S211915

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **NORMA LILIAN CORTEZ, and BERNAL RODRIGO,** **Defendants and Appellants.**

Case No. S_____

Second Appellate District, Division Eight, Case No. B233833
Los Angeles County Superior Court, Case No. BA345971
The Honorable Dennis J. Landin, Judge

2ND **PETITION FOR REVIEW**

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The People of the State of California, plaintiff and respondent in the above-entitled action, hereby petition this Honorable Court to grant review in this case pursuant to California Rules of Court, rules 8.500 and 8.504, following an unpublished decision by the California Court of Appeal, Second Appellate District, Division Eight, case number B233833, filed on May 30, 2013, reversing appellant Cortez's judgment of conviction but affirming appellant Bernal's judgment of conviction. (Exh. A.)

ISSUES PRESENTED

A. Important Question of Law

May a court instruct the jury with CALCRIM No. 361 on the failure to explain or deny evidence where a defendant's testimony is implausible or contains logical gaps?

B. Subsidiary Issues of Clear Error

(1) Is a statement that implicates a non-testifying codefendant admissible where it is against the declarant's interest, inextricably tied to and part of the statement against interest, and made under circumstances that this Court and the Court of Appeal have repeatedly deemed to demonstrate trustworthiness?

(2) Did the prosecutor commit prejudicial error in rebuttal argument by making a brief and isolated statement regarding reasonable doubt that the jury's "belief" must not be "imaginary" but rather be "based in the evidence in front of me" after the jury was properly instructed on the standard of proof and to follow the trial court's instructions?

STATEMENT OF THE CASE

Appellants committed a premeditated murder of sixteen-year-old Miguel Guzman and an attempted murder of nineteen-year-old Emmanuel Zuniga, neither of whom were gang members or affiliates, while the victims were walking in the neighborhood where they lived. On the day of the crimes, appellant Cortez drove her car, with appellant Bernal in the passenger seat, into the 18th Street gang's territory. Appellant Cortez lived in the rival Rockwood gang's territory and associated with its members, and appellant Bernal was a Rockwood gang member. Appellant Cortez slammed on the brakes of her car when she saw the victims and yelled, "Where you from?" She and appellant Bernal yelled over each other at the victims. Appellant Cortez then said, "Let them have it." Appellant Bernal got out of the car and shot at the victims, killing Guzman.

Appellants were convicted of premeditated murder and attempted premeditated murder, with firearm and gang enhancements. Each appellant was sentenced to 50 years to life in state prison. (2BCT 543-546, 561-562; 2CCT 521-526, 540-541.[1])

The majority opinion of the Court of Appeal affirmed appellant Bernal's conviction, but reversed the judgment against appellant Cortez, finding three errors to be prejudicial as to her. Of primary significance, the majority held that the trial court prejudicially erred in instructing on a witness's failure to explain or deny testimony (CALCRIM No. 361) because implausible answers did not warrant the instruction. The majority followed *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469, and *People v. Kondor* (1988) 200 Cal.App.3d 52, 57, without addressing the directly

[1] As there are separate clerk's transcripts for the appellants, respondent will refer to appellant Bernal's clerk's transcript as "BCT" and appellant Cortez's clerk's transcript as "CCT."

conflicting line of cases that the instruction applies when a defendant's answers are implausible or contain logical gaps. (Opn. at 13, 15; RB 58-59 [noting conflict and citing *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1030 ("*Sanchez*"), *People v. Mask* (1986) 188 Cal.App.3d 450, 455 ("*Mask*"), *People v. Roehler* (1985) 167 Cal.App.3d 353, 393-394 ("*Roehler*"), *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1120-1122, as well as this Court's opinion in *People v. Belmontes* (1988) 45 Cal.3d 744, 784 (disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421), which cited *Mask* with approval].)

The majority also found the error to be prejudicial without addressing that CALCRIM No. 361 is a permissive instruction, without including a prejudice analysis, and despite the *Lamer* court's statement that, due to the permissive nature of the instruction, it was unable to find cases in which the erroneous inclusion of a failure-to-explain instruction was deemed to constitute reversible error. (Opn. at 13-15, 18-19; see *Lamer*, *supra*, 110 Cal.App.4th at p. 1472.)

The majority further found that admission of appellant Bernal's declaration against interest—his statement that he and appellant Cortez went to shoot at two 18th Street gang members, that he shot the victim, and that appellant Cortez drove—made in a casual setting to his nephew was prejudicially admitted because it also implicated appellant Cortez. (Opn. at 16-18.) The majority applied its own test for admissibility while failing to acknowledge or apply this Court's rule in *Samuels* that a declaration against interest implicating a non-testifying codefendant may be admitted in its entirety as long as the statement is not exculpatory, self-serving, or collateral to the declarant. (See RB 41-43, citing *People v. Samuels* (2005) 36 Cal.4th 96, 120-121 ("*Samuels*").)

The majority also found that the prosecutor committed prejudicial misconduct, only as to appellant Cortez, when he briefly commented on the reasonable doubt standard in rebuttal ("you say, 'I believe I know what happened, and my belief is not imaginary. It's based on the evidence in front of me'") and in response to an incorrect standard given by defense counsel. (Opn. at 10-13.) The majority did not consider the statement in the context of the argument as a whole, did not apply the presumption that jurors follow the law and instructions given by the court, and did not provide a prejudice analysis other than to briefly summarize the evidence against appellant Bernal and conclude he did not suffer prejudice because the evidence against him was "especially strong." (Opn. at 11-13.)

Justice Grimes dissented and disagreed with the majority on all three of the foregoing issues. As to CALCRIM No. 361, she first explained that, contrary to the majority's finding, "at least two cases" found that "plausibility *is* a proper consideration in giving [CALCRIM No. 361]." Justice Grimes found that appellant Cortez failed to explain or deny "a considerable body of evidence against her" and failed to "plausibly explain" several other points. (Opn. at 2-3.)

Justice Grimes further disagreed with the majority's analysis as well as its finding of untrustworthiness on the admissibility of appellant Bernal's declaration against interest. She discussed and applied this Court's ruling in *Samuels*, finding that appellant Bernal's statement was admissible because it was not exculpatory, self-serving, or collateral to him and the portions that also incriminated appellant Cortez were necessary to fully convey the scope of the crime. (Dis. Opn. at pp. 3-5.) Justice Grimes further explained that the majority confused Bernal's *actual* statement that "we went to shoot someone" with a *reasonable inference* that could be drawn from the statement. (Dis. Opn. at 6.)

Justice Grimes additionally disagreed that the prosecutor's comment on reasonable doubt amounted to misconduct or, much more, prejudicial misconduct. In context, the prosecutor was responding to defense counsel's incorrect explanation of reasonable doubt, first reread the reasonable doubt instruction and emphasized the correct standard, and did not lower the burden of proof by then properly emphasizing that imaginary doubt is not reasonable doubt. The trial court had also instructed on reasonable doubt and told the jury to follow the court's instructions if the attorneys' comments conflicted. (Dis. Opn. at 1-2.)

Finally, Justice Grimes addressed the remainder of the issues raised by the appellants and addressed, in a separate heading, the strength of the evidence against appellant Cortez. She disagreed with the majority's finding that the case against appellant Cortez was "'close'" or "'not particularly strong.'" (Dis. Opn. at 11.)

Respondent's petition for rehearing was denied on June 27, 2013.

First and foremost, review is necessary to resolve a direct conflict in published case law on the applicability of CALCRIM No. 361 regarding a witness's failure to explain or deny testimony. Thus, review is necessary to secure uniformity of decision. (See Cal. Rules of Court, rule 8.500(b)(1).)

Review is also necessary because the two other rationales for reversal are contrary to law—the majority failed to address and follow this Court's ruling in *Samuels* on the admissibility of a declaration against interest (Evid. Code, § 1230) and failed to follow well-settled precedent in finding prejudicial prosecutorial misconduct. Although not independently important questions, answering them is necessary to uphold the murder and attempted murder convictions, and would require little additional judicial resources because the Court of Appeal's decision was clearly erroneous.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE LONGSTANDING CONFLICT ON WHETHER A TRIAL COURT MAY INSTRUCT WITH CALCRIM NO. 361, ADDRESSING A DEFENDANT'S FAILURE TO EXPLAIN OR DENY TESTIMONY, WHEN A DEFENDANT'S RESPONSES ARE IMPLAUSIBLE OR CONTAIN LOGICAL GAPS

Review is necessary to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1)). Currently, there is a decades-old conflict in published law on the applicability of CALCRIM No. 361, the instruction on a defendant's failure to explain or deny facts, where a defendant gives implausible answers or her answers contain logical gaps.[2] The majority opinion in the present case reversed a first degree murder conviction which was supported by strong evidence of guilt due to, inter alia, its reliance on the minority view that CALCRIM No. 361 does not apply where the defendant gives implausible answers. (See Opn. at 14-15.)

