would give exonerating testimony weighing in favor of separate trials. In addition, if one were to characterize the evidence of the three incidents presented to the jury, the drive-by murder of Monsivais and the attempted murder of De La Rosa would appear far more "inflammatory" than the tagging incident on Vendome Street, even though the jury also heard that Fuentes shot Rangel in response to Rangel's threat to kill Sanchez while pointing a gun at him.

At bottom, Fuentes's and Rossier's argument is that a joint trial of crimes committed on three different dates was inherently unfair because the jury inevitably cumulated the evidence to find them guilty of the specific crimes with which they were charged. Rossier also complains of her prejudicial association with her assertedly more culpable codefendants. The relationship of the events of the Vendome Street tagging/shooting, the Bellevue Avenue drive-by shootings and the Marshall High School conspiracy, however, was central to the prosecution's case and was based on admissible evidence of the Red Shield clique's goal of expanding its territory and of a conspiracy among the defendants (and others) to do so. Moreover, the court gave appropriate limiting instructions concerning the proper use of evidence of uncharged misconduct and its applicability only to the defendant(s) as to whom it was admitted and specifically instructed the jury regarding its obligation to consider each count separately, as well as to determine whether each defendant charged was guilty of a specific crime. (See *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 40 ["less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice"].)

Finally, the jury's finding that Fuentes was not guilty of conspiracy to commit murder in connection with the Marshall High School events belies Rossier's claim that severance was necessary to prevent the jury from inappropriately cumulating the evidence of all the crimes and responding to the totality of the evidence presented without separately assessing the individual culpability of each defendant. There simply was no spillover effect from the evidence presented against Fuentes, Sanchez and Aguilar on count 3, even if it would not have been admissible in a separate trial of Rossier alone.

In sum, whether viewed from the point at which the court ruled on the severance motions or based on our assessment of what in fact occurred at trial, joinder was proper and did not result in a gross unfairness amounting to a denial of due process for either Fuentes or Rossier. (See *People v. Arias* (1996) [13 Cal.4th 92](https://www.leagle.com/cite/13%20Cal.4th%2092), 127; see also *People v. Sapp* (2003) [31 Cal.4th 240](https://www.leagle.com/cite/31%20Cal.4th%20240), 259-260.)[16](https://www.leagle.com/decision/incaco20100719009#fid16)

**3. *Other Evidentiary Issues***

**a. *Fuentes's statements to Pacheco about the drive-by shooting***

Rossier contends the trial court committed prejudicial error when it allowed the People to introduce against her (and not only against Fuentes, Flores and Sanchez) Pacheco's account of his telephone call with Fuentes on the night of September 6, 2003 shooting and a conversation with Fuentes the following day at school during which Fuentes told Pacheco, "we hit the guys from Temple Street," and stated Sanchez had used the rifle, but the shotgun had jammed during the incident. Overruling the defendants' hearsay objections, the court admitted the testimony as an admission of a coconspirator in furtherance of the conspiracy's objective under Evidence Code section 1223.[17](https://www.leagle.com/decision/incaco20100719009#fid17)

Emphasizing the prosecution theory that the discussion between Pacheco and Flores concerning the fact that the shotgun had jammed was related to Sanchez's intent to use the shotgun two days later in his planned attack at Marshall High School, Rossier argues the evidence should not have been admitted against her because it was never charged that she was part of the conspiracy to commit murder at Marshall High. As to her, Fuentes's statements to Pacheco about the September 6 shooting simply narrated past events and thus were not made in furtherance of a conspiracy. (See, e.g., *People v. Hardy* (1992) [2 Cal.4th 86](https://www.leagle.com/cite/2%20Cal.4th%2086), 146-147 [statements that merely narrate past events are not to be deemed "in furtherance" of conspiracy].)

The People's theory of the case, consistently reiterated before and during trial, including in closing argument, and supported by testimony regarding discussions among the gang members, was that an ongoing conspiracy existed during the summer of 2003 to expand the territory and enhance the reputation of the 18th Street gang, and particularly the Red Shield clique, which included the Vendome Street tagging and shooting incident, the Bellevue Avenue drive-by shooting and the plans to shoot individuals at Marshall High. Although a more limited version of the conspiracy was charged in count 3, the conspiracy itself need not be charged for Evidence Code section 1223's hearsay exception to apply to statements by coconspirators. (*See People v. Rodrigues* (1994) [8 Cal.4th 1060](https://www.leagle.com/cite/8%20Cal.4th%201060), 1133-1134; *People v. Jourdain* (1980) [111 Cal.App.3d 396](https://www.leagle.com/cite/111%20Cal.App.3d%20396), 404.) For the statements of an alleged coconspirator to be admitted, moreover, the People only need to present prima facie evidence of the conspiracy—that is, evidence (independent of the statements themselves) sufficient to permit the jury to find a conspiracy exited. (*Rodrigues,* at p. 1134; *People v. Herrera* (2000) [83 Cal.App.4th 46](https://www.leagle.com/cite/83%20Cal.App.4th%2046), 58-64.) Ultimately it is up to the jury to decide whether the conspiracy was sufficiently proved, and the offered statements made in furtherance of it. (See *Herrera,* at pp. 65-66.) Here, the jury was in fact properly instructed in accordance with CALCRIM No. 418 that it was not to consider the statement of a coconspirator unless it found, independent of the statement, that a conspiracy existed at the time the statement was made.

The trial court did not abuse its discretion in determining there was sufficient evidence of an ongoing conspiracy to permit introduction of Pacheco's description of his conversations with Fuentes on September 6 and 7, 2003. (See *People v. Griffin* (2004) [33 Cal.4th 536](https://www.leagle.com/cite/33%20Cal.4th%20536), 577 [trial court's determination of admissibility of evidence generally reviewed for abuse of discretion]; see also *People v. Hovarter* (2008) [44 Cal.4th 983](https://www.leagle.com/cite/44%20Cal.4th%20983), 1004 [under the abuse of discretion standard, "`a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice'"].) To be sure, portions of Fuentes's statements were descriptive of the events that had already taken place during the drive-by shooting; but other aspects of the conversations, including those directed to finding out what went wrong with the shotgun, were sufficiently linked to the testimony about the gang members' intent to expand the territory of Red Shield to permit the conclusion the statements were in furtherance of the conspiracy. (See *People v. Herrera, supra,* 83 Cal.App.4th at p. 62 ["The question becomes whether there is sufficient evidence which, if believed by the jury, would support the finding of a conspiracy. `The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury."'"]; cf. *People v. Noguera* (1992) [4 Cal.4th 599](https://www.leagle.com/cite/4%20Cal.4th%20599), 626.)[18](https://www.leagle.com/decision/incaco20100719009#fid18)

**b. *Rossier's letters while in custody***

Rossier also argues the trial court committed prejudicial error by permitting the People to introduce, over her objections that the material was irrelevant and constituted improper Evidence Code section 1101 evidence, four letters (exhibits 20-23) she wrote about unrelated events while in custody following the Bellevue Avenue drive-by shooting. In the letters, found at Sanchez's and Fuentes's residences, Rossier identified herself as a gang member and appeared to direct fellow gang members with respect to the use of violence against enemies or rivals. In particular, in exhibit 20, found at Fuentes's home, Rossier wrote, ""Fool, Nena [Roxana Ramos] did rat me out. Make sure that you only tell Shorty [Benjamin Flores] and Payaso. Don't tell nobody else. The lawyer told me she is gonna have to go to court and testi[fy] against me. If anything happens to her right now, they will link it to me. I'll let you know when the time is right. Fool, what kind of shit is that? Ratting out your own homie. That shit don't go, fool. I'll let you know when and what to do to her."[19](https://www.leagle.com/decision/incaco20100719009#fid19)

When the court and counsel initially discussed the admissibility of Exhibit 20, it was believed by all parties the letter referred to the September 6, 2003 incident. In fact, the letter concerned a fight at Hollywood High School that led to Rossier's placement in a juvenile camp for assault. Further argument concerning the admissibility of the letter and the adequacy of a proposed limiting instruction—together with a defense motion for a mistrial—took place once it became apparent the letter did not directly involve the drive-by shooting. Notwithstanding its different subject, the People argued the letter, based on its content and the fact it was sent to Fuentes, was admissible as circumstantial evidence of Rossier's intent to promote, and her knowledge and participation in, the 18th Street gang. The court agreed, confirmed its prior ruling the letter—as well as the three others written by Rossier—was admissible and denied the mistrial motion. The court ultimately instructed the jury that exhibit 20 and the other letters could only be considered against Rossier; that counsel had stipulated exhibit 20 did not refer to any alleged incident in the case being tried, but rather to an unrelated incident; and that the letters could be considered as circumstantial evidence only for the limited purpose of deciding whether Rossier acted with knowledge of the charged offense and/or with the specific intent required to commit those crimes or the enhancements alleged against her.

That can be little doubt the letters, in which Rossier readily acknowledged her gang affiliation and directly linked her to Fuentes and Sanchez in terms of potentially violent gang activity, were relevant—that is, had some tendency to prove she was an active participant in the September 6, 2003 drive-by shooting, and not simply a naive teen innocently cruising in the stolen minivan, as urged by her defense counsel.[20](https://www.leagle.com/decision/incaco20100719009#fid20) (See *People v. Funes* (1994) [23 Cal.App.4th 1506](https://www.leagle.com/cite/23%20Cal.App.4th%201506), 1518 [evidence of gang affiliation properly introduced to prove intent]; *People v. Burns* (1987) [196 Cal.App.3d 1440](https://www.leagle.com/cite/196%20Cal.App.3d%201440), 1455-1456 [reference in letter to gang membership relevant where gang affiliation had been integral factor in apparent plan to execute intended victims; "[t]his evidence supported an inference that appellant was not merely a passive companion with no knowledge of what [his confederates] planned to do but was rather a fellow gang member and close associate of the two perpetrators and intimately involved in a joint criminal retaliatory endeavor"].) Although, as Rossier's counsel argues on appeal, the prosecutor may have used these letters to "devastatingly prejudicial" effect by portraying Rossier as a "hardcore gangbanger," the trial court properly balanced the letters' probative value against the potential for prejudice and determined they were admissible, provided adequate limiting instructions were given. (See *People v. Williams* (1997) [16 Cal.4th 153](https://www.leagle.com/cite/16%20Cal.4th%20153), 193 ["in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect"].) That decision was not an abuse of discretion. (See *People v. Barnett* (1998) [17 Cal.4th 1044](https://www.leagle.com/cite/17%20Cal.4th%201044), 1118 ["[w]hen a trial court overrules a defendant's objections that evidence is . . . unduly prejudicial . . ., we review the rulings for abuse of discretion"]; see also *People v. Sassounian* (1986) [182 Cal.App.3d 361](https://www.leagle.com/cite/182%20Cal.App.3d%20361), 402 [trial court should not exclude highly probative evidence unless the undue prejudice is unusually great].)[21](https://www.leagle.com/decision/incaco20100719009#fid21)

**4. *Challenges to the Trial Court's Instructions to the Jury***

**a. *The accomplice instructions***

**i. *Governing law***

Section 1111 prohibits conviction on the testimony of an accomplice—defined by the statute as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given"—unless the testimony is "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." The reason for the corroboration requirement is apparent: An accomplice is likely to implicate the defendant in order to shift the blame and minimize his or her own culpability. (*People v. Tobias* (2001) [25 Cal.4th 327](https://www.leagle.com/cite/25%20Cal.4th%20327), 331; *People v. Hayes* (1999) [21 Cal.4th 1211](https://www.leagle.com/cite/21%20Cal.4th%201211), 1271.)