CALCRIM No. 361 states as follows:

> If the defendant failed in (his/her) testimony to explain or deny evidence against (him/her), and if (he/she) could reasonably be expected to have done so based on what (he/she) knew, you may consider (his/her) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt.
>
> If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.

The courts agree that a defendant must fail to explain or deny facts or evidence within her knowledge and within the scope of the cross-

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[2] Most of the cases addressed CALJIC No. 2.62, the predecessor to CALCRIM No. 361. As the instructions are essentially the same in substance, respondent will refer to the instruction as CALCRIM No. 361 or "a failure to explain or deny instruction" for ease of reference.

examination in order for the trial court to properly instruct the jury according to CALCRIM No. 361. (See, e.g., *Lamer*, *supra*, 110 Cal.App.4th at p. 1469; *Mask*, *supra*, 188 Cal.App.3d at p. 455; *People v. Roehler*, *supra*, 167 Cal.App.3d at p. 392; *People v. Saddler* (1979) 24 Cal.3d 671, 682 ("*Saddler*").) Several courts, dating back to the 1980's, have found that, "if the defendant tenders an explanation which, while superficially accounting for his activities, *nevertheless seems bizarre or implausible*, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury." (*Mask*, *supra*, 188 Cal.App.3d at p. 455, italics added, citing *Roehler*, *supra*, 167 Cal.App.3d at pp. 393-394, and *Haynes*, *supra*, 148 Cal.App.3d at pp. 1120-1122; see *Belmontes*, *supra*, 45 Cal.3d 744, 784; accord, *Sanchez*, *supra*, 24 Cal.App.4th at p. 1030.) Along these lines, this Court has also found that, if a defendant elects to testify at trial and there are "logical gaps" in the ensuing testimony, the jury may be given an instruction on the failure to explain or deny. (*People v. Redmond* (1981) 29 Cal.3d 904, 911.)

The Court of Appeal in *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 ("*Kondor*"), disagreed with the *Mask* line of cases. The *Kondor* court found that the test for giving the failure to explain or deny instruction was "not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear." (*Ibid.*)

Approximately two months after *Kondor* was decided, this Court cited *Mask* with approval, quoting *Mask*'s ruling that bizarre or implausible explanations warrant a failure to explain or deny instruction. (*Belmontes*, *supra*, 45 Cal.3d at p. 784.) Nevertheless, in 2003, the court of appeal in *Lamer*, *supra*, 110 Cal.App.4th 1463, followed *Kondor* without addressing *Belmontes* or *Mask*.

Although respondent addressed the legal conflict on appeal and argued that the *Mask* line of cases should be followed (see RB 59, 62), the majority opinion here stated that plausibility of a defendant's responses "is not the test" for application of CALCRIM No. 361. (Opn. at pp. 14-15, citing *Lamer*, *supra*, 110 Cal.App.4th at p. 1469, and *Kondor*, *supra*, 200 Cal.App.3d at p. 57.) In so finding, the majority failed to acknowledge the contrary law set forth in the *Mask* lines of cases and approved in *Belmontes*. (See RB 59; Dis. Opn. at pp. 2-3 [noting conflict and that majority did not address the opinions conflicting with the position it took].)

The *Mask* line of cases should be followed because an implausible explanation or one that includes logical gaps is inherently a failure to explain or deny facts. It is rare that a defendant who is testifying would say absolutely nothing when posed with questions on cross-examination. The more likely scenario is that a defendant would provide answers, such as those provided by appellant Cortez, that either contradict the prosecution evidence or that do not adequately explain the facts because her answers are so bizarre or implausible to a reasonable person given the other evidence presented. In the latter scenario, the jury should be permitted to consider the implausible nature of the defendant's explanations in assessing credibility. (See *Redmond*, *supra*, 29 Cal.3d at p. 911 ["[i]t is entirely proper for a jury, during its deliberations, to consider logical gaps in the defense case" when assessing credibility and deciding the facts]; *Mask*, *supra*, 188 Cal.App.3d at p. 455 [where a defendant offers an inherently implausible explanation that "superficially" accounts for his activities, his credibility is a question for the jury], citing *Roehler*, *supra*, 167 Cal.App.3d at pp. 393-394; accord, *Belmontes*, *supra*, 45 Cal.3d at p. 784.)

What is more, the majority failed to follow the applicable law on assessing prejudice by ignoring the overwhelming evidence against appellant Cortez. (See Opn. at 13-15.) The majority did not address that

CALCRIM No. 361 is a permissive instruction which, by its own terms, does not apply if the jury finds the defendant sufficiently explained or denied certain facts. (See CALCRIM 361 [stating that "if" the jury finds the defendant failed to explain or deny an accusation, the instruction applies]; *Lamer*, *supra*, 110 Cal.App.4th at p. 1472 [error is "routinely" found harmless due to instruction's permissive language and because it makes clear it would be "unreasonable to draw an adverse inference if the defendant lacks the knowledge needed to explain or deny the evidence against him"].)

Although the majority here followed one portion of *Lamer*, it failed to acknowledge that the *Lamer* court also noted it was unable to find cases in which the erroneous inclusion of a failure-to-explain instruction was deemed to constitute reversible error. (*Lamer*, *supra*, 110 Cal.App.4th at p. 1472 [additionally finding that predecessor to CALCRIM 200, stating that not all instructions apply, mitigated any potential prejudice from the failure to explain or deny instruction]; see also *Saddler*, *supra*, 24 Cal.3d at p. 681 [same].) The majority then found prejudice without any analysis of the strong evidence against appellant Cortez (see also Dis. Opn. at p. 11), and reversed a murder conviction.

Given appellant Cortez's failure to explain or deny facts through implausible answers and logical gaps in her testimony, as well as the strong evidence of her guilt, any analysis of the potential prejudice would have resulted in a finding that the instruction was properly applied or at the very least non-prejudicial. (See, e.g., RB 45-46, 51-52, 56, 64; Dis. Opn. at 2-3, 11.) All four of the eyewitnesses told officers that the driver was a Hispanic woman, who was "older" or appeared to be in her thirties or forties. Zuniga and Ramos, who was a disinterested witness, both heard a woman's voice yelling at Guzman and Zuniga. She specifically asked, "Where you guys from?," and then said, "Let them have it," just before

appellant Bernal shot and killed Guzman. Appellant Cortez was also caught by police, sitting in the driver's seat of the car used in the shooting, immediately after the shooting, while waiting for appellant Bernal to hide the gun. Further, Barhona and Hernandez both identified her as the driver. The letter appellant Bernal attempted to send outside of his jail facility as well as his statements to his nephew confirmed that he and appellant Cortez committed the crimes together. (See RB 2-25 [Statement of Facts].)

Significantly, as set forth in Justice Grimes's dissent, appellant Cortez's testimony was riddled with implausible and incredible statements. (See Dis. Opn. at 11 ["[t]he inconsistent explanations she gave police during her interview, and the inconsistencies and implausibility of her trial testimony, impugned her credibility and undermined the persuasive value of her pastor's testimony that she attended Bible study and was involved in outreach programs," and "[i]t was undisputed that she associated with members of the Rockwood gang"]; see also RB 60-64.) For example, she did not account for a three-hour discrepancy initially, then said she was mistaken when presented with the time of her arrest. (See 7RT 3406-3407, 3436-3437.) Appellant Cortez claimed she drove appellant Bernal around at his direction without knowing where they were going, apparently for approximately three hours. (7RT 3417-3418.) She further implausibly testified that she did not ask about the minor who unexpectedly got in the back seat of her car. (7RT 3415-3416.) Appellant Cortez further claimed that appellant Bernal got out of her car two blocks from the shooting scene, without her stopping the car. (7RT 3426.) She also gave inconsistent and incredible answers about why she allowed appellant Bernal back in her car at the shooting scene and why she waited for him at the location of her arrest. (7RT 3430-3431, 3439, 3442.)