To be "chargeable with an identical offense" and thus considered an accomplice within the meaning of section 1111, a witness must be found to be a principal under section 31. (*People v. Lewis* (2001) 26 Cal.4th 334, 368; *People v. Williams* (2008) [43 Cal.4th 584](https://www.leagle.com/cite/43%20Cal.4th%20584), 636; see also § 31 [defining principal as "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission"].) If the evidence establishes as a matter of law the witness was an accomplice, the court must so inform the jury and instruct it on the corroboration requirement. (*Lewis,* at p. 369 [when "`"facts with respect to the participation of a witness in the crime for which the accused is on trial are clear and not disputed, it is for the court to determine whether he is an accomplice"'"]; *People v. Hayes, supra,* 21 Cal.4th at p. 1271.) Likewise, if there is sufficient evidence from which a reasonable juror could find the witness to be an accomplice, the trial court must instruct the jury with the definition of accomplice contained in section 1111 and inform the jury, if it finds by a preponderance of the evidence a witness is an accomplice in accordance with the legal definition, the witness's testimony implicating the defendant must be independently corroborated before it may be considered. (*Lewis,* at p. 369; *People v. Zapien* (1993) [4 Cal.4th 929](https://www.leagle.com/cite/4%20Cal.4th%20929), 982.) In either situation the jury must also be instructed the testimony of an accomplice witness is to be viewed with distrust. (*Zapien,* at p. 982.)

**ii. *The challenged instructions***

The trial court instructed the jury, using CALCRIM No. 335, that Pacheco was an accomplice as a matter of law and, as a result, his testimony could be used to convict a defendant only if it was supported by other, independent credible evidence. However, the court declined to instruct that the Kuk brothers or Dorma Mendez, who were in the stolen minivan on September 6, 2003 during the Bellevue Avenue drive-by shooting, were accomplices as a matter of law, instead instructing, pursuant to CALCRIM No. 334, that before it could consider any statement or testimony from those three witness, or from Angelina Rakitina[22](https://www.leagle.com/decision/incaco20100719009#fid22) and Carlos Marroquin, as evidence against any of the defendants, the jury first had to decide whether they were accomplices to the crimes charged. As to the statements or testimony of any of those witnesses who was found to be an accomplice, the court instructed, independent supporting evidence was required. The court also specifically instructed the evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

Fuentes argues it was error not to instruct that the Kuk brothers and Mendez were accomplices as a matter of law. He does not contend any other aspect of CALCRIM Nos. 334 and 335, including the definition of an accomplice or explanation of the nature of supporting evidence necessary to corroborate the accomplice's testimony, was defective.

**iii. *In light of the independent corroborating evidence, any error in the accomplice instructions was harmless***

A trial court's failure to instruct on accomplice liability is harmless if there is adequate corroborating evidence in the record. (*People v. Williams, supra,* 43 Cal.4th at p. 638; *People v. Lewis, supra,* 26 Cal.4th at p. 370; *People v. Fauber* (1992) [2 Cal.4th 792](https://www.leagle.com/cite/2%20Cal.4th%20792), 834.) "`Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence `is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*Lewis,* at p. 370; accord, *People v. Brown* (2003) [31 Cal.4th 518](https://www.leagle.com/cite/31%20Cal.4th%20518), 556.)

There was sufficient corroborating evidence at trial to support the veracity of the testimony of the Kuk brothers and Mendez. Although defense counsel vigorously contested the credibility of gang member and government informant James Felix, Felix told the police Fuentes had bragged to him that he (Fuentes) had shot two Temple Street gang members. Felix also reported to the police that Flores had described his role in the drive-by shooting to him, claiming that the shotgun he used had jammed and did not fire, but that "his other homeboy" shot two Temple Street gang members. No more independent corroboration of Fuentes's and Flores's participation in the drive-by shooting was necessary. (Cf. *People v. Young* (2005) [34 Cal.4th 1149](https://www.leagle.com/cite/34%20Cal.4th%201149), 1181 [testimony of witness may be accepted by jury unless it is physically impossible or inherently improbable].)

As to Sanchez, he was arrested on September 8, 2003 in the stolen blue minivan, and his fingerprints were found on the minivan. Forensic tests confirmed the bullet removed from Monsivais's body had been fired from the rifle recovered from the minivan at the time of Sanchez's arrest. In addition, shell casings found at the crime scene on September 6 were matched to that rifle. These connections among Sanchez, the minivan and the murder weapon are sufficient corroboration of the testimony of any of the witnesses who might also be accomplices. (See *People v. Brown, supra,* 31 Cal.4th at p. 556.)

Finally, as to Rossier the requisite corroborating evidence was presented by a senior electrical engineer from AT&T who testified about two calls shortly before and after 10:30 p.m. on September 6, 2003 that were made to and from the cell phone recovered from the stolen minivan two days later. (As discussed, Rossier's father is the phone's subscriber; and, when he was arrested with the phone in the minivan on September 8, 2003, Sanchez identified it as belonging to his girlfriend.) Data from the cell towers indicated at the time of the two calls—which was also the time of the drive-by shooting—the phone was at a location very near the murder scene. Although undoubtedly "slight," this evidence is sufficient to permit the jury to consider the testimony and statements of the other prosecution witnesses against Rossier, even if they all were accomplices subject to the corroboration requirement of section 1111.

**b. *Conspiracy to commit assault with a firearm as a lesser included offense of conspiracy to commit murder***

**i. *Governing law***

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) [36 Cal.4th 686](https://www.leagle.com/cite/36%20Cal.4th%20686), 745), that is, "`"`those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'"'" (*People v. Valdez* (2004) [32 Cal.4th 73](https://www.leagle.com/cite/32%20Cal.4th%2073), 115.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser included offense, but not the greater offense, are present. (*Ibid.; People v. Breverman* (1998) [19 Cal.4th 142](https://www.leagle.com/cite/19%20Cal.4th%20142), 154; *People v. Birks* (1998) [19 Cal.4th 108](https://www.leagle.com/cite/19%20Cal.4th%20108), 118.) However, the existence of "`*any* evidence, no matter how weak'" will not justify instructions on a lesser included offense. There must be "`evidence that a reasonable jury could find persuasive.'" (*Breverman,* at p. 162.)

A particular offense is considered a "lesser included offense" and, therefore, subject to the duty to instruct if it satisfies one of two tests. The "elements" test is satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that the greater cannot be committed without committing the lesser; the "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser offense. (*People v. Sloan* (2007) [42 Cal.4th 110](https://www.leagle.com/cite/42%20Cal.4th%20110), 117; accord, *People v. Reed* (2006) [38 Cal.4th 1224](https://www.leagle.com/cite/38%20Cal.4th%201224), 1227-1228.)

The scope of the sua sponte duty to instruct is determined from the charges and facts actually alleged in the accusatory pleading: "[T]he rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are presented *in the accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither `harsher [n]or more lenient than the evidence merits.'" (*People v. Birks, supra,* 19 Cal. 4th at p. 119.)

**ii. *Forfeiture and invited error***

Sanchez, Fuentes and Aguilar were charged in count 3 with conspiracy to commit murder relating to the September 8, 2003 Marshall High episode. The court properly instructed the jury on the elements of that offense. The jury acquitted Fuentes, but found both Sanchez and Aguilar guilty. Sanchez, joined by Aguilar, now argues the court erred in failing to instruct the jury it could convict the defendants of conspiracy to commit an assault with a firearm, as a lesser included offense of the charged conspiracy to commit murder, based on the overt act allegations in the second amended information and the evidence introduced at trial.[23](https://www.leagle.com/decision/incaco20100719009#fid23)

The Attorney General's argument that Sanchez and Aguilar have forfeited this issue on appeal because neither requested a lesser included instruction on count 3 is difficult to understand. The question is whether the trial court in this case had a sua sponte duty to instruct on conspiracy to commit assault with a firearm as a lesser included offense of conspiracy to commit murder. Necessarily that issue only arises when no instruction has been requested. Indeed, the court has an obligation to instruct sua sponte on lesser included offenses even if defense counsel does not want such an instruction. (*People v. Breverman, supra,* 19 Cal.4th at p. 162 ["the sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued"]; accord, *People v. Barton* (1995) [12 Cal.4th 186](https://www.leagle.com/cite/12%20Cal.4th%20186), 195.)

Moreover, the reporter's transcript reveals Sanchez's counsel did inquire about a lesser included instruction on count 3 and expressly "made a record" on the point. When discussing whether it was necessary to give CALCRIM No. 3517, the instruction on completing verdict forms when lesser included offenses and greater crimes (other than homicides) are not separately charged, the trial court stated, "3517, lesser included's. And we really don't have any because that covers the nonhomicide lesser included's." Sanchez's counsel responded, "Your Honor, why don't we have a lesser included for the conspiracy to commit murder?" Fuentes counsel joined the discussion, saying, "There is no such thing." Sanchez's counsel replied, "I am alleging there is another crime." And the court answered, "I thought you were. And I thought we discussed the matter, and that is—I think the case is *Finnabak* [*People v. Fenenbock* (1996) [46 Cal.App.4th 1688](https://www.leagle.com/cite/46%20Cal.App.4th%201688)], you know. It would be one thing if the People have alleged in their actual allegation conspiracy to commit murder by assaulting with a firearm. But you don't look at the lesser included based upon, for instance, overt acts. You look at it based upon the pleading. . . ." Sanchez's counsel concluded the discussion by stating, "Thank you, Your Honor. I only brought it up because I wanted to make a record."

The exchange just quoted also belies the Attorney General's argument that any failure to instruct on a lesser included offense of conspiracy to commit assault with a firearm is invited error as to either Sanchez, whose attorney expressly sought the instruction, or Aguilar, whose attorney was silent during the discussion of instructions but joins Sanchez's argument on appeal. To be sure, if defense counsel intentionally caused the trial court to err, acting for tactical reasons and not out of mistake, the claim is barred on appeal as invited error. (*People v. Williams, supra,* 43 Cal.4th at p. 629; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 49.) The invited error doctrine extends to a deliberate choice by a defendant and his or her counsel to utilize an all-or-nothing strategy and to request that the court not instruct on lesser included offenses. (*People v. Bunyard* (1988) [45 Cal.3d 1189](https://www.leagle.com/cite/45%20Cal.3d%201189), 1234-1236.) It may well be that Fuentes, whose lawyer argued there was no lesser included offense—and who thereafter was found not guilty of the greater offense charged—could be found to have invited any error in failing to instruct on conspiracy to commit assault with a firearm as a lesser included offense. But the record simply does not support the Attorney General's claim of forfeiture by invited error as to Sanchez or Aguilar.[24](https://www.leagle.com/decision/incaco20100719009#fid24)

**iii. *Sanchez and Aguilar were entitled to an instruction that conspiracy to commit assault with a firearm is a lesser included offense of conspiracy to commit murder***

A conspiracy to commit murder, like the crime of murder itself, does not require use of a firearm. Accordingly, under the elements test conspiracy to commit assault with a firearm is not a lesser included offense of conspiracy to commit murder. (See *People v. Birks, supra,* 19 Cal.4th at p. 117.)

However, in *People v. Cook* (2001) [91 Cal.App.4th 910](https://www.leagle.com/cite/91%20Cal.App.4th%20910), the Court of Appeal affirmed a conviction for conspiracy to commit assault by means of a firearm as a lesser included offense of conspiracy to commit murder, holding the trial court properly looks to the overt acts pleaded in a charge of conspiracy to determine whether it includes lesser included target offenses under the accusatory pleading test. (*Id.* at pp. 920-921.) The court explained, "[P]rinciples of due process require that the overt acts be pleaded with particularity in order to give defendants notice of the nature and cause of the charge so that defendant may defend against that charge. [Citations.] It cannot be said then that an accusatory pleading charging conspiracy fails as a matter of law to give sufficient notice of the charged offense and any lesser included offense. [¶] To the extent an accusatory pleading fails to allege overt acts sufficient to give notice of a lesser included offense, the trial court may not rely on the pleading as a basis to instruct on lesser included offenses not included in the allegations of that pleading. Nevertheless, the possibility that some pleadings charging conspiracy may fail to give sufficient notice of lesser included offenses is not cause to hold, as a matter of law, that no pleading charging conspiracy gives sufficient notice of lesser included offenses." (*Id.* at p. 921.)

In affirming the conviction for conspiracy to commit assault by means of a firearm, the court in *Cook* expressly disagreed with *People v. Fenenbock, supra,* [46 Cal.App.4th 1688](https://www.leagle.com/cite/46%20Cal.App.4th%201688)—the case referred to by the trial court in declining to give a lesser included instruction in connection with count 3—which had held the trial court was not obligated to instruct sua sponte on lesser included target offenses (assault, battery or mayhem) based on allegations of overt acts committed in furtherance of the alleged conspiracy. The *Fenenbock* court reasoned overt act allegations "do not provide notice of lesser included target offenses." (*Id.* at p. 1708.) "Because overt acts need not be criminal offenses or even acts committed by the defendant, the description of the overt act in the accusatory pleading does not provide notice of lesser offenses necessarily committed by the defendant. Moreover, inasmuch as overt acts may be lawful acts, the overt acts do not necessarily reveal the criminal objective of the conspiracy." (*Id.* at p. 1709, fn. omitted.)

We agree with the analysis and conclusion in *Cook*: The allegations of overt acts in an accusatory pleading charging defendants with conspiracy to commit murder may identify lesser included target offenses with sufficient clarity to trigger the trial court's sua sponte duty to instruct on the lesser included offense(s). The *Fenenbock* court's per se rule limiting analysis to the specific charging allegations and disregarding the overt acts alleged to have been committed in furtherance of the conspiracy—followed in this case by the trial court—conflicts with the very purpose of the lesser-included-offense doctrine and its accusatory pleading test, which comes into play only when the elements test is not satisfied. As explained in *People v. Birks, supra,* [19 Cal.4th 108](https://www.leagle.com/cite/19%20Cal.4th%20108), the issue is whether an information or indictment adequately notifies the defendant, for due process purposes, that he or she must be prepared to defend against any lesser offenses necessarily included in the greater offense expressly charged based on "the facts actually alleged in the accusatory pleading." (*Id.* at pp. 117-118.) If the defendant is on notice, the instructional rule ensures that neither the prosecutor nor the defendant may force the jury to confront an all-or-nothing choice. For this salutary purpose—which benefits both the prosecution and the defense (*People v. Barton, supra,* 12 Cal.4th at p. 196; *Birks,* at p. 119)—it can make no difference whether the facts actually alleged are that the defendants conspired to commit murder by means of assault with a firearm or conspired to commit murder with an overt act allegation that they obtained firearms in furtherance of the conspiracy.[25](https://www.leagle.com/decision/incaco20100719009#fid25)

Whether the trial court's instructional duty exists in a particular case, as the *Cook* court held (see *People v. Cook, supra,* 91 Cal.App.4th at p. 921), requires analysis of the information itself. Here, count 3 of the second amended information alleged Fuentes, Sanchez and Aguilar "did unlawfully conspire together and with another person and persons whose identity is unknown to commit the crime of MURDER" and alleged five overt acts in furtherance of that conspiracy:

• Co-conspirators discussed their intent to shoot rival `White Fence' gang members, and other rival criminal street gang members.• Co-Conspirators drove to where a van was parked, retrieved a shotgun that was concealed within the van, and fired one shotgun round.• Co-Conspirators took a taxi to the Echo Park Hills and retrieved a van which concealed a .22 caliber rifle and a shotgun.• Co-Conspirators returned to `18th' Street gang territory in the van with a .22 caliber rifle, a shotgun and ammunition for both weapons.• Co-Conspirators solicited the assistance of other 18th Street gang members in shooting rival `White Fence' gang members and other rival criminal street gang members.

Although, as the trial court observed, the actual charge of conspiracy to commit murder did not include the words "murder by assaulting with a firearm," there can be no doubt that "shooting" the rival gang members, most probably by using the rifle and shotgun retrieved by the alleged coconspirators, was central to the conspiracy as actually alleged in the second amended information (and as portrayed by the evidence at trial).

The evidence at trial, presented primarily through the testimony of Pacheco and Marroquin, was that about one week before Sanchez, Aguilar and Marroquin were arrested in the stolen minivan, members of the White Fence gang had come to Marshall High School looking for 18th Street gang members. When Marroquin told Sanchez about this, Sanchez responded that he wanted to do something to send a message and to earn respect for the18th Street gang. On September 8, 2003, the day of the arrest itself, Sanchez spoke to Marroquin about getting some "homies" and doing a jale at Marshall High. The two young men then left the school and retrieved the stolen minivan. Marroquin went into the back of the vehicle and opened up the laundry bag containing the rifle and the shotgun, as well as some bullets. After they picked up Aguilar, Sanchez again talked about doing "some shit" to White Fence at Marshall High School. Pacheco similarly testified that Sanchez said he was planning on returning to the school to "bust a jale" before going to Mexico. According to Felix, when the stolen minivan stopped by him, Aguilar said they were going to Marshall to find "the fools" from Mara Salvatrucha and "go hit the Mierdas." Sanchez, however, testified he did not intend to commit a murder at Marshall High School that afternoon (or to shoot anyone); rather, when the police stopped the stolen minivan, he was returning to Marshall to back up Marroquin in an after-school fight with members of the Krazys criminal street gang.

Although this evidence appears sufficient to support Sanchez's and Aguilar's convictions for conspiracy to commit murder—an issue we need not decide[26](https://www.leagle.com/decision/incaco20100719009#fid26) —it is also fully consistent with a verdict of conspiracy to commit assault with a firearm, either because the jury believed that Sanchez and Aguilar did not intend to fire the rifle or the shotgun, but merely to display the loaded firearms in a threatening manner (see *People v. Rodriguez* (1999) [20 Cal.4th 1](https://www.leagle.com/cite/20%20Cal.4th%201), 10-11 & fn. 3 [pointing loaded gun in threatening manner sufficient proof of assault with a firearm, which requires present ability to inflict a violent injury]) or because the jury concluded the intent to shoot at rival gang members did not include an intent to kill one or more of them, a required element of conspiracy to commit murder. (See *People v. Swain* (1996) [12 Cal.4th 593](https://www.leagle.com/cite/12%20Cal.4th%20593), 607 [conspiracy to commit murder requires a finding of intent to kill and "cannot be based on a theory of implied malice"].) In light of these possible differing interpretations of the evidence (particularly since no precise definition of "jale" was provided by the witnesses), there was substantial evidence to support an instruction on the lesser included offense of conspiracy to commit an assault with a firearm. (See *People v. Baker* (1999) [74 Cal.App.4th 243](https://www.leagle.com/cite/74%20Cal.App.4th%20243), 252-253 [evidence of defendants' statements could be interpreted as indicating either intent to commit a simple assault or to commit an assault with a deadly weapon or with deadly force; because a rational jury could have concluded only the lesser offense was intended, the jury should have been instructed on a conspiracy to commit the lesser offense].)

**iv. *Failure to instruct on the lesser included offense of conspiracy to commit an assault with a firearm was prejudicial***

As the Attorney General argues, the erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818). (*People v. Sakarias* (2000) [22 Cal.4th 596](https://www.leagle.com/cite/22%20Cal.4th%20596), 621; *People v. Breverman, supra,* 19 Cal.4th at p. 176.) Thus, reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors committed by the trial court. (*Watson,* at pp. 836-837; see *People v. Prince* (2007) [40 Cal.4th 1179](https://www.leagle.com/cite/40%20Cal.4th%201179), 1267.) Under this standard, "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) [25 Cal.4th 610](https://www.leagle.com/cite/25%20Cal.4th%20610), 646.)

The Attorney General misinterprets this standard for determining prejudicial error, however, arguing the jury's finding that Sanchez and Aguilar were guilty of conspiracy to commit murder necessarily included a finding they had an express intent to kill a rival gang member, thus demonstrating the failure to instruct on the lesser included offense was harmless. That, of course, cannot be correct; for in every case in which an appellate court finds the failure to give a lesser included offense instruction constituted error, the defendant has been convicted of the greater offense, and the jury necessarily found the elements of that greater offense had been proved. Rather, in assessing whether the failure to instruct on a lesser included offense was harmless, the reviewing court properly looks to the jury's findings with respect to other charges or enhancements alleged against the defendant.

For example, in *People v. Lewis, supra,* 25 Cal.4th at page 646, in an appeal from a conviction for first degree felony murder with true findings on special allegations of robbery murder and burglary murder (as well as for robbery and burglary), the defendant contended he had mistakenly entered the victim's apartment while under the influence of drugs and alcohol, believing it was that of an acquaintance, and then stabbed the victim because he was afraid he was going to be attacked. The Supreme Court held any error in failing to instruct on involuntary manslaughter and voluntary manslaughter based on imperfect self-defense was harmless. The Court explained, "Here, the trial court instructed the jury on first degree felony murder and the crimes of robbery and burglary. In addition, the court instructed the jury on theft as a lesser included offense of robbery and burglary, an instruction emphasizing that if defendant formed the intent to steal only after he had entered the Rumseys' apartment and assaulted them, he was guilty of the lesser crime of theft. The jury found defendant guilty of robbery and burglary, and it found true the special circumstance allegations that defendant killed James Rumsey in the commission of robbery and burglary. [Citations.] To render these verdicts, the jury had to find that defendant had already formed the intent to steal when he entered the Rumseys' apartment and assaulted them, thus necessarily rejecting the defendant's version of the events." Thus, it was the jury's finding that the defendant had committed robbery, not theft, that permitted the finding of harmless error with respect to the lesser-included offenses of murder, not the conviction for murder itself.

Similarly, in *People v. Sakarias, supra,* [22 Cal.4th 596](https://www.leagle.com/cite/22%20Cal.4th%20596), the Supreme Court found harmless any error in failing to instruct on theft as a lesser included offense of robbery in a case in which the defendant had been convicted of first degree murder with special circumstances of murder in the commission of robbery and burglary and of separate counts of robbery and burglary. The defendant argued substantial evidence supported a finding his intent to take property from the victim's person arose only after the killing, which would be theft, not robbery. After concluding the evidence of after-formed intent was insufficient to justify an instruction on theft (*id.* at p. 620), the Court held, even if the trial court erred in not instructing on theft, the error was harmless: "The jury, moreover, necessarily rejected that factual theory in finding true the robbery-murder special circumstance, which they were instructed was not established if `the robbery was merely incidental to the commission of the murder.' Thus, the question whether [the victim] was killed with the intent to take property from her, or whether the taking was merely an afterthought to the killing, was clearly presented to and resolved by the jury." (*Id.* at p. 621; accord, *People v. Turner* (1990) [50 Cal.3d 668](https://www.leagle.com/cite/50%20Cal.3d%20668), 690-691 [jury resolved after-intent inference against defendant when it found true special circumstance allegation that murder was committed while defendant was engaged in robbery].)

Here, in contrast to *Lewis* and *Sakarias,* the evidence was sufficient to permit a reasonable jury to conclude Sanchez and Aguilar planned to commit an assault with a firearm at Marshall High School on September 8, 2003, rather than to commit a murder using a firearm; and no other jury finding resolved that issue of their intent adversely to them. It is reasonably probable under these circumstances a properly instructed jury would have convicted them of the lesser included offense, rather than the greater offense of conspiracy to commit murder. Retrial of count 3 is required.