Appellant Cortez at times claimed to have no knowledge of the Rockwood gang, gang activity or behavior, or that appellant Bernal was a

gang member, but at other times testified the victims threw gang signs before appellant Bernal shot at them and that she knew appellant Bernal was a Rockwood member who went by "Scooby." (7RT 3442, 3382-3384, 3424, 3446-3448, 3452, 3661, 3663.) Appellant Cortez initially testified she told detectives the night of the shooting that Zuniga reached for a gun, but then later admitted on cross-examination that she had not made that statement to detectives. (7RT 3427, 3652.) After being shown the videotape of her interview with detectives, she also admitted she was dishonest with police when she said Guzman and Zuniga provoked the shooting. (7RT 3650-3651.)

Here, the majority opinion's adoption of the *Kondor/Lamer* minority rule that CALCRIM No. 361 does not apply to implausible answers or logical gaps in a defendant's testimony, without acknowledgement of the contrary *Mask* line of cases, resulted in the wrongful reversal of a murder conviction of a sixteen-year-old boy who was not gang affiliated. Retrial in gang cases is often difficult, if not impossible, due to witnesses' fears of retaliation. Indeed, one eyewitness, Juan Hernandez, could not be located by the time of trial. (5RT 2445.) Although Zuniga and Ramos ultimately cooperated with the investigation and testified at trial, they both expressed concerns for their safety and neither spoke to police of their own accord. (See 2RT 966, 1000 [Ramos called 911, but asked to remain anonymous; he spoke with police at the scene because they ultimately came to his house while canvassing the neighborhood; the prosecution also kept his information confidential during trial]; 3RT 1277 [Zuniga feared for his safety and spoke with detectives initially only because Detective Motto happened to encounter him at Guzman's family's home a week after the shooting].) The strongest evidence of appellant Cortez's intent and knowledge that the shooting was going to happen came from Zuniga and

Ramos. Thus, their absence would make retrial extremely difficult if not impossible.

Particularly in a case such as this, review is necessary to resolve the decades-old conflict in published case law and secure uniformity of decision on the applicability of CALCRIM No. 361, as well as to determine whether the permissive instruction is inherently non-prejudicial.

II. THE COURT OF APPEAL ERRONEOUSLY REVERSED A FIRST DEGREE MURDER CONVICTION BASED UPON ITS OWN RULE FOR ADMISSION OF A DECLARATION AGAINST INTEREST RATHER THAN ON THE RULE THAT THIS COURT ESTABLISHED

Review is necessary to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) The majority opinion held that appellant Bernal's declaration against interest (Evid. Code, § 1230)—his statement to his nephew that he and appellant Cortez went to shoot at two "18's," that he was the shooter, and that appellant Cortez drove – was erroneously and prejudicially admitted against appellant Cortez because it also implicated her. (Opn. at 17-20.) The majority, however, failed to acknowledge or apply the rule announced by this Court in *People v. Samuels*, *supra*, 36 Cal.4th 96, for admissibility of declarations against interest that implicate a non-testifying codefendant. (See RB 41-43 [discussing *Samuels*].)

This Court ruled in *Samuels* that a declaration against interest may be admitted against a non-testifying codefendant, even if portions of it implicate the codefendant, as long as the statement is not "exculpatory, self-serving, or collateral" to the declarant and is, instead, "inextricably tied to and part of a specific statement against penal interest." (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121.) Here, without acknowledging this rule or *Samuels* at all, the majority found that appellant Bernal's statement to his nephew was untrustworthy and inadmissible against appellant Cortez

without redaction, not because it was exculpatory, collateral, or self-serving, or was made under other circumstances suggesting he had a motive to lie, but because it amounted to "speculation." (Opn. at 17-18.)

Specifically, the majority found that the portion where appellant Bernal said "*we went*" to shoot at two "18s" suggested that appellant Cortez "knew of a plan to commit the shooting and went along with it," but "Bernal could not speak from personal knowledge in describing Cortez's state of mind." (Opn. at 18.) In so finding, the majority not only created its own rule for determining the trustworthiness of a declaration against interest, while disregarding the *Samuels* rule, but it also (1) ignored the further *Samuels* ruling that a statement against penal interest may be admitted in its entirety if it is inextricably tied to and part of a declaration against interest, and (2) conflated the issues of *admissibility* of evidence (i.e. the determination of trustworthiness) and the evidentiary *weight* to be given to the statement.

This Court, in *Samuels*, held that a declarant's statement against interest—that the declarant committed the murder, did so because the defendant paid him to do it, and enlisted another person to assist—was admissible in its entirety even though it implicated the non-testifying defendant. (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121.) The statement was made under trustworthy circumstances because it was volunteered to an acquaintance, and "was specifically disserving to [the declarant's] interests in that it intimated he had participated in a contract killing – a particularly heinous type of murder – and in a conspiracy to commit murder." (*Ibid.*) This Court found that the portion incriminatory to the defendant was not simply collateral, was not an attempt to shift blame, and was, instead, "inextricably tied to and part of a specific statement against penal interest." (*Ibid.*)

Here, as even the majority opinion acknowledges, appellant Bernal's statements were against his penal interest and made "in a setting that promoted truthfulness (a discussion in the family home between close family members), and were trustworthy to the extent he reported on his own actions and thoughts." (Opn. at 18.) Contrary to the majority opinion, however, appellant Bernal's statement did not contain speculation on appellant Cortez's state of mind. He recited only what they did – they went together to shoot at two 18th Street gang members. (See Dis. Opn. at 5-6 [noting his statement supported an *inference* on her state of mind, in conjunction with other evidence, but did not purport to explain what she was thinking].)

The portions of the statement that incriminated appellant Cortez–"we" went to shoot two 18s and she drove—were also "inextricably tied to and part of a specific statement against penal interest" because appellant Bernal increased his culpability by saying that he fired at the victims from a car driven by someone else. He not only identified himself as the shooter but was also potentially admitting to a conspiracy to commit murder as well as a drive-by shooting, both of which show premeditation. (See Pen. Code §§ 187, subd. (a), 189; *People v. Chavez* (2004) 118 Cal.App.4 379, 386; see also *Samuels*, *supra*, 36 Cal.4th at pp. 120-121 [portions of statement that were incriminatory to defendant were "specifically disserving to [declarant's] interests in that it intimated he had participated in a contract killing . . . and in a conspiracy to commit murder"]; Dis. Opn. at 4 [remarks incriminating Cortez were not collateral and were "quite damaging" to Bernal because he implied they intended a drive-by shooting, which is probative of premeditation and conspiracy to commit murder].) Had the *Samuels* rule been applied here, the majority would have little choice but to find that appellant Bernal's statement was properly admitted in its entirety as a declaration against interest.

Review is necessary for this Court to reaffirm that a statement implicating a non-testifying codefendant is admissible in its entirety if it was against the declarant's interest and made under circumstances repeatedly deemed by this Court as well as the Court of Appeal to be the most trustworthy, and if the portions incriminating the codefendant were inextricably tied to and part of a statement against penal interest. The majority, here, failed to follow this rule. Instead, the majority issued an opinion that is contrary to the law as established by this Court in *Samuels* and, based upon that erroneous law, reversed a first degree murder conviction.

III. THE COURT OF APPEAL FAILED TO FOLLOW THIS COURT'S PRECEDENT IN FINDING PREJUDICIAL PROSECUTORIAL MISCONDUCT

Review is again necessary to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) The majority opinion here found prejudicial prosecutorial misconduct based upon a brief comment by the prosecutor during argument, emphasizing that imaginary doubt is not reasonable doubt. (Opn. at 10-13.) Respondent recognizes that review of the instant issue necessarily involves an assessment of the particular circumstances of this case, which, standing alone, is not traditionally a reason for review. Review should nevertheless be granted here because (1) the finding of prejudicial misconduct is egregious in context and when the law established by this Court is applied, (2) the majority opinion reversed a first degree murder conviction based upon this finding alone, as well as cumulatively, despite strong evidence of appellant Cortez's intent and knowledge, and (3) review will require only a brief assessment of the prosecutor's rebuttal argument. (See Opn. at 13; Dis. Opn. at 1-2.)