**c. *Defense of others***

The trial court's obligation to instruct on the general principles of law applicable to the case includes the duty to instruct on an asserted defense, including self defense or defense of others, if there is sufficient evidence from which a reasonable juror could find the defense applicable. (*People v. Koontz* (2002) [27 Cal.4th 1041](https://www.leagle.com/cite/27%20Cal.4th%201041), 1046; *People v. Breverman, supra,* 19 Cal.4th at p. 154.) When a trial court refuses a proposed instruction for lack of evidence, we review the record de novo to determine whether the record contains substantial evidence to warrant the instruction. (*People v. Manriquez* (2005) [37 Cal.4th 547](https://www.leagle.com/cite/37%20Cal.4th%20547), 581, 584; *People v. Cruz* (2008) [44 Cal.4th 636](https://www.leagle.com/cite/44%20Cal.4th%20636), 664.)[27](https://www.leagle.com/decision/incaco20100719009#fid27)

Fuentes was convicted in count 4 of carrying a loaded firearm in a public place in violation of section 12031, subdivision (a)(1), in connection with the tagging/shooting incident on Vendome Street on August 29, 2003. Subdivision (j)(1) of section 12031 provides, "Nothing in this section is intended to preclude the carrying of any loaded firearm under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." Asserting substantial evidence indicated Fuentes came toward Rangel and Sanchez with a gun only after Rangel had threatened to shoot Sanchez, Fuentes contends the trial court erred in failing sua sponte to instruct the jury, in addition to the elements of the offense charged in count 4, on protection of others as a defense to the charge—that is, that he did not unlawfully possess a loaded firearm if he only carried it when he reasonably believed it was necessary to use it to defend Sanchez's life.

A prerequisite for the defense-of-others defense under section 12031, subdivision (j)(1), however, is that it would "otherwise be lawful" for the defendant to possess or carry the firearm. Fuentes failed to satisfy that requirement: As of August 29, 2003, Fuentes was 17 years old—a minor. Subject to certain exceptions not relevant to the instant case, section 12101, subdivision (a)(1), makes it unlawful for a minor to possess "a pistol, revolver, or other firearm capable of being concealed upon the person." There is no dispute the loaded firearm used by Fuentes to shoot Rangel—the subject of the count 4 conviction—was, in fact, *capable* of being concealed on Fuentes's person, although in dismissing the additional charge under section 12025, subdivision (a), the trial court concluded the evidence was insufficient that Fuentes had actually concealed it on his person prior to shooting Rangel. Accordingly, quite apart from the issues of constructive or actual possession before or after the brief confrontation with Rangel, which are addressed by the Attorney General, the trial court was not required to instruct on defense of others.

**d. *CALCRIM Nos. 220 and 226***

Fuentes challenges the trial court's use of CALCRIM Nos. 220 and 226, contending CALCRIM No. 220 impermissibly precluded the jury from considering lack of evidence on the issue of proof beyond a reasonable doubt and CALCRIM No. 226 improperly invited jurors to consider matters outside the record. Neither argument has merit.

As to CALCRIM No. 220,[28](https://www.leagle.com/decision/incaco20100719009#fid28) Fuentes argues the portion of the instruction that told the jury it "must impartially compare and consider all the evidence that was received throughout the entire trial" in determining whether the prosecution had proved its case beyond a reasonable doubt limited the jury's determination of reasonable doubt to the evidence received at trial, thus precluding the jury from considering the lack of evidence in making its decision, and effectively reduced the prosecution's burden of proof. Identical challenges to this portion of CALCRIM NO. 220 have consistently been rejected by the appellate courts. (*People v. Zavala* (2008) [168 Cal.App.4th 772](https://www.leagle.com/cite/168%20Cal.App.4th%20772), 781; *People v. Garelick* (2008) [161 Cal.App.4th 1107](https://www.leagle.com/cite/161%20Cal.App.4th%201107), 1117-1119; *People v. Stone* (2008) [160 Cal.App.4th 323](https://www.leagle.com/cite/160%20Cal.App.4th%20323), 330-332; *People v. Campos* (2007) [156 Cal.App.4th 1228](https://www.leagle.com/cite/156%20Cal.App.4th%201228), 1237-1238; *People v. Guerrero* (2007) [155 Cal.App.4th 1264](https://www.leagle.com/cite/155%20Cal.App.4th%201264), 1267-1269; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Westbrooks* (2007) [151 Cal.App.4th 1500](https://www.leagle.com/cite/151%20Cal.App.4th%201500), 1508-1510; *People v. Hernandez Rios* (2007) [151 Cal.App.4th 1154](https://www.leagle.com/cite/151%20Cal.App.4th%201154), 1156-1157.)

As those opinions explain, the instruction expressly directs jurors that, unless the evidence proves a defendant guilty beyond a reasonable doubt, the defendant is entitled to an acquittal. The only plausible understanding of this language is that a "lack of evidence" is ground for a reasonable doubt; nothing in the instruction itself (or elsewhere in the CALCRIM instructions given in this case) suggests jurors may not consider any perceived lack of evidence in deciding whether proof beyond a reasonable doubt is lacking. (See, e.g., *People v. Guerrero, supra,* 155 Cal.App.4th at pp. 1268-1269 ["[i]f the government presents no evidence, then proof beyond a reasonable doubt is lacking, and a reasonable juror applying this instruction would acquit the defendant"]; *People v. Campos, supra,* 156 Cal.App.4th at p. 1238 ["[t]he only reasonable understanding of the language, `[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty,' is that a lack of evidence could lead to reasonable doubt"].)

CALCRIM No. 226, which advises jurors to use their common sense and experience when evaluating the credibility of witnesses,[29](https://www.leagle.com/decision/incaco20100719009#fid29) is similarly a proper statement of the law that does not invite jurors to consider extrajudicial evidence or to employ a standard less than proof beyond a reasonable doubt when determining whether a defendant is guilty of the crimes charged. Our colleagues in Division Two of this court rejected the same challenge to CALCRIM No. 226 in *People v. Campos, supra,* 156 Cal.App.4th at pages 1239 to 1240, holding, "To tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do. In approaching any issue, a juror's background, experience and reasoning must necessarily provide the backdrop for the juror's decisionmaking, whether instructed or not. CALCRIM No. 226 does not tell jurors to consider evidence outside of the record, but merely tells them that the prism through which witnesses' credibility should be evaluated is common sense and experience. . . . CALCRIM No. 226 does not instruct jurors to use their common sense and experience in finding reasonable doubt, which could potentially conflict with the beyond a reasonable doubt standard, but only in assessing a witnesses' credibility."

The *Campos* court further explained, "[O]ther instructions given to jurors make clear that the term `common sense and experience' is not a license to consider matters outside of the evidence. Jurors were instructed that they must decide the facts based on the evidence presented (CALCRIM No. 200), that they were not to conduct research or investigate the crime (CALCRIM No. 201), that their determination of guilt had to be based on evidence received at trial (CALCRIM No. 220), that they were only to consider evidence (sworn testimony and exhibits) presented in the courtroom (CALCRIM No. 222), that they had to decide whether facts have been proved based on `all the evidence' (CALCRIM No. 223), that they should review all the evidence before concluding that the testimony of one witness proves a fact (CALCRIM No. 301) and other instructions emphasizing the exclusive significance of the evidence. (CALCRIM No. 302.)" (*People v. Campos, supra,* 156 Cal.App.4th at p. 1240.)

The trial court here used the same instructions as did the trial court in *People v. Campos, supra,* [156 Cal.App.4th 1228](https://www.leagle.com/cite/156%20Cal.App.4th%201228). Fuentes has provided no persuasive reason for us to depart from Division Two's analysis upholding the use of CALCRIM No. 226.

**e. *CALCRIM No. 375***

Using a modified form of CALCRIM No. 375 the trial court instructed the jury concerning the limited purposes for which certain evidence was admitted and could properly be considered by it (specifically, evidence of the Vendome Street tagging/shooting incident and Rossier's post-arrest letters). Sanchez argues the instruction was improper as to him because, as a factual and legal matter, his presence at the Vendome Street shooting could not be considered as proof that he had acted with knowledge of any of the charged crimes or with the requisite intent to commit any of those crimes.[30](https://www.leagle.com/decision/incaco20100719009#fid30)

In light of our holding that evidence concerning the Vendome Street tagging/shooting incident was properly admitted pursuant to Evidence Code section 1101, subdivision (b), as evidence of Fuentes, Sanchez and Rossier's intent with respect to the Bellevue Avenue drive-by shooting, Sanchez's argument regarding CALCRIM No. 375 necessarily fails. The instruction is a correct statement of the law. (Cf. *People v. Reliford* (2003) [29 Cal.4th 1007](https://www.leagle.com/cite/29%20Cal.4th%201007), 1012-1016 [upholding analogous CALJIC jury instruction]; *People v. Carpenter* (1997) [15 Cal.4th 312](https://www.leagle.com/cite/15%20Cal.4th%20312), 380-382.) As modified to reflect the evidence actually admitted in this case, it properly summarized the material facts and applicable legal principles. To the extent Sanchez simply contends, yet again, that knowledge and criminal intent for the charged crimes are not reasonably inferred from his participation in the Vendome Street incident because of the differences between the shooting that occurred on August 29, 2003 and the drive-by murder on September 6, 2003, the jury was expressly instructed it was for it to decide what weight, if any, to give to that evidence. The jury is presumed to have followed the trial court's instructions, and there is no indication it did not. (*People v. Sanchez* (2001) [26 Cal.4th 834](https://www.leagle.com/cite/26%20Cal.4th%20834), 852.)

**5. *Sufficiency of the Evidence***

**a. *Standard of review***

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] `Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence `is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) [43 Cal.4th 327](https://www.leagle.com/cite/43%20Cal.4th%20327), 357.)

**b. *Substantial evidence supports Rossier's convictions for second degree murder and attempted premeditated murder***

Rossier correctly identifies "the crucial issue" as to her culpability for the drive-by shooting as dependent on whether the evidence established she knew and shared the intent of "the actual perpetrators"—Fuentes, who used the rifle to shoot and kill Monsivais and to wound Manuel De La Rosa;[31](https://www.leagle.com/decision/incaco20100719009#fid31) Flores, who tried to fire the shotgun; and Sanchez, who drove the stolen minivan. Rossier contends the evidence at trial was insufficient to prove she was an aider and abettor, that is, that she knew of the perpetrators' unlawful purpose and specifically intended to, and did in fact, aid, facilitate or encourage the commission of the drive-by shooting. (See *People v. Beeman* (1984) [35 Cal.3d 547](https://www.leagle.com/cite/35%20Cal.3d%20547), 561; see also CALCRIM No. 401 [aiding and abetting: intended crimes].) Rossier's argument is little more than an invitation to this court to reweigh the evidence and substitute our own evaluation for that of the jury, a request we necessarily decline. (See, e.g., *People v. Culver* (1973) [10 Cal.3d 542](https://www.leagle.com/cite/10%20Cal.3d%20542), 548; *People v Felix* (2009) [172 Cal.App.4th 1618](https://www.leagle.com/cite/172%20Cal.App.4th%201618), 1624.)

Contrary to Rossier's contention, there was far more evidence upon which the jury could base its finding she had aided and abetted the Bellevue Avenue drive-by shooting than simply her gang membership, her presence in the stolen minivan and "her rambling, angry letters." Testimony at trial indicated Rossier was originally seated next to Sanchez, her boyfriend, while he drove the minivan on September 6, 2003. Once Pacheco had handed the laundry bag containing the guns and ammunition to someone inside the minivan, Rossier held the bag while Fuentes removed the shotgun and rifle. Rossier then changed places, allowing Fuentes to occupy the front passenger's seat, the position from which he fired the lethal shots. Moreover, according to Pacheco, Rossier was present when the purportedly more culpable men discussed driving to Silver Lake gang territory and "busting a jale" prior to the shooting; and Rossier told him afterward that she had tried to help Flores unjam the shotgun during the shooting spree. That evidence, together with Rossier's membership in the Red Shield clique of the 18th Street criminal street gang and her participation in the events that preceded the drive-by shooting, constitute ample circumstantial evidence of her knowledge of Fuentes's and Flores's unlawful purpose and her specific intent to assist them in shooting victims they believed were members of a rival gang.

Rossier's challenge to the sufficiency of this evidence, in effect, is that none of the People's witnesses who described her activities on the evening of September 6, 2003 was credible. Without doubt, the various gang members who testified for the prosecution—in particular, Pacheco, the Kuk brothers and Felix—faced their own legal difficulties and had strong incentives to lie and deflect blame from themselves. At various times, as Rossier argues, they gave conflicting versions of the central events surrounding the shootings. But those issues of witness credibility were all presented to the jury, which apparently decided to believe the witnesses, at least in substantial part. That is the jury's function, not ours. (*People v. Bolin* (1998) [18 Cal.4th 297](https://www.leagle.com/cite/18%20Cal.4th%20297), 331; *People v. Zamudio, supra,* 43 Cal.4th at p. 357.)

**c. *Inconsistent verdicts; selective prosecution***

Under the brief heading directed to the sufficiency of the evidence, Rossier also argues her convictions are improper because the jury's verdicts were inconsistent (she could not have simultaneously aided and abetted an attempted premeditated murder of De La Rosa, but only a second degree murder of Monsivais during the same shooting spree; the guilty findings on the substantive charges cannot be reconciled with the not true findings as to her on the firearm-use enhancement allegations) and she was the victim of selective prosecution.[32](https://www.leagle.com/decision/incaco20100719009#fid32)

"As a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] . . . Although `"error," in the sense that the jury has not followed the court's instructions, most certainly has occurred,' in such situations, `it is unclear whose ox has been gored.' [Citation.] It is possible that the jury arrived at an inconsistent conclusion through `mistake, compromise, or lenity.' [Citation.] Thus, if a defendant is given the benefit of an acquittal on the count on which he was acquitted, `it is neither irrational nor illogical' to require him [or her] to accept the burden of conviction on the count on which the jury convicted." (*People v. Avila* (2006) [38 Cal.4th 491](https://www.leagle.com/cite/38%20Cal.4th%20491), 600.) Here, it is likely that the jury thought it unnecessary to convict Rossier of the more serious murder charge and the firearm enhancements since she was not one of the actual shooters. Although not technically correct in terms of the law's imposition of responsibility for her role as an aider and abettor, she was plainly not prejudiced by any inconsistency in the verdicts reached.

Rossier's selective prosecution claim is similarly without merit. Indeed, although presenting the argument, Rossier concedes she cannot meet the strict criteria for establishing that she was singled out for prosecution on the basis of some invidious purpose or due to a prohibited classification. (See *Baluyut v. Superior Court* (1996) [12 Cal.4th 826](https://www.leagle.com/cite/12%20Cal.4th%20826), 832-833 ["`[t]o establish the defense [of discriminatory enforcement], the defendant must prove: (1) "that he [or she] has been deliberately singled out for prosecution on the basis of some invidious criterion"; and (2) that "the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities"'"]; accord, *Murgia v. Municipal Court* (1975) [15 Cal.3d 286](https://www.leagle.com/cite/15%20Cal.3d%20286), 298 [same].)

**6. *The Prosecutor Did Not Commit Prejudicial Misconduct***

**a. *Governing law***

"`The applicable federal and state standards regarding prosecutorial misconduct are well established. "`A prosecutor's . . . intemperate behavior violates the federal Constitution only when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "`"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'" (*People v. Navarette* (2003) [30 Cal.4th 458](https://www.leagle.com/cite/30%20Cal.4th%20458), 506; accord, *People v. Morales* (2001) [25 Cal.4th 34](https://www.leagle.com/cite/25%20Cal.4th%2034), 44.)

**b. *Mischaracterization of premeditation and deliberation***

During her initial closing argument the prosecutor discussed the concept of premeditation and deliberation, explaining premeditation could occur during a relatively short period of time, "You look to the extent of the consideration, not the length of time." She gave as an example driving to court: "[L]et's say you are coming on the 110 freeway coming south from Pasadena, and you have to turn off to get off in downtown. You are driving along. You go, `I better get over,' so you get in the correct lane. You look in your mirror, look behind you, see it is clear to go. You move over a couple of lanes. Well, right there you have deliberated and premeditated. It is an innocent thing but you do it every day. You have planned it. It wasn't an accident. You moved over there. You thought about it. . . ." Fuentes contends the changing-lanes example given by the prosecutor misstated the law and improperly trivialized the proof required to find him guilty of first degree murder.

In support of his argument Fuentes mistakenly relies upon two cases in which everyday decisionmaking was equated to the reasonable doubt standard of proof, rather than to explain the concept of premeditation or deliberation as an element of first degree murder. Thus, in *People v. Nguyen* (1995) [40 Cal.App.4th 28](https://www.leagle.com/cite/40%20Cal.App.4th%2028), 36, the Court of Appeal strongly disapproved a prosecutor's argument "suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry," before concluding any error was harmless because the jury was correctly instructed by the court on the standard. (*Id.* at pp. 36-37.) In explaining its disapproval of the argument, the *Nguyen* court quoted *People v. Brannon* (1873) 47 Cal. 96, 97: "`The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of a criminal case involving life or liberty, something further is required. . . . There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence.'" (*Nguyen,* at p. 36.)

Relying on *Nguyen,* in *People v. Johnson* (2004) [115 Cal.App.4th 1169](https://www.leagle.com/cite/115%20Cal.App.4th%201169) our colleagues in Division One of this court reversed the judgment of conviction because the trial court amplified the approved reasonable doubt instruction by analogizing it to decisions made by people in their daily lives such as planning a vacation or buying a home. "We are not prepared to say that people planning vacations or scheduling flights engage in a deliberative process to the depth required of jurors or that such people finalize their plans only after persuading themselves that they have an abiding conviction of the wisdom of the endeavor." (*Johnson,* at p. 1172.)

There is, of course, a significant difference between giving examples of decisionmaking from everyday life to illustrate, as here, the meaning of "deliberate" or "premeditated" and using such examples to define the concept of proof beyond a reasonable doubt. The prosecutor properly argued to the jury "there [was] ample evidence that the defendants considered and thought about and planned what they were going to do before they actually did it" and correctly explained that neither deliberation nor premeditation requires thought over an extended period. (See *People v. Halvorsen* (2007) [42 Cal.4th 379](https://www.leagle.com/cite/42%20Cal.4th%20379), 419 [true test of deliberation and premeditation is not the duration of time but the extent of the reflection].) The changing-lanes illustration did not significantly misstate the definition of either term. (See *People v. Williams, supra,* 16 Cal.4th at pp. 223-224 [reviewing transcript of prosecutor's actual remarks belies contention "deliberation" was misdefined].) Moreover, the trial court fully instructed the jury on that element of deliberate, premeditated murder and attempted premeditated murder and further instructed the jury pursuant to CALCRIM No. 200, "If you believe that any attorney's comments on the law conflict with my instructions, you must follow my instructions." There was no prejudicial misconduct.[33](https://www.leagle.com/decision/incaco20100719009#fid33)

**c. *Vouching for the credibility of witnesses***

During her final closing argument, while discussing Marroquin's testimony concerning the September 8, 2003 Marshall High events, the prosecutor asked rhetorically, "Why would he lie? What's he lying about? It doesn't make any sense. I mean, he implicated himself." Responding to defense counsel's assertion of Marroquin's motive to lie, she continued, "Counsel kept talking about his motivation to lie, but what did they think he's lying about. Specifically? They haven't told you what they think he's lying about because his story, his statement makes sense. He told the police the truth. He told the police what he knew." Then referring more generally to the Kuk brothers and Felix, as well as Marroquin, the prosecutor said, "This is a serious case. This is a case that's been complicated. You heard a lot of evidence. You've heard a lot of testimony. And you've got witnesses who definitely are gang members, drug dealers, all the rest of it. But in some ways, those admissions to their gang membership and drug dealership really gives them additional credibility."

After making these comments the prosecutor concluded her summation, advising the jurors they were not to speculate why other individuals who had been in the stolen minivan on September 6, 2003 were not on trial, and asking the jury to return guilty verdicts. Only then did defense counsel object that the prosecutor had been vouching for the credibility of the People's witnesses. After noting the objection was "a tad late," the court immediately instructed the jury, "Any reference to any party in this case vouching or believing the testimony of an individual witness is simply inappropriate and not evidence as it applies to any party in this case. The jurors decide the believability of any witness and make up your own independent mind about that. Once again, any statements of any attorney in this case and the argument and in the opening statement phase and anything that's not contained within the stipulation is simply not evidence in this case." That admonition was subsequently echoed by the standard instruction, given by the court here pursuant to CALCRIM No. 222, that "[n]othing the attorneys say is evidence . . . . Their remarks are not evidence."

Aguilar[34](https://www.leagle.com/decision/incaco20100719009#fid34) argues the prosecutor committed misconduct by vouching for or bolstering the credibility of Marroquin and Felix. Although a prosecutor may not vouch for the credibility of a witness based on personal belief or by referring to evidence outside the record (*People v. Martinez* (2010) [47 Cal.4th 911](https://www.leagle.com/cite/47%20Cal.4th%20911), 958; *People v. Sully* (1991) [53 Cal.3d 1195](https://www.leagle.com/cite/53%20Cal.3d%201195), 1235), none of the challenged statements can fairly be characterized as improper: "A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them." (*Martinez,* at p. 958.) Moreover, in light of the trial court's immediate admonition, as well as its standard instruction that comments by the attorneys are not evidence, no reasonable likelihood exists that the jury applied those comments in an objectionable fashion. (See *People v. Morales, supra,* 25 Cal.4th at p. 44 [when a claim of prosecutorial misconduct relates to comments made before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion"].)

**d. *Denigrating defense counsel***

While Sanchez was testifying in his defense, the prosecutor, noting an event that had occurred during the previous court day, asked Sanchez if Fuentes's counsel had come over to talk to him. Sanchez responded, "Yeah, he always does." The prosecutor then asked if Sanchez's own counsel was present at the time, and Sanchez said he did not remember. The prosecutor then asked, "What did [Fuentes's counsel] want to talk to you about?" There were immediate objections by counsel for Fuentes and Rossier; and, after a brief sidebar conference, the objections were sustained.

As later disclosed on the record, the prosecutor apparently believed Fuentes's counsel had suggested to Sanchez that he look at the jury when testifying. She subsequently asked Sanchez if anyone had advised him to do that (after informing the court she intended to ask that question). The court overruled a defense objection, and Sanchez answered, "Nobody ever told me anything like that."

Fuentes and Rossier contend the question to Sanchez about Fuentes's counsel constituted a personal attack, which impugned the integrity of defense counsel by suggesting he had improperly coached the witness. (See *People v. Welch* (1999) [20 Cal.4th 701](https://www.leagle.com/cite/20%20Cal.4th%20701), 753 ["It is misconduct when a prosecutor in closing `denigrates counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues.'"].) As the trial court remarked at the time, the record simply does not support the argument that the prosecutor was in any way denigrating defense counsel, nor is it reasonably likely the jury's attention was diverted from the evidence to any purported impropriety by defense counsel. (See *People v. Sandoval* (1992) [4 Cal.4th 155](https://www.leagle.com/cite/4%20Cal.4th%20155), 183-184; cf. *People v. Taylor* (2001) [26 Cal.4th 1155](https://www.leagle.com/cite/26%20Cal.4th%201155), 1167 [referring to defense "tricks" or "moves" did not constitution improper personal attack].) Moreover, any possible prejudice from the question itself—and it is difficult for us to conceive of any—was fully dissipated both by Sanchez's unequivocal denial that he had been advised how to testify by anyone, as well as by the trial court's instruction that the attorneys' questions are not evidence and are to be considered only to the extent they help in understanding the witness's answer. (CALCRIM No. 222.)

**e. *Smirking and other purported misconduct***

Noting several points in the record where the trial court admonished the prosecutor not to be so animated with her facial expressions and body language (both positive and negative) or to refrain from possible nonverbal communication (shaking her head) with one of her witnesses (Pacheco), Rossier argues a smirking prosecutor who coached her witnesses deprived her of a fair trial. It does appear the prosecutor, perhaps unintentionally and in her zeal, on occasion during this lengthy trial lapsed into unprofessional, nonverbal, but nonetheless communicative behavior. When noticed by the court or brought to its attention by defense counsel, she was corrected. Although we certainly do not condone smirking, sneering or gestures that convey positive or negative messages to witnesses or the jury, whether considered separately or collectively, it is not likely this conduct misled the jury or affected its evaluation of the evidence. (See *People v. Espinoza* (1992) [3 Cal.4th 806](https://www.leagle.com/cite/3%20Cal.4th%20806), 820-821 ["it is not reasonably probable that the prosecutor's occasional intemperate behavior [using facial expressions or gestures to express dismay or disbelief] affected the jury's evaluation of the evidence or the rendering of its verdict"]; *People v. Stewart* (2004) [33 Cal.4th 425](https://www.leagle.com/cite/33%20Cal.4th%20425), 503 [same].)