At trial, appellant Cortez's counsel argued, "Even a mother would be able to believe their [sic] child is guilty with appropriate evidence. That amount of evidence, that's proof beyond a reasonable doubt." (9RT 4514.) In response, the prosecutor stated in closing argument:

> Counsel talked to you about reasonable doubt. You have the instruction on that. I think he tried to characterize it as proof so strong that a mother would convict her own child. Obviously that's ridiculous. No mother of a defendant will ever sit on a jury. No brother, cousin or friend of a person accused of a crime will sit on a jury because they are biased. You are not biased. You are reasonable people.
>
> The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, "I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me."

(9RT 4594.)

The majority opinion found that by defining proof beyond a reasonable doubt as a non-imaginary belief, the prosecutor erroneously lowered the burden of proof. (Opn. 11.) The Court further found that it was reasonably likely the jury construed the prosecutor's remarks in an objectionable fashion because: the court's instruction was given before the prosecutor's argument; the court overruled defense counsel's objection to the prosecutor's argument, thus implicitly endorsing the argument; and the court did not admonish the jury to follow its instructions or reread the instruction on reasonable doubt after the argument. (Opn. at 12-13.)

In finding prejudicial misconduct, the majority failed to apply the law established by this Court that the prosecutor's statements must be viewed "in the context of the argument as a whole." (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) The majority stated it was viewing the prosecutor's comment in context, but it actually ignored the other portions of the

prosecutor's argument. (Opn. at 12.) Immediately before stating that an imaginary doubt is not reasonable doubt, the prosecutor re-read the court's instruction on reasonable doubt and emphasized that the jury's verdict had to be based on the evidence. (9RT 4594; Dis. Opn. at 1.) Additionally, the prosecutor made the comment only in response to defense counsel's erroneous argument that reasonable doubt was proof strong enough for a mother to convict her child. (9RT 4514; Dis. Opn. at 2.)

The majority also did not apply the presumption that jurors will disregard arguments by counsel that conflict with the court's instructions and follow the instructions given by the court (see Opn. at 12). (See *People v. Osband* (1996) 13 Cal.4th 622, 717.) The majority stated it was not applying the presumption because it "applies only absent a contrary showing in the record." (Opn. at 12.) It then found a "contrary showing" was made because the trial court overruled defense counsel's objection to the prosecutor's comment without admonishing the jury. (Opn. at 12.) The foregoing does not amount to a "showing" that the jury did not follow the court's instructions. The jury did not, for example, ask any questions about reasonable doubt and there was no suggestion it had any difficulty reaching a verdict due to any dispute over the proper standard to apply. (See Dis. Opn. at 1-2 [jury most likely discounted the attorneys' statements as argument and followed the court's instructions].)

Finally, the majority found prosecutorial misconduct warranting reversal of appellant Cortez's first degree murder conviction, but did not provide a prejudice analysis other than to briefly summarize the evidence against *appellant Bernal* and conclude that he did not suffer prejudice because the evidence against him was "especially strong" (Opn. at 13). (See *People v. Brown* (2003) 31 Cal.4th 518, 553-554 ("*Brown*") [defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner,

and "[i]n conducting this inquiry, [the reviewing court] 'do[es] not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements'"].) The majority later found the case against appellant Cortez to be "close" as a general matter and, of all the prosecution evidence against her showing knowledge and intent, it included only that she said, "Where you from?," and "Let them have it," just before the shooting. (Opn. at 19.) The remainder of the majority's discussion of the evidence included a summary of only appellant Cortez's defense, and the majority gave complete credence to her testimony despite the numerous times the prosecutor impeached her and all of her implausible and contradictory statements. (Compare Opn. at 19, with RB 19-22 [summarizing Cortez's testimony].)

The majority further stated the evidence was strong against appellant Bernal because he brought a gun along, admitted to his nephew that he committed the shooting, and made incriminating statements in a letter, and because Zuniga identified him as the shooter. (Opn. at 13.) If the majority had summarized all the evidence against appellant Cortez, however, it would have noted the following facts showing her guilt and specifically her knowledge and intent: (1) she initiated the encounter by issuing a gang challenge immediately when she approached the victims, yelling, "Where you from?;" (2) she said, "Let them have it," immediately before appellant Bernal shot; (3) she associated with Rockwood members; (4) she drove appellant Bernal into rival gang territory knowing he was a Rockwood member and knowing he always carried a gun; (5) she waited for appellant Bernal to return to the car after the shooting; (6) she waited for him while he hid the gun in the area where she was ultimately apprehended shortly after the shooting; (7) two eyewitnesses, Marvin Barhona and Juan Hernandez, identified her as the driver; (8) appellant Bernal told his nephew that he and appellant Cortez went to shoot two 18th Street gang

members that day; (9) appellant Bernal's letter that was confiscated by authorities implicated both appellants; and (10) her testimony was incredible, implausible, and impeached several times. (See RB 2-25 [Statement of Facts].)

The majority did not apply the law established by this Court for assessing prosecutorial misconduct and, as a result, found prejudicial misconduct warranting reversal of appellant's first degree murder conviction. Under the circumstances, review should be granted on this issue to reaffirm the proper principles to be applied to an assessment of a prosecutor's comments to the jury during argument, and to prevent the unjust reversal of a murder conviction. And, just as significantly, the resolution of this issue, along with the second issue on hearsay, both of which will require little of this Court's time, will permit this Court to reach the important question about CALCRIM No. 361 that the Court of Appeal is divided on.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Dated: July 9, 2013

Respectfully submitted,

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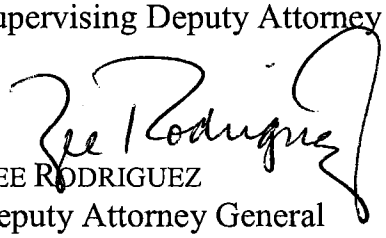

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 5,566 words.

Dated: July 9, 2013

KAMALA D. HARRIS
Attorney General of California

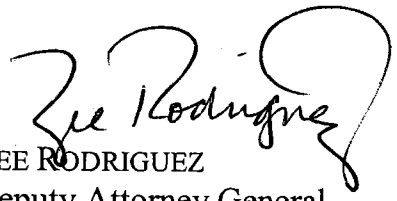

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Exhibit A

Filed 5/30/13

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

NORMA LILIAN CORTEZ et al.,

Defendants and Appellants.

B233833

(Los Angeles County
Super. Ct. No. BA345971)

APPEAL from the judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed as to Bernal; reversed as to Cortez.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant Norma Lilian Cortez.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Rodrigo Alonso Bernal.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendants Norma Lilian Cortez and Rodrigo Alonso Bernal were charged by amended information with premeditated murder (Pen. Code, § 187, subd. (a); count 1)[1] and attempted premeditated murder (§§ 664/187, subd. (a); count 2). It was alleged that Bernal personally used a firearm, discharged a firearm, and discharged a firearm causing great bodily injury or death. (§ 12022.53, subds. (b), (c), (d); counts 1 & 2). As to both Cortez and Bernal, it was alleged that a principal personally used a firearm, discharged a firearm, and discharged a firearm causing great bodily injury or death. (§ 12022.53, subds. (b), (c), (d), (e)(1); counts 1 & 2). The information also included gang allegations (§ 186.22, subd. (b)(1)(C), (4)). The defendants were found guilty by the jury, and all special allegations were found to be true. They were each sentenced to an aggregate term of 50 years to life.

On appeal, Cortez contends her attorney provided her with ineffective assistance of counsel by failing to object to the admission of evidence of the meaning of her tattoo; the prosecutor lowered its burden of proof by misrepresenting the beyond a reasonable doubt standard of proof; the trial court erroneously instructed the jury with CALCRIM No. 361; the admission of Bernal's out-of-court statements to his nephew violated her right to confront and cross-examine witnesses, and was error under Evidence Code sections 1230 and 352; the trial court failed to instruct the jury to view Bernal's out-of-court statements with caution; cumulative error; and that the trial court applied the wrong legal standard in ruling on her motion for a new trial.

Bernal contends the trial court erred by refusing to instruct on self-defense, imperfect self-defense, and provocation for both second degree murder and voluntary manslaughter. Appellants each join in the other's arguments that may inure to their benefit.

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1 All undesignated statutory references are to the Penal Code, unless otherwise indicated.