Finally, Rossier argues the prosecutor deliberately elicited inadmissible evidence from Los Angeles Police Detective Jeff Breuer, the investigating officer in the case, concerning telephone calls to and from Rossier's cell phone. Specifically, in addition to extensive questioning about calls on September 8, 2003, the prosecutor asked Detective Breuer if, during the course of his investigation, he had determined calls had been made to Pacheco's father from Rossier's phone. A defense objection that the question was based on uncertified telephone records (hearsay), which had not been disclosed during discovery, was sustained. (The prosecutor asserted the records had been provided to defense counsel; the court sustained the objection only on the hearsay ground.) The court also stated the answer to the question would be stricken and directed the jury to disregard it. In fact, no answer had yet been given to the question; and Detective Breuer never testified that a call had gone from Rossier's phone to Pacheco's father—on September 6, 2003 or any other date.[35](https://www.leagle.com/decision/incaco20100719009#fid35)

Even if we were to accept Rossier's somewhat dubious contention the question was not asked in good faith, in light of the trial court's immediate decision to sustain the defense objection, asking that question does not constitute prejudicial prosecutorial misconduct. (See *People v. Bennett* (2009) [45 Cal.4th 577](https://www.leagle.com/cite/45%20Cal.4th%20577), 595 ["[w]hen a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the admonition and that prejudice was therefore avoided"].) To be sure, it is misconduct for a prosecutor to intentionally elicit inadmissible and prejudicial testimony. (See, e.g., *People v. Smithey* (1999) [20 Cal.4th 936](https://www.leagle.com/cite/20%20Cal.4th%20936), 961; *People v. Bell* (1989) [49 Cal.3d 502](https://www.leagle.com/cite/49%20Cal.3d%20502), 532.) Here, however, no evidence was elicited in response to the improper question. Moreover, asking this single question did not amount to an "egregious pattern of conduct that rendered the trial fundamentally unfair"; nor in the context of this lengthy, generally well-conducted, although contentious, trial, can we say there is a reasonable likelihood the jury was misled by it, particularly since the court gave a curative admonition to disregard any answer and further instructed the jury not to assume the truth of anything suggested by a question asked a witness. (See *Smithey,* at p. 961 ["[w]e presume the jury followed the court's detailed instructions regarding this matter and conclude that, in light of the instructions, there is no reasonable likelihood the jury was misled by the prosecutor's improper question"].)

**7. *Section 12031, Subdivision (a)'s Prohibition Against Carrying a Loaded Firearm in a Public Place Is Not Unconstitutional***

Relying on *District of Columbia v. Heller* (2008) 554 U.S. \_\_\_ [[128 S.Ct. 2783](https://www.leagle.com/cite/128%20S.Ct.%202783), 171 L.Ed.2d 637], which invalidated under the Second Amendment to the United States Constitution the District of Columbia's ban on the possession of all firearms, including possession of handguns in the home,[36](https://www.leagle.com/decision/incaco20100719009#fid36) Fuentes argues his conviction for carrying a loaded firearm in a public place (§ 12031, subd. (a)) must be reversed because it is based on an unconstitutional statute. An identical challenge to a conviction under section 12031, subdivision (a), was rejected by our colleagues in Division One of the Fourth Appellate District in *People v. Flores* (2008) [169 Cal.App.4th 568](https://www.leagle.com/cite/169%20Cal.App.4th%20568), 576: "[W]e believe section 12031 is so far removed from the blanket restrictions at issue in *Heller* that its constitutional validity remains undisturbed by the Supreme Court's opinion." (Accord, *People v. Villa* (2009) [178 Cal.App.4th 443](https://www.leagle.com/cite/178%20Cal.App.4th%20443), 450.)

The *Flores* court explained why *Heller* did not undermine the constitutionality of a conviction for carrying a loaded firearm in a public place: "Section 12031 prohibits a person from `carr[ying] a loaded firearm on his or her person . . . while in any public place or on any public street.' (§ 12031, subd. (a)(1).) The statute contains numerous exceptions. There are exceptions for security guards (*id.,* subd. (d)), police officers and retired police officers (*id.,* subd. (b)(1), (2)), private investigators (*id.,* subd. (d)(3)), members of the military (*id.,* subd. (b)(4)), hunters (*id.,* subd. (i)), target shooters (*id.,* subd. (b)(5)), persons engaged in `lawful business' who possess a loaded firearm on business premises and persons who possess a loaded firearm on their own private property (*id.,* subd. (h)). A person otherwise authorized to carry a firearm is also permitted to carry a loaded firearm in a public place if the person `reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.' (*Id.,* subd. (j)(1).) Another exception is made for a person who `reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety.' (*Id*., subd. (j)(2).) Finally, the statute makes clear that `[n]othing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite.' (*Id*., subd. (*l*).) [¶] This wealth of exceptions creates a stark contrast between section 12031 and the District of Columbia statutes at issue in *Heller.* In particular, given the exceptions for self-defense (both inside and outside the home), there can be no claim that section 12031 in any way precludes the use `of handguns held and used for self-defense in the home.' (*Heller, supra,* 554 U.S. at p. \_\_\_ [128 S.Ct. at p. 2822].) Instead, section 12031 is narrowly tailored to reduce the incidence of unlawful public shootings, while at the same time respecting the need for persons to have access to firearms for lawful purposes, including self-defense. [Citation.] Consequently, section 12031 does not burden the core Second Amendment right announced in *Heller*—`"the right of law-abiding, responsible citizens to use arms in defense of hearth and home"'—to any significant degree. [Citation.] We, therefore, conclude that *Heller* does not require reversal of Flores's section 12031 conviction." (*People v. Flores, supra,* 169 Cal.App.4th at p. 577, fn. omitted.)

We find fully persuasive the *Flores* court's analysis of the significant differences between the District of Columbia statutes invalidated in *Heller* and section 12031. Fuentes does not address any of these distinctions and presents no compelling reason for us not to follow *Flores* and uphold the constitutionality of section 12031, subdivision (a).[37](https://www.leagle.com/decision/incaco20100719009#fid37)

**8. *Ineffective Assistance of Counsel***

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms but also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) [466 U.S. 668](https://www.leagle.com/cite/466%20U.S.%20668), 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) [13 Cal.4th 552](https://www.leagle.com/cite/13%20Cal.4th%20552), 561.) "`The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) [46 Cal.3d 612](https://www.leagle.com/cite/46%20Cal.3d%20612), 656.)

In considering a claim of ineffective assistance of counsel, it is not necessary to determine "`whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Fields* (1990) [51 Cal.3d 1063](https://www.leagle.com/cite/51%20Cal.3d%201063), 1079, quoting *Strickland v. Washington, supra,* 466 U.S. at p. 697.) It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a "reasonable probability" that absent the errors the result would have been different. (*People v. Williams, supra,* 16 Cal.4th at p. 215; *People v. Ledesma* (1987) [43 Cal.3d 171](https://www.leagle.com/cite/43%20Cal.3d%20171), 217-218.)

As discussed, in permitting the prosecution to introduce evidence of the Vendome Street incident, the trial court directed that the shooting would not be characterized as a homicide and neither counsel nor any witness was to disclose that Rangel had been killed. Nonetheless, during opening statements Fuentes's trial counsel informed the jury that Rangel had been killed during the shooting incident on Vendome Street, a comment that Fuentes now argues constituted constitutionally ineffective assistance of counsel.

The challenged statement itself was brief. Fuentes's lawyer was elaborating on his theme that the prosecutor in her opening statement had omitted "a great deal of the truth . . . . I'm going to tell you what counsel [the prosecutor] didn't tell you." Fuentes counsel then explained, "They also left out other interesting facts in regard to this shooting on August 29. . . . Mr. Rangel did not hold his gun down at his side. Mr. Rangel picked it up and pointed it directly at Bryan Sanchez and said, `this is your funeral,' over some spray paint. They know that. They also know that Mr. Rangel had almost twice the legal limit of alcohol in his body and two different kinds of cocaine. . . . He was a hardcore gang member. That is why the evidence will show you there is no charge about —"

At this point the prosecutor objected on the ground the statement was improper argument; the trial court sustained the objection. Trial counsel continued, "The evidence will show you there is no charge of murder as to that count because —" The prosecutor again objected. The trial court sustained the objection, stating, "We know what the charge is to that count." Undeterred, Fuentes's counsel continued, "The evidence will show you it was self-defense. That Rafael Fuentes —" Another objection by the prosecutor was sustained, and the court called all counsel forward for a sidebar conference.

During that conference outside the jury's presence, Fuentes's counsel explained he wanted to emphasize that there was no grand conspiracy, as the People contended, and that the Vendome Street incident and the Bellevue Avenue drive-by shooting were not related. The defendants were simply spray painting, and Fuentes used the firearm only in defense of Sanchez, not as part of an effort to expand the Red Shield clique's territory. "This is a totally unrelated offense. It is a totally unrelated incident." In response to the court's reminder that it was defense counsel who wanted to preclude the jury from learning that Rangel had died, Fuentes's counsel stated he believed the entire Vendome Street tagging and shooting episode should be excluded; but since the court had ruled it admissible, he wanted to the jury to understand the two shootings were quite different in how they had occurred.

The court reiterated its prior ruling (based on requests from other defense counsel) that the jury was not to learn that Rangel had died, but told Fuentes's lawyer, "I think you can indicate what the individual [Rangel] did and your client's reaction to it, and indicate that it has nothing to do with any kind of conspiracy. It happened at the moment."

Although Fuentes's counsel's reference to the absence of a charge of murder arising from the Vendome Street incident unquestionably violated the court's pretrial ruling, the statement was the product of a deliberate decision to explain why Fuentes—being tried for carrying a loaded firearm in a public place on August 29, 2003, as well as for murder and a conspiracy to commit murder on subsequent days—had used a gun on the earlier date. While we certainly do not condone a deliberate violation of a court order, we cannot conclude the decision to do so had no rational tactical purpose. (See *People v. Lucas* (1995) [12 Cal.4th 415](https://www.leagle.com/cite/12%20Cal.4th%20415), 442 [on a direct appeal a conviction will only be reversed for ineffective assistance of counsel where the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission].)[38](https://www.leagle.com/decision/incaco20100719009#fid38)

Moreover, in light of the essentially undisputed evidence that Fuentes fired at Rangel in an effort to defend Sanchez, whom Rangel had threatened with his own gun, while Fuentes, Sanchez, Rossier and Ramos were engaged in tagging in Silver Lake gang territory, we can conceive of no possible prejudice to Fuentes from his counsel's statement to the jury that Rangel was killed *and* no murder charge had been filed. That is, Fuentes has failed to meet his burden of showing a reasonable probability he would have obtained a better result at trial had the statements not been made. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)[39](https://www.leagle.com/decision/incaco20100719009#fid39)

**9. *Sentencing Issues***

**a. *Flores's counts 1 and 2 firearm-use enhancements***

Section 12022.53, subdivision (b), provides a 10-year enhancement for "any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm . . . ." Subdivision (e)(1) extends this enhancement to "any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b) . . . ."

Flores was sentenced on count 1, second degree murder perpetrated by shooting a firearm from a vehicle, to a term of 20 years to life in state prison. (§ 190, subd. (d).)[40](https://www.leagle.com/decision/incaco20100719009#fid40) The court also imposed the 10-year firearm-use enhancement on count 1 pursuant to section 12022.53, subdivisions (b) and (e)(1). On count 2 Flores was sentenced to an indeterminate life term with the possibility of parole for attempted premeditated murder (§ 664, subd. (a)), with a 15 year minimum parole eligibility date pursuant to section 186.22, subdivision (b)(5), because the offense was committed to benefit a criminal street gang and a 10-year firearm-use enhancement pursuant to section 12022.53, subdivisions (b) and (e)(1).

Contending the term "principal" as used in section 12022.53, subdivision (e)(1), does not include individuals who did not personally use a firearm and are only liable for one of the offenses enumerated in section 12022.53, subdivision (a), under the natural and probable consequences doctrine, Flores asserts the trial court improperly imposed the 10-year firearm-use enhancements on counts 1 and 2. According to Flores's argument, the People proceeded against him at trial under alternate legal theories—Flores either directly aided and abetted the murder of Monsivais and the attempted murder of De La Rosa or he aided and abetted an assault with a firearm, which is not an offense specified in section 12022.53, subdivision (a), and was liable for the more serious offenses under the natural and probable consequences doctrine. Because it cannot be determined from the general verdict form on which theory the jury in fact relied, Flores argues, the firearm-use enhancements must be reversed.

The premise for Flores's argument is flawed. Section 30 classifies the parties to crimes as either "principals" or "accessories." As discussed, section 31 expressly defines a principal to include a person who aids and abets the commission of a crime.[41](https://www.leagle.com/decision/incaco20100719009#fid41) Section 32 defines an accessory to a crime as one who, after a felony has been committed, assists a principal in the felony with the intent to help the principal avoid arrest or conviction.[42](https://www.leagle.com/decision/incaco20100719009#fid42) Thus, under these statutory definitions, "[a] defendant in a criminal action . . . is convicted as a principal or accessory or not at all." (*People v. Talbott* (1944) 65 Cal.App.2d 654, 660.) Yet a defendant who is guilty of an offense by way of the natural and probable consequences doctrine is clearly not an accessory to the offense—his or her guilt is not predicated on acts perpetrated after the felony was committed. Rather, the defendant who is an aider and abettor remains just that, an aider and abettor (that is, a "principal"). The doctrine simply extends the scope of criminal liability to include all crimes committed by the direct perpetrator that are the natural and probable consequence of the target crime.

Indeed, Flores's argument to the contrary notwithstanding, it has been understood for centuries an aider and abettor is liable not only for the crime he or she intended to aid and abet but also for any crime that is the natural and probable consequence of the target crime. (See Sayre, *Criminal Responsibility For The Acts Of Another* (1930) 43 Harv. L.Rev. 689, 696-699.) Thus, whether the term aid and abet is considered to have an "approved usage" or to have acquired over the centuries a "peculiar and appropriate meaning," when the Legislature declared aiders and abettors to be "principals," it included within that term aiders and abettors liable for the commission of crimes that are the natural and probable consequences of the crimes they intended to aid and abet. (§ 7, subd. 16 ["[w]ords and phrases [in the Penal Code] must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning"].) If the Legislature had intended to give the term "principal" a different meaning in section 12022.53, subdivision (e)(1), it would have said so. (See *People v. Acosta* (2002) [29 Cal.4th 105](https://www.leagle.com/cite/29%20Cal.4th%20105), 114 ["[a]s a matter of statutory construction, `a word or phrase repeated in a statute should be given the same meaning throughout'"].)

**b. *Imposition of both firearm-use and gang enhancements on Flores***

As discussed, in sentencing Flores the trial court not only imposed a 10-year firearm-use enhancement on both counts 1 and 2 but also specified a 15-year minimum parole eligibility date on each count pursuant to section 186.22, subdivision (b)(5). Because Flores did not personally use or discharge a firearm in committing the offenses, however, pursuant to section 12022.53, subdivision (e)(2),[43](https://www.leagle.com/decision/incaco20100719009#fid43) he was not subject to "[a]n enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to" section 12022.53. (*People v. Brookfield* (2009) [47 Cal.4th 583](https://www.leagle.com/cite/47%20Cal.4th%20583), 591; see *People v. Gonzalez* (2010) [180 Cal.App.4th 1420](https://www.leagle.com/cite/180%20Cal.App.4th%201420), 1427; *People v. Salas* (2001) [89 Cal.App.4th 1275](https://www.leagle.com/cite/89%20Cal.App.4th%201275), 1281-1282 [§ 12022.53, subd. (e)(2), prevents imposition of the 15-year minimum term specified in § 186.22, subd. (b)(5), as well as expanded liability under § 12022.53, subd. (e)(1), unless defendant personally used the firearm].)

The Attorney General concedes the trial court erred in this regard. The judgment as to Flores must be modified to stay imposition of the 15-year minimum parole eligibility term set forth in section 186.22, subdivision (b)(5). (See *People v. Gonzalez* (2008) [43 Cal.4th 1118](https://www.leagle.com/cite/43%20Cal.4th%201118), 1129; *People v. Sinclair* (2008) [166 Cal.App.4th 848](https://www.leagle.com/cite/166%20Cal.App.4th%20848), 854; see generally Cal. Rules of Court, rule 4.447 ["[n]o finding of an enhancement may be stricken or dismissed because imposition of the term either is prohibited by law or exceeds limitations on the imposition of multiple enhancements"; sentencing judge must "stay execution of so much of the term as is prohibited or exceeds the applicable limit"].)

**c. *Joint and several liability for direct victim restitution***

At sentencing the trial court ordered direct victim restitution for economic losses for the shooting victim Manuel De La Rosa and the family of decedent Juan Monsivais. (§ 1202.4, subd. (f).) Fuentes, Flores, Sanchez and Rossier—that is, each of the defendants convicted of the murder of Monsivais and the attempted murder of De La Rosa—were ordered to pay restitution, but the obligation was denominated "joint and several." The abstracts of judgment for Flores and Rossier, however, do not state the liability is joint and several. (The abstracts of judgment for Fuentes and Sanchez do contain that notation.) The Attorney General concedes this error and acknowledges our power to order a correction in the abstracts of judgment but suggests it would be in the interest of judicial economy to require Flores and Rossier to first present their request for clerical correction in the trial court.

The matter is before us. The error has been identified. We order it corrected.

**DISPOSITION**

As to Pedro Aguilar the judgment is reversed, and the matter remanded for a new trial consistent with the views expressed in this opinion. As to Bryan Sanchez the judgment is reversed as to count 3 only, and the matter remanded for a new trial on that count consistent with the views expressed in this opinion; in all other respects the judgment is affirmed. As to Edgar Javier Flores the judgment is modified to reflect the 15-year minimum parole eligibility terms (§ 186.22, subd. (b)(5)) imposed as to counts 1 and 2 are stayed; in all other respects the judgment is affirmed. As to Rafael R. Fuentes and Jasmin Rossier the judgments are affirmed.

The abstracts of judgment for Flores and Rossier are ordered corrected (1) to indicate as to Flores the 15-year minimum parole eligibility terms on counts 1 and 2 are stayed; and (2) to reflect as to Flores and Rossier that the liability for direct victim restitution is joint and several with the obligation of each other and of Fuentes and Sanchez. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

We concur.

WOODS, J.

ZELON, J.

**FootNotes**

1. Pursuant to California Rules of Court, rule 8.200(a)(5) each appellant has joined in the others' arguments to the extent they are helpful to his or her appeal. For clarity, although mindful of the joinders, we identify the individual who has raised a specific claim in our discussion of the issues.

2. Our general description of events, including the offenses charged and the roles of the various defendants and witnesses, is based on the evidence presented at trial, viewing the whole record in the light most favorable to the judgment. (Cf. *People v. Zamudio* (2008) [43 Cal.4th 327](https://www.leagle.com/cite/43%20Cal.4th%20327), 357.) Where material to our resolution of an issue raised on appeal, we identify any substantial conflicts in the evidence.

3. "Jalar" is the Spanish verb meaning to pull; and the word "jale" is commonly used as a noun to describe work or a workplace. Testimony at trial indicated as used by Hispanic gang members "jale" has the same meaning as "a mission" and "putting in work" and connotes "to do something on the street, kill or do something."

4. Additional evidence about the September 6, 2003 Bellevue Avenue shooting was provided by James Felix, a government informant who was a member of the Hoovers clique of the 18th Street gang.

5. Statutory references are to the Penal Code unless otherwise indicated.

6. Pacheco was also charged with conspiracy to commit murder in count 3 of the first amended information, but his motion to dismiss pursuant to section 995 was granted by the court.

7. Marroquin was not charged with Sanchez and Aguilar in the second amended information for conspiracy to commit murder. Pursuant to a negotiated agreement, he pleaded guilty to being in a stolen car. He spent approximately one month in custody (in a juvenile facility) and was then placed on probation.

8. In *People v. Ortiz* (1978) [22 Cal.3d 38](https://www.leagle.com/cite/22%20Cal.3d%2038), 43, the Supreme Court construed section 1098 to mean "a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with who he is tried." Subsequent appellate decisions, however, have not read *Ortiz* to require separate trials unless multiple defendants are all charged in at least one count, provided the offenses to be jointly tried arose from the same set of circumstances. (See *People v. Wickliffe* (1986) [183 Cal.App.3d 37](https://www.leagle.com/cite/183%20Cal.App.3d%2037), 40-41 [defendants charged with offenses that "arose from a single set of circumstances against the same victim during the same time and in the same place"]; *People v. Hernandez* (1983) [143 Cal.App.3d 936](https://www.leagle.com/cite/143%20Cal.App.3d%20936), 939, 941 [defendants "charged with a crime or series of crimes committed as part of a single transaction"].)

9. With respect to Fuentes's motion to sever trial of counts 4 and 5—the firearms charges arising from the Vendome Street incident—from trial of the other charges, the court stated, "I evaluate this under [section] 1098 of the Penal Code and under [Evidence Code section] 352, and I am of the opinion that it [joinder] is appropriate in this case."

10. Evidence Code section 1101, subdivision (a), states, "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

11. An abuse of discretion will not be found unless the trial court has exceeded the bounds of reason by exercising its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) [20 Cal.4th 1](https://www.leagle.com/cite/20%20Cal.4th%201), 9-10.)

12. We do not separately address Fuentes, Sanchez and Rossier's contention their due process rights were violated by the limited admission of evidence of the Vendome Street incident because that argument presumes the evidence was inadmissible under some state rule of evidence (see *Hicks v. Oklahoma* (1980) [447 U.S. 343](https://www.leagle.com/cite/447%20U.S.%20343), 346 [100 S.Ct. 2227, 65 L.Ed.2d 175 [misapplication of state law constitutes deprivation of liberty interest in violation of due process clause]) and because no objection was made on this ground in the trial court. (See *People v. Partida* (2005) [37 Cal.4th 428](https://www.leagle.com/cite/37%20Cal.4th%20428), 436 ["[t]o the extent, if any, that defendant may be understood to argue that due process required exclusion of the evidence for a reason different from his trial objection, that claim is forfeited"].)

13. The efficiency and benefits of a joint trial were described in *People v. Bean* (1988) [46 Cal.3d 919](https://www.leagle.com/cite/46%20Cal.3d%20919), 939-940: "A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." (Accord, *People v. Soper* (2009) [45 Cal.4th 759](https://www.leagle.com/cite/45%20Cal.4th%20759), 772; see *People v. Ochoa* (1998) [19 Cal.4th 353](https://www.leagle.com/cite/19%20Cal.4th%20353), 409 [joinder "`ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials [citation], and in several respects separate trials would result in the same factual issues being presented in both trials'"].)

14. Although the trial court's ruling on the motion to sever was proper when made, a reviewing court "`may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such to deprive the defendant of a fair trial or due process of law.'" (*People v. Cleveland* (2004) [32 Cal.4th 704](https://www.leagle.com/cite/32%20Cal.4th%20704), 726; accord, *People v. Lewis and Oliver* (2006) [39 Cal.4th 970](https://www.leagle.com/cite/39%20Cal.4th%20970), 998.)