Finding merit in Cortez's contentions regarding prosecutorial conduct, CALCRIM No. 361, Evidence Code section 1230, and cumulative error, we reverse her conviction on these grounds. We affirm as to Bernal.

FACTS

On September 3, 2008, childhood friends Miguel Guzman, 16 years old, and Emanuel Z., 19 years old, lived in the neighborhood near the intersection of 5th and Bonnie Brae Streets in Los Angeles. There was a lot of 18th Street gang graffiti in the area, and gang members frequented the neighborhood. Guzman and Emanuel were not gang members. As they were crossing 5th Street near the corner of Bonnie Brae Street, Emanuel heard a woman ask, "Where you guys from?" Emanuel saw a car driven by Cortez, with Bernal in the passenger seat, and a male in the back seat. The driver's window was down. Guzman and Emanuel did not respond and kept walking.

Emanuel heard the same woman's voice say, "Let them have it." He saw the car driven by Cortez stop. Guzman asked Emanuel, "Are they going to shoot or no[?]" Bernal got out of the car. He pulled a dark-colored gun from his waist, put his left hand on top of the car, and started shooting across the roof of the car at Guzman and Emanuel. Emanuel ran as soon as he saw the gun. Guzman appeared startled and put up his hands. Bernal shot five or six times, killing Guzman. Guzman did not have a gun and no one shot back at Bernal.

Emanuel ran inside a building at 504 South Bonnie Brae Street. Guzman was behind him, but Emanuel did not know if Guzman made it to the building. When Emanuel went to the building's balcony, he saw Guzman on the pavement below, being tended to by paramedics. Emanuel tried to leave but police would not let anyone out of the building. He did not immediately speak with police because he was "shocked" and afraid to talk to police. He spoke with detectives about a week after the shooting, when they encountered him unexpectedly at Guzman's house while Emanuel was visiting with Guzman's family. Emanuel identified Bernal as the shooter from a six-pack photo array and during the preliminary hearing, but not at trial. He identified three women in a six-pack photo array as resembling Cortez.

David R. also lived in the neighborhood near 5th and Bonnie Brae Streets. He heard the sound of brakes slamming, and saw a light beige car driven by Cortez, with Bernal as a passenger, stop suddenly. He thought a child was in the back seat. He saw defendants yelling at Guzman, but could not tell what was being said because they were yelling over each other. Guzman may have responded "18th Street," but continued walking. Bernal got out of the car and pulled a gun from his waist and started shooting. Guzman put up his hands and looked scared. After the final gunshot, the beige car moved a couple of feet forward, and stopped when Bernal said, "Hold on, . . . hold on." Once Bernal got in the car, he said, "Let's go, let's go." The car drove south on Bonnie Brae Street. David called 911, giving the operator a partial license plate number, and then noticed Guzman lying on 5th Street, not moving or breathing. Police spoke to David on the day of the shooting as they went door to door canvassing the neighborhood.

Marvin B. also lived in the neighborhood. He was in his apartment when he heard a gunshot and, from his window, saw Bernal standing next to a parked car and firing shots. He heard more shots and saw Bernal chase someone across the street. He heard more gunshots after Bernal left his line of sight. Marvin walked outside and saw defendants' car on 6th Street, turning right on Alvarado Street. He saw the female driver's face. He spoke with police at the scene shortly after the shooting and provided a description of Cortez to police. That same day, he identified Cortez in a field showup.

Los Angeles Police Officer Javier Ramirez responded to the scene at 4:15 p.m. Guzman was bleeding from his mouth and not breathing. Because the shooting happened in 18th Street gang territory, responding officers drove to rival gang Rockwood's nearby turf. They saw a car matching the description and license plate of the suspect, double-parked in the middle of the street in front of 401 Witmer Street, with its hazard lights on. Cortez was in the driver's seat and was taken into custody. A live round was found on the passenger side of the car, of the same caliber and brand of several found at the scene of the shooting.

Cortez was interviewed by police on the evening of September 3, 2008. A recording of the interview was played for the jury. She said that on the day of the

shooting, Bernal asked for a ride to pick up some money. They stopped and picked up a friend of Bernal's, who was "very young" and dressed in "gangster attire." Bernal sat in the front passenger seat, and his friend sat in the back. Bernal instructed her to "just drive around." He then told her to stop at 3rd and Bonnie Brae Streets so he and his friend could get out, and to keep on driving as they would catch up with her. As she was driving, she heard some gunshots from two blocks away at 5th and Bonnie Brae Streets. Bernal and his friend then got back in her car. She did not know what had happened, and she did not ask them about the gunshots. She drove to where she was ultimately arrested, where Bernal and his friend got out of her car and told her to wait. Cortez had known Bernal for about a year. They were friends, even though she was in her 40's and he was in his 20's. She did not believe Bernal was a gang member, but he did associate with the Rockwood gang. She admitted that Bernal had a gun that he "always carries."

Later in the interview, Cortez changed her story, admitting her previous story was not true. She said that before the shooting, she heard Bernal yelling "Where you from?" to two young men whom Cortez believed to be gang members. They responded, "18th Street." Bernal yelled, "Rockwood." Cortez told Bernal to "[l]et it go." But Bernal jumped out of the car, and then she heard gunshots. The back-seat passenger did not get out of the car. Cortez kept driving, but did not get far because of traffic. Bernal ran and jumped back in the car. She started to "cuss[] him out." He said nothing to her except, "drive." She kept driving, and she was scared. Bernal told her to stop, and she parked and put on her hazard lights. Bernal and his friend took off to stash the gun.

Detective John Motto investigated the shooting. He testified that six bullet casings, and one expended bullet, were found at the scene. There were casings found on Bonnie Brae and 5th Streets. They were all nine-millimeter. It could not be determined where the shooter was standing from the casings alone because they can discharge from the gun in different directions, and could roll downhill to a different location. The casings were from two different brands of bullets. However, it was common for officers to find casings from multiple manufacturers at one crime scene that were discharged from the same gun.

On September 4, 2008, police interviewed Bernal's 17-year-old nephew, Oscar Tejeda. Tejeda's taped interview was played for the jury. The interviewing officer falsely told Tejeda that Bernal had confessed to the shooting. Tejeda told the officer that Bernal was a member of the Rockwood gang and goes by the moniker "Scooby." Tejeda had seen Cortez socializing with Bernal and other members of the Rockwood gang. According to Tejeda, Bernal stopped by his apartment on September 3 to drop off some marijuana that he did not want to get caught with. While at the apartment, Bernal told Tejeda "he went shooting with some -- somebody at some woman I think." He said "he went with some lady to go shoot somebody." Bernal said "[h]e was shooting." Bernal told Tejeda "yesterday we went and we shot at two 18s." He said the "driver was a girl." Tejeda could not remember the female's name, but knew that she lived in his apartment building, and he knew who she was. Tejeda believed she was dating another member of Rockwood.

When Detective Michael Arteaga asked Tejeda to tell him exactly what Bernal said, Tejeda responded, "I don't remember how he told me exactly . . . . He's like, we went, me and this woman, don't know her name, we went to -- we went shooting some 18s, like at some 18s." Bernal did not tell Tejeda what he had done with the gun. Bernal told Tejeda he "shot two 18s." Bernal also said that police had caught Cortez in her car while she waited for him.

Tejeda identified Cortez from a six-pack photo array. Detective Arteaga asked whether Cortez's name was "Stephanie," "Sylvia," "Nancy," "Mickey," "Martha," or "Norma." Tejeda said he believed her name is Norma, which is in fact Cortez's first name.

At trial, Tejeda testified that police came to his house with their guns drawn and handcuffed him and his sister. Some hours later police asked him for a gun and said that if he did not hand it over, he would be arrested for aiding a murder suspect. Tejeda told police he did not know what they were talking about. He was scared. Police took Tejeda to the station. At the station, he lied to police about what Bernal had told him. In fact, Bernal did not say anything about a shooting. Tejeda felt pressured by the police to lie.

Tejeda did testify that Bernal was a member of the Rockwood gang. He admitted that the detective who interviewed him was friendly and polite. He also admitted that he had seen Cortez and Bernal socializing before with members of the Rockwood gang.

Gang expert Antonio Hernandez testified that the Rockwood and 18th Street gangs are enemies and occupy adjacent territories. Gang members would not casually enter the territory of a rival gang. Bernal was a member of Rockwood, with the monikers "Scooby" or "Woody." The primary activities of the Rockwood gang are robberies, assaults, extortion, criminal threats, felony vandalisms and narcotics sales. Hernandez did not know Cortez to be a member of the Rockwood gang.

Cortez has a triangular, three-dot tattoo on her arm. According to Hernandez, both gang members and nongang members may have this tattoo. However, it is a common tattoo for gang members and associates. The tattoo signifies the "crazy life," suggesting that its bearer is living a life of doing drugs, drinking, and committing crimes. Victim Guzman also had such a tattoo. Hernandez did not believe that Cortez and Guzman were gang members. However, someone is a gang associate if they hang out with gang members, but have not been formally admitted into the gang. Hernandez did not believe Emanuel was a gang member either.

When a gang member asks, "Where are you from," it is a challenge, intended to initiate a confrontation. Based on a hypothetical mirroring the facts of this case, Hernandez believed the shooting was for the benefit of the Rockwell gang.

While Bernal was in jail, he tried to send a letter to a Rockwell gang member, Jose Birrueta. In the letter, Bernal told Birrueta Cortez's full name and booking number, and asked if he "could go and see her at Lynwood jail and talk to her to see what she's saying with me or against me. If she's against me write to me and let me know what's up so I can make a game plan. If she's with me let me know what she's saying and tell her to change her story because they don't have anything on both of us to say that I wasn't with her that day to let me go. She's the only one holding me back so when I get out I could help her with a lawyer." Bernal asked Birrueta to "convince her to say I was not with her, that they scare her, the police did, and she was just nervous and she just confused."

Bernal also wrote "here's the name of the other fool who's snitching me out. Emanuel Z[.] [¶] . . . [¶] My nephew talked to him to say the police scare him and threatened him. So when the detectives came he said what he say, so to say different. He was scared, but it was a lie, what he said when he gets to court. My sister's kid."

Cortez testified in her own defense. She was not a member of a gang, and was not involved in any kind of gang mission on the day of the shooting. Bernal asked her for a ride so he could pick up some money he had loaned to someone. Cortez told him she would need gas money if she gave him a ride, and he agreed. They started driving on 6th Street near Bonnie Brae and Alvarado Streets, and picked up Bernal's teenage friend, who got in the back seat. Bernal did not ask for permission to give his friend a ride, and Cortez did not ask why he got into the car. She figured he was Bernal's friend and he was probably in the car because he owed Bernal the money. She did not care and did not see anything wrong in the situation. Bernal told Cortez to continue driving, and he would direct her where to go.

As they neared the intersection of 5th and Bonnie Brae Streets, Cortez saw two young men in the street, yelling "18th Street" and making signs with their hands. No one in her car responded to the young men. However, Bernal jumped out of her still moving car without saying a word. Cortez saw one of the young men "reaching like a motion like to getting a gun." She was still driving, and then heard gunshots. Bernal then got back into the car and said, "let's go."

Bernal directed Cortez to another location. She stopped where Bernal told her to, and Bernal and his friend got out of the car. Cortez knew that something bad had happened but did not want to ask what because she was scared. She put on her hazard lights and waited for Bernal to return. She was a "bundle of nerves" and did not go home because she was not thinking. She was "frozen" and did not know what to do. The police arrived 10 minutes later, and she was arrested. She initially was not truthful with the police because she was scared.

Cortez believed Bernal to be a nice, helpful person, and she did not think he was a gang member. She met him when she moved into her apartment, and Bernal and some of

his friends offered to help her with her groceries. She testified that was "how we developed . . . a friendship." Their relationship was platonic. However, she admitted telling police that Bernal talked a lot about the Rockwood gang and was proud of it, and that she knew him to get in fights and carry a gun at all times. Cortez also admitted that she knew she lived in Rockwood gang territory, but later denied that there was gang activity in her neighborhood or the neighborhood where the shooting occurred.

Cortez's son, Steven McBride, knew Bernal and assumed he was a gang member. He had seen his mother and Bernal hang out together.

Cortez's ex-husband, Schuyler McBride, testified that when he first started dating Cortez, he "[did]n't believe she was a [gang] member," although she had friends who were gang members. They both socialized with gang members in their community. Because Cortez and McBride socialized with gang members, they had "street smarts about gangs," and knew "what gangs were all about." When asked whether it would surprise McBride to learn that Cortez was friends with Bernal, he responded, "No."

The pastor and a member of Cortez's church, New Hope Ministries, testified that Cortez attended Bible study and was involved in some of the church's outreach programs. According to pastor Troy Nakama, the ministry "is very unique because it reaches out to people that normally wouldn't attend churches. We target individuals that are struggling in life and such." The ministry runs a gang outreach program, including a men's rehabilitation. Pastor Nakama could not recall Cortez being involved in any of the ministry's outreach programs, but Susana Rodriguez, Cortez's friend and a member of her church, believed Cortez did some outreach work, although Cortez was not involved in gang outreach specifically.

Kimi Lent, a gang interventionist, testified that gangs are more prevalent in low income communities, and that people in such communities had fewer resources, and would rely on each other for transportation. In gang culture, a "mission" is a planned crime. Driveby shootings can be conducted as part of a mission. Gang members would not normally carry out a mission with a nongang member.

Bernal presented the testimony of Dr. Mitchell Eisen, a psychologist with expertise on eyewitness identifications and suggestibility, who opined that witness identifications when weapons are involved may be less reliable because witnesses tend to focus on the weapons rather than the suspect, and that police administering identification procedures may influence those identifications.

DISCUSSION

Cortez and Bernal raise a number of claims of error on appeal. Cortez contends the prosecutor lowered the burden of proof by misrepresenting the beyond a reasonable doubt standard; the trial court erroneously instructed the jury with CALCRIM No. 361; and the admission of Bernal's out-of-court statements to his nephew violated her right to confront and cross-examine witnesses, and was error under Evidence Code section 1230. We find merit in these contentions and find the cumulative errors prejudiced her. We reverse her conviction on these grounds. For this reason, we need not address her remaining contentions, except to the extent they inure to Bernal's benefit and Bernal joins in them. Bernal, for his own part, contends the trial court erred by refusing to instruct on self-defense, imperfect self-defense, and provocation. We find no merit in Bernal's contention or Cortez's contentions as they apply to him. We therefore affirm his conviction.

1. Prosecutorial Misconduct in Rebuttal Argument

Cortez contends the prosecutor misrepresented the beyond a reasonable doubt standard of proof during his rebuttal argument when he said, "The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.' " We agree with Cortez that the prosecutor's statements constituted misconduct and were prejudicial.

"A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such unfairness as to make the resulting conviction a

denial of due process. [Citation.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1352-1353.) The prosecutor's improper conduct need not be intentional to constitute reversible error. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

"It is improper for the prosecutor to misstate the law generally, and in particular, to attempt to lower the burden of proof." (*People v. Ellison, supra*, 196 Cal.App.4th at p. 1353.) "[W]hen the claim [of prosecutorial misconduct] focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) We reverse a defendant's conviction because of prosecutorial misconduct when "it is reasonably probable the result would have been more favorable to the defendant in the absence of the misconduct." (*People v. Ellison, supra*, at p. 1353.)

The prosecutor's remarks in the present case misrepresented the "beyond the reasonable doubt standard" and constituted a fundamental misstatement of the law. Proof beyond a reasonable doubt -- that is, "proof that leaves you with an abiding conviction that the charge is true" (CALCRIM No. 220) -- is a qualitatively different and higher standard than a "not imaginary" belief based on the evidence. Something so little as a strong suspicion may support the statement "I believe I know what happened based on the evidence in front of me," but it cannot be disputed that a conviction based on a mere belief (imaginary or otherwise) or strong suspicion does not comport with due process. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [beyond a reasonable doubt standard a requirement of due process].) A preponderance of the evidence may also support a nonimaginary belief, though that means only that the evidence on one side outweighs the evidence on the other side. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567; CACI No. 200.) Clearly, it is a lower standard than proof beyond a reasonable doubt and is also insufficient to support a criminal conviction. (*People v. Gaytan* (1940) 38 Cal.App.2d 83, 87.) The prosecutor committed misconduct

when he misstated the reasonable doubt standard. (See, e.g., *People v. Ellison*, *supra*, 196 Cal.App.4th at p. 1353 [prosecutor committed misconduct by arguing to the jury that reasonable doubt standard required jury "to determine whether defendant's innocence was reasonable"]; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268 [prosecutor's use of puzzle analogy "convey[ed] an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt" and constituted misconduct]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 [prosecutor's argument that people apply reasonable doubt standard " 'every day' " and that it was same standard people used in deciding whether to change lanes trivialized the standard and was improper].)

Moreover, when viewed in context, there is a reasonable likelihood the jury construed the prosecutor's remarks in a fashion that lowered the People's burden of proof. It is true the court properly instructed the jurors on proof beyond a reasonable doubt and told them that if the attorneys' comments on the law conflict with the instructions, they must follow the instructions. And while we presume the jury followed the court's instructions, that presumption applies only absent a contrary showing in the record. (*People v. Burch* (2007) 148 Cal.App.4th 862, 869.) There is such a showing here. The court first gave the pertinent instructions, and then the parties proceeded to make their closing arguments. Cortez's counsel equated proof beyond a reasonable doubt with proof sufficient for a mother to convict her child. In rebuttal, the prosecutor argued that defense counsel's characterization of the standard was "ridiculous." He then invoked the court's instruction on reasonable doubt and purported to tell the jury what it meant. ("The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary.'") Defense counsel objected that the prosecutor had misstated the law, and the court overruled the objection without any further comment.

The jury observed a dispute over what the reasonable doubt standard meant. Defense counsel said one thing and the prosecutor said another. When defense counsel

objected to the prosecutor's statements, the court's ruling signaled to the jury that the prosecutor's description of the standard was unobjectionable. The court did not give a curative instruction, admonish the jury to follow the court's instructions, or read the reasonable doubt instruction after closing arguments. The jury went directly into deliberations with the court's implicit endorsement of the prosecutor's misstatement. Under these circumstances, it was reasonably likely the jury construed the prosecutor's misstatement of the burden of proof in an objectionable fashion.

These circumstances distinguish this case from those relied on by respondent. In *People v. Katzenberger, supra*, 178 Cal.App.4th at page 1268, and *People v. Nguyen, supra*, 40 Cal.App.4th at page 36, the courts determined the prosecutors' arguments misstating the burden of proof did not prejudice the defendants. In *People v. Katzenberger*, the jury was alerted to the dispute over the prosecutor's improper argument, and the court told the jury "it would 'clarify' the issue by reading the jury instruction on reasonable doubt." (*People v. Katzenberger*, at p. 1268.) In *People v. Nguyen*, the defendant did not object to the misstatement and the prosecutor directed the jury to read the reasonable doubt instruction, despite the misstatement. (*People v. Nguyen*, at p. 36.) In neither of these cases did the court implicitly endorse the prosecutor's misstatement to the degree it did here.

Bernal joined in Cortez's arguments (Cal. Rules of Court, rule 8.200(a)(5)), but we find no reversible error with regard to him. The evidence against Bernal was especially strong. He brought a gun along for the ride with Cortez, admitted to his cousin that he committed the shooting, made incriminating statements in his letter to a fellow gang member, and Emanuel identified him as the shooter.

2. CALCRIM No. 361

Cortez contends the trial court erred when it instructed the jury with CALCRIM No. 361. CALCRIM No. 361 provides: "If the defendant failed in (his/her) testimony to explain or deny evidence against (him/her), and if (he/she) could reasonably be expected to have done so based on what (he/she) knew, you may consider (his/her) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to

prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." We review this assertion of instructional error de novo. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) Having done so, we are persuaded the trial court erred in this instance.

In order for the court to give this instruction, there must be facts or evidence in the prosecution's case within the defendant's knowledge that the defendant failed to explain or deny. (*People v. Lamer, supra*, 110 Cal.App.4th at p. 1469.) This instruction has been the target of some hostility. As one court has emphasized, "it should not even be requested by either side unless there is some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate. In the typical case it will add nothing of substance to the store of knowledge possessed by a juror of average intelligence." (*People v. Haynes* (1983) 148 Cal.App.3d 1117, 1120.) Mere conflict between the defendant's testimony and that of prosecution witnesses is not a failure to explain or deny, nor is a failure to recall specific details. (*People v. Saddler* (1979) 24 Cal.3d 671, 682; *People v. Roehler* (1985) 167 Cal.App.3d 353, 393.) Neither one paves the way for giving this instruction. (*People v. Saddler, supra*, at p. 682; *People v. Roehler, supra*, at p. 393.) Moreover, "the test for giving the instruction is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear." (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57; see also *People v. Lamer, supra*, 110 Cal.App.4th at p. 1469.)

Here, Cortez did not fail to explain or deny any fact or evidence within her personal knowledge. She generally explained her actions the day of the shooting. She explained why she gave Bernal a ride (to pick up some money), why she drove to the area of the shooting (she was following Bernal's directions), and why she waited for Bernal after the shooting (she was scared, nervous, and not thinking straight). Respondent is simply incorrect when it asserts that Cortez failed to explain a number of things within her knowledge. For instance, respondent argues Cortez did not explain a three-hour

discrepancy between the time she said the shooting occurred (approximately 1:00 p.m.) and the time prosecution witnesses said it occurred (approximately 4:00 p.m.). A conflict in the evidence does not equate to a failure to explain. (*People v. Saddler*, *supra*, 24 Cal.3d at p. 682.) Still, when confronted with the discrepancy on cross-examination, she explained it. She admitted that she was not "quite sure" the shooting occurred around 1:00 p.m., and it was probable she had been mistaken when she said that it occurred early in the day. Respondent also argues she did not explain whether she thought Bernal's friend was dressed like a gang member. But Cortez explained the friend's dress, and if there was any failure to explain, it was only because the prosecutor cut her off. The prosecutor asked if Bernal's friend was "dressed like a gangster"; Cortez responded that he was wearing a very loose shirt, "[t]he way kids dress now." The prosecutor slightly reworded the question to ask if Cortez *thought* he was dressed like a gangster, and she replied, "I see so many kids that dress like him." He then asked, "Are you just going to refuse to answer my question?" She responded, "No, because --," after which the prosecutor cut her off and asked another question. In yet another instance, respondent argues Cortez failed to explain why she did not stop the car to let Bernal in after the shooting. To the contrary, she explained she was not going to "stop and check" because gunfire had just occurred and she was scared. As a final example, respondent maintains she failed to explain how a live bullet ended up on the floorboard of her car. In fact, she testified she did not put the bullet there, she had no idea how it got there, and she did not know if it was there before Bernal got into the car because she did not check the car before then. Cortez explained that the bullet's presence was not within her personal knowledge. She need not have speculated how the bullet came to be there. (See *People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1469 [instruction proper only when defendant fails to explain matters within his or her knowledge].)

Respondent further asserts that several of Cortez's statements were implausible and therefore justified the instruction. Whether respondent found her statements plausible is not the test, however. (*People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1469.) The instruction should not have been given.

3. Confrontation Clause and Evidence Code Section 1230

Cortez contends that evidence of Bernal's statements to his nephew were inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) because they were out-of-court statements implicating her, and she was not able to cross-examine Bernal, violating her rights under the Sixth Amendment confrontation clause.

The confrontation clause is violated only by the admission of *testimonial* hearsay statements, which the statements here were not. (*People v. Loy* (2011) 52 Cal.4th 46, 66.) In our recent decision in *People v. Arceo* (2011) 195 Cal.App.4th 556 (*Arceo*), we rejected the defendant's objection to statements as a violation of his Sixth Amendment confrontation rights. The defendant sought to exclude out-of-court statements by nontestifying codefendants that implicated him in the crimes. As Cortez does here, the defendant claimed the statements were inadmissible under *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518. We held the confrontation clause has no application to nontestimonial out-of-court statements by codefendants. (*Arceo*, at p. 571.) In *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*), the court held that when it was not reasonably anticipated that a statement would be used at trial, the statement was not "testimonial" within the meaning of *Crawford*. (*Cervantes*, at p. 174.) When Bernal confided in his nephew, he did not speak with the belief that his statements would be used at trial. His statements to his nephew were casual remarks made to a family member, in the family home, and were not testimonial under *Crawford*. (*People v. Loy*, at pp. 66-67.)

Still, the California codified rules of evidence apply to nontestimonial statements. Bernal's statements were admissible against Cortez only if they fell within an exception to the hearsay rule and "otherwise satisfie[d] the constitutional requirement of trustworthiness." (*Cervantes*, *supra*, 118 Cal.App.4th at p. 177; see also *Arceo*, *supra*, 195 Cal.App.4th at pp. 573-574.) The trial court ruled that Bernal's remarks to his nephew were reliable and were admissible as declarations against penal interest. We disagree that Bernal's out-of-court statements were admissible against Cortez.

A trial court's admissibility ruling under Evidence Code section 1230 is reviewed on appeal for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 536 (*Brown*).)[2] "Evidence Code section 1230 provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was against the declarant's penal interest. The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 462.) Generally, this hearsay exception is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 442.) "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, *whether the declarant spoke from personal knowledge*, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 334, italics added.)

In the present case, Bernal's statements to the effect that he and a woman went to commit a shooting were not sufficiently trustworthy to be admitted against Cortez. Bernal apparently told his nephew this in several different statements. (E.g., "we went, me and this woman, don't know her name, we went to -- we went shooting some 18s, like at some 18s"; "yesterday we went and we shot at two 18s"; "he went with some lady to go shoot somebody.") The references to a woman or lady and the phrase "we went"

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2 Cortez contends that the proper standard of review is de novo. (See *Cervantes*, *supra*, 118 Cal.App.4th at p. 174 ["we conclude it is appropriate to conduct a de novo review of the totality of the circumstances that surround the making of the statement"].) However, we are bound to follow the Supreme Court's determination of the standard of review in *Brown* and find that the great weight of authority has employed the abuse of discretion standard of review. (See *People v. Lawley* (2002) 27 Cal.4th 102, 153-154; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335-336 (*Greenberger*); *People v. Wilson* (1993) 17 Cal.App.4th 271, 276.)

necessarily implied that he *and Cortez* went to go shoot someone that day. The statements suggest Cortez knew of a plan to commit the shooting and went along with it. Indeed, the prosecutor argued to the jury that Bernal's statements were evidence Cortez knew of Bernal's purpose and had the intent to assist him. The prosecutor stated: "And when the nephew talked to the police about what his uncle told him, he repeatedly said that his uncle told him we went, we went and shot at some 18ths. That is how you know she had the knowledge of his purpose going there and she had the intent to assist him." However, Bernal could not speak from personal knowledge in describing Cortez's state of mind. His statements in that respect were speculation and hence not trustworthy. (*People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104 ["In the absence of personal knowledge, a witness's testimony or a declarant's statement is no better than rank hearsay or, even worse, pure speculation."].) References to "we," a lady, or a woman could have easily been redacted from Bernal's statements, leaving other relevant portions that amounted to a confession on his part. For example, his statement that "he went with some lady to go shoot somebody" could have been redacted to say "he went . . . to go shoot somebody." We agree with the notion that his statements were admissible against him because they were against his penal interest, were made in a setting that promoted truthfulness (a discussion in the family home between close family members), and were trustworthy to the extent he reported on this own actions and thoughts. As against Cortez, though, they lacked a guarantee of trustworthiness, and they should not have been admitted without at least redacting the portions that specifically implicated her.

4. Cumulative Error

Cortez contends that even if no individual errors were prejudicial alone, the cumulative effect of multiple errors require reversal. When a defendant claims cumulative error the "test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) "[W]e review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*) The cumulative effect of the errors discussed *ante* -- prosecutorial misconduct, instructing the

jury with CALCRIM No. 361, and the admission of Bernal's out-of-court statements against Cortez -- require reversal.

The case against Cortez was close and not particularly strong. Her conviction was based on aiding and abetting liability. Cortez admitted that she drove Bernal around the afternoon of the shooting and was present when the shooting occurred. There was no real dispute about her conduct on the day of the shooting. But the People had to also prove that Cortez *knew* Bernal intended to commit murder and she *intended* to aid and abet him in that crime. (CALCRIM No. 401.) Thus, the primary issue with which the jury had to grapple was whether she had the requisite knowledge and intent.

On the one hand, Emanuel testified he heard a woman say, "Where you guys from?" and "Let them have it," right before the shooting. On the other hand, Cortez's testimony suggested that she did not have knowledge of Bernal's purposes or intend to aid him in committing a crime. She testified that she was not a gang member and was not involved in any kind of gang mission on the day of the shooting. She drove Bernal because he asked for a ride to pick up some money, and in exchange he was to give her gas money. She said Bernal jumped out of her moving car without announcing what he was doing, she heard gunshots, and then he got back into the car. She knew something bad had happened but did not want to ask questions because she was scared. While her out-of-court statements to police were not entirely consistent with her trial testimony, she was consistent that she believed she was giving Bernal a ride to pick up money and did not seem to know of any plan to commit a shooting. Her pastor and church friend testified that she attended Bible study and was involved in the ministry's outreach programs. In short, only circumstantial evidence supported Cortez's knowledge of Bernal's purpose and intent to aid him, and her testimony was direct evidence to the contrary.

The jury likely understood a nonimaginary belief in Cortez's guilt was sufficient to convict her, given the prosecutor's misstatement lowering the People's burden of proof. CALCRIM No. 361 suggested to the jury that Cortez might have failed to explain or deny evidence against her and invited the jury to draw a negative inference on that

basis, even though there was no such failure on her part. And the admission of Bernal's speculative and untrustworthy statements to his nephew about Cortez's state of mind permitted the prosecutor to in turn speculate about Cortez's knowledge and intent. The prosecutor's argument suggested these statements were the best evidence of her knowledge and intent. In a close case against Cortez, it is reasonably probable that misadvising the jury on the burden of proof, calling attention to a negative inference that has no applicability, and admitting untrustworthy statements as to Cortez combined to tip the balance against her. We must reverse Cortez's conviction on this basis.

5. Self-defense

Bernal contends the trial court erred when it denied his counsel's request for instructions on self-defense, imperfect self-defense, and provocation (for both second degree murder and voluntary manslaughter). At trial, defense counsel contended the evidence warranted the instructions because the victims may have initiated a gang confrontation by "throwing gang signs [and] yelling," and because there were shell casings scattered about, implying that the victims may have been shooting as well. The trial court concluded that its role was to determine "whether there was evidence which, if believed by the jury, is sufficient to raise a reasonable doubt. [¶] And frankly, based on the state of the evidence, I don't see that in this case." We agree with the trial court here.

A trial court must instruct on an asserted defense, including self-defense, if there is sufficient evidence from which a reasonable juror could find the defense applicable. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1046; *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) When the 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, 581, 584; *People v. Cruz* (2008) 44 Cal.4th 636, 664.) Substantial evidence is " ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' " that the particular facts underlying the instruction did exist. (*Cruz*, at p. 664; see also *People v. Wilson* (2008) 43 Cal.4th 1, 16.)

Self-defense requires that a defendant actually and reasonably believes in the need to defend against imminent bodily injury or death. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1081; *Breverman, supra*, 19 Cal.4th at p. 154; see also §§ 197 [homicide justified when killing is accomplished in defense of self or others], 198 [circumstances excusing homicide must be "sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone"].) A jury must consider what " 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .' " (*Humphrey*, at pp. 1082-1083.) If the defendant acts under the subjective but objectively unreasonable belief he or she is in imminent danger of great bodily injury or death, the killing is considered to have resulted from "imperfect self-defense." That is, the defendant " 'is deemed to have acted without malice and cannot be convicted of murder,' " but can be convicted of the lesser-included offense of voluntary manslaughter. (*Id.* at p. 1082; see also *People v. Randle* (2005) 35 Cal.4th 987, 994 ["Imperfect self-defense mitigates, rather than justifies, homicide; it does so by negating the element of malice."], overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; *People v. Wilson, supra*, 43 Cal.4th at p. 16.) Neither the self-defense nor imperfect self-defense doctrines may be invoked by a "a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.)

The trial court properly refused both instructions because the evidence was too insubstantial to support either defense theory. (See *People v. Strozier* (1993) 20 Cal.App.4th 55, 63.) First, the evidence showed Bernal provoked the confrontation between his group and the victims. Bernal drove into rival gang territory and yelled "Where are you from?" to the victims, a known gang confrontation. It is irrelevant that shell casings of different brands were found near the shooting, because there was no evidence