15. In a petition for writ of habeas corpus filed in this court during the pendency of his direct appeal, but not in his appeal itself, Sanchez argues he was deprived of the effective assistance of counsel because his trial counsel failed to move to sever his trial from Rossier on the grounds of antagonistic defenses. As discussed, Sanchez testified and presented an alibi defense for the September 6, 2003 drive-by shooting: He claimed he was at a movie and dinner with Rossier at the time of the incident. Rossier did not testify; but in closing argument her counsel insisted, although the People's evidence indicated Rossier was in the minivan at the time of the drive-by shooting, there was no evidence she knew a shooting was going to occur or that she had any greater involvement in the events other than going with her boyfriend to participate in tagging. In a separate order, filed concurrently with this opinion, we issue an order to show cause returnable in the superior court for the purpose of conducting an evidentiary hearing on Sanchez's petition for writ of habeas corpus claiming ineffective assistance of counsel with respect to his convictions for second degree murder (count 1) and attempted premeditated murder (count 2).

16. Aguilar also asserts the trial court erred in denying his motion to sever, arguing not only that the court abused its discretion in evaluating the factors to be considered in determining whether severance was appropriate, but also that joinder of the single count in which he was charged with conspiracy to commit murder with the other three counts against his four codefendants violated section 1098 as construed by the Supreme Court in *People v. Ortiz, supra,* 22 Cal.3d at page 43, because he was not included in at least one count with all other defendants with whom he was tried (specifically, he was not named in any count with either Flores or Rossier) and the offenses to be jointly tried did not occur as part of a single transaction or arise from the same set of circumstances. Because we reverse Aguilar's conviction for conspiracy to commit murder based on the court's failure to instruct on the lesser included offense and remand for a new trial on that count, we need not address Aguilar's severance arguments.

17. Evidence Code section 1223 provides, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivision (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

18. Rossier's additional argument that admission of Pacheco's description of his conversations with Fuentes violated her Sixth Amendment right to confront witnesses under *Crawford v. Washington* (2004) [541 U.S. 36](https://www.leagle.com/cite/541%20U.S.%2036) [124 S.Ct. 1354, 158 L.Ed.2d 177] is totally devoid of merit. The Confrontation Clause applies only to "testimonial statements." (*Id.* at p. 51.) "It is the testimonial character of that statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington* (2006) [547 U.S. 813](https://www.leagle.com/cite/547%20U.S.%20813), 821 [126 S.Ct. 2266, 165 L.Ed.2d 224].) Statements made by a coconspirator in furtherance of the conspiracy are by their very nature not testimonial. (*Crawford,* at p. 55; see *Bourjaily v. United States* (1987) [483 U.S. 171](https://www.leagle.com/cite/483%20U.S.%20171), 183 [107 S.Ct. 2775, 97 L.Ed.2d 144].)

19. One of Rossier's other letters described her desire to ride around with a machine gun, drink beer and shoot members of the rival Mara Salvatrucha gang. Another directed the recipient to "put in work"—that is, to commit crimes to benefit the gang—in their neighborhood.

20. Evidence Code section 210 defines "relevant evidence" to include evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

21. We must presume the jury understood and followed the court's limiting instructions. (*People v. Yeoman* (2003) [31 Cal.4th 93](https://www.leagle.com/cite/31%20Cal.4th%2093), 139 ["we and others have described the presumption that jurors understand and follow instructions as `[t]he crucial assumption underlying our constitutional system of trial by jury'"]; accord, *People v. Young* (2005) [34 Cal.4th 1149](https://www.leagle.com/cite/34%20Cal.4th%201149), 1214.)

22. Rakitina, an 18th Street gang member, was in the car with Payaso and other gang members when Payaso retrieved the reportedly jammed shotgun after the Bellevue Avenue drive-by shooting and confirmed it could be fired.

23. Notwithstanding Sanchez's argument the trial court's failure to instruct on conspiracy to commit assault with a firearm violated his federal constitutional right to due process, error in failing to instruct sua sponte on a lesser included offense in a noncapital case is "an error of California law alone, and is thus subject only to state standards of reversibility." (*People v. Breverman, supra,* 19 Cal.4th at p. 165.)

24. We need not decide under what, if any, circumstances "implicitly agreeing or acquiescing at trial to the procedure objected to on appeal," rather than explicitly agreeing or requesting the procedure, forfeits an issue on appeal in a criminal case. (See *People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408 [civil proceeding involving petition for unconditional release of a sexually violent predator].) Plainly, silence cannot constitute a forfeiture of an argument the trial court violated its sua sponte obligation to instruct on a lesser included offense—that is the very meaning of sua sponte.

25. The bench notes to CALCRIM No. 415, Conspiracy (Pen. Code, § 182), under the heading "Lesser Included Offenses," although identifying the contrary holding in *People v. Fenenbock, supra,* [46 Cal.App.4th 1688](https://www.leagle.com/cite/46%20Cal.App.4th%201688), advise "the court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy," citing *People v. Cook, supra,* 91 Cal.App.4th at pages 919 through 920 and 922. CALCRIM No. 563, Conspiracy to Commit Murder (Pen. Code, § 182), which was used by the trial court here, does not contain a comparable bench note.

26. Neither Sanchez nor Aguilar argues on appeal that this evidence is insufficient to support their convictions for conspiracy to commit murder.

27. In this context, "substantial evidence" means "`"evidence from which a jury composed of reasonable [persons] could . . . conclude"'" that the particular facts underlying the instruction did exist. (*People v. Cruz, supra,* 44 Cal.4th at pp. 636, 664.)

28. The trial court instructed pursuant to CALCRIM No. 220, "The fact that a criminal charge had been filed against the defendants is not evidence that the charge is true. You must not be biased against the defendants just because they have been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves a particular defendant guilty beyond a reasonable doubt, that defendant is entitled to an acquittal and you must find that defendant not guilty."

29. The trial court instructed, in part, pursuant to CALCRIM No. 226, "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, or socioeconomic status. You may believe all, part, or none of any witness's testimony."

30. The court instructed, in part, "If you conclude that defendants Sanchez or Rossier were `present at the Vendome shooting,' you may but are not required to consider their presence for the limited purpose of deciding whether or not: [¶] (a) Defendant Sanchez and/or defendant Rossier acted with knowledge of the charged or lesser included crimes and allegations with which they are charged; and/or [¶] (b) Defendants Sanchez and/or Rossier acted with the required specific intent to commit the charged or lesser included crimes and allegations with which they are charged."

31. Fuentes also argues there was insufficient evidence to support his convictions on the murder and attempted murder charges, contending, apart from the testimony of the accomplices, Pacheco, Mendez and the Kuk brothers, the People failed to prove he shot Monsivais and De La Rosa or aided and abetted the individual who did. However, as we discussed in finding any error in the accomplice instructions harmless because there was adequate, independent corroborating evidence in the record, the accomplice testimony was properly considered by the jury. Accepting, as we must, that the jury found this testimony to be credible, there is ample evidence to support Fuentes's convictions for these crimes. (See *People v. Zamudio, supra,* 43 Cal.4th at p. 357 [in assessing claim of insufficient evidence we presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence].)

32. Rossier's appellate counsel asserts with rhetorical flourish, "It is not at all clear why the prosecutor went after Rossier with such a vengeance when the male defendants were obviously the real culprits and at the same time letting others, including the woman who actually supplied the guns and the other passengers in the van on Bellevue, go uncharged."

33. Fuentes's counsel did not object to the prosecutor's allegedly improper comment, nor did he request an admonition or curative instruction. Accordingly, this argument is forfeited on appeal. (*People v. Jones* (2003) [29 Cal.4th 1229](https://www.leagle.com/cite/29%20Cal.4th%201229), 1262; *People v. Box, supra,* 23 Cal.4th at p. 1207.) Contrary to Fuentes's assertion, nothing in the record suggests a timely objection would have been futile or ineffective to cure any purported harm. (*People v. Dykes* (2009) [46 Cal.4th 731](https://www.leagle.com/cite/46%20Cal.4th%20731), 757.) We nonetheless consider and reject Fuentes's claim on the merits because, as an alternative to his claim of prosecutorial misconduct, Fuentes urge us to hold his counsel's failure to object to the changing-lanes illustration constituted ineffective assistance of counsel.

34. We consider Aguilar's claim of prosecutorial misconduct notwithstanding our reversal of his conviction because all appellants have properly joined in each other's argument. (See fn. 1, above.)

35. Immediately before the question at issue, Detective Breuer only said the police had attempted to identify the subscribers for each of the numbers recorded on the phone. The trial court specifically ruled that such a general inquiry into what the police had done with regard to records for Rossier's cell phone was proper, and there has been no challenge to that ruling on appeal.

36. The United States Supreme Court in *Heller* did not address whether the Second Amendment is incorporated in the due process clause of the Fourteenth Amendment and thus applies to the states. (See *People v. Yarbrough* (2008) [169 Cal.App.4th 303](https://www.leagle.com/cite/169%20Cal.App.4th%20303), 312, fn. 3; *People v. Villa* (2009) [178 Cal.App.4th 443](https://www.leagle.com/cite/178%20Cal.App.4th%20443), 447, fn. 1.) On June 28, 2010 the Supreme Court in *McDonald v. City of Chicago* (2010) 561 U.S. \_\_\_ held the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States. The *McDonald* decision, however, did not otherwise rule on the constitutional validity of the municipal ordinances at issue in the case, instead remanding the matter to the Seventh Circuit Court of Appeals for further proceedings. The right to bear arms is not recognized as one of the individual rights enumerated in the California Constitution. (*Kasler v. Lockyer* (2000) [23 Cal.4th 472](https://www.leagle.com/cite/23%20Cal.4th%20472), 481; *Yarbrough,* at p. 312, fn. 3.)

37. To the extent Fuentes advances an as-applied, rather than a facial, challenge to section 12031, subdivision (a), arguing his conviction infringes his constitutional right to possess a firearm for self defense, that contention fails for same reasons as his argument that the trial court erred in failing to instruct the jury on the defense of others as a defense to the firearm possession charge, discussed in section 4.c., above.

38. Fuentes may be correct, as the trial court suggested during the sidebar conference, that his lawyer could have told the jury the evidence would show the two incidents were fundamentally different without adding that Rangel had been killed; but it was not unreasonable for counsel to believe that emphasizing no additional murder charge had been filed against his client, who was charged with murder and attempted murder based on the Bellevue Avenue drive-by shooting and conspiracy to commit murder at Marshall High School, made the point in a more dramatic and persuasive fashion.

39. Sanchez and Rossier also argue due process requires reversal because of the cumulative effect of the trial errors. Whether considered individually, as discussed, or cumulatively, other than the instructional error as to count 3, none of the asserted errors deprived either Sanchez or Rossier of a fair trial. (See *People v. Cunningham* (2001) [25 Cal.4th 926](https://www.leagle.com/cite/25%20Cal.4th%20926), 1009 [defendant is "entitled to a fair trial but not a perfect one"]; see also *People v. Bradford* (1997) [15 Cal.4th 1229](https://www.leagle.com/cite/15%20Cal.4th%201229), 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].)

40. Although section 190, subdivision (d), provides the punishment for second degree murder perpetrated by shooting a firearm from a vehicle is an indeterminate term of 20 years to life in state prison, the court also specified there was a minimum parole eligibility date of 15 years on this count pursuant to section 186.22, subdivision (b)(5), because the offense was committed to benefit a criminal street gang. Although the 15-year minimum may have little practical effect, "[t]he true finding under section 186.22(b)(5), which provides for a lower minimum term [than section 190], `is a factor that may be considered by the Board of Prison Terms when determining defendant's release date, even if it does not extend the minimum parole date per se.'" (*People v. Lopez* (2005) [34 Cal.4th 1002](https://www.leagle.com/cite/34%20Cal.4th%201002), 1009.)

41. Section 31 provides, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

42. Section 32 provides, "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

43. Section 12022.53, subdivision (e)(2), states: "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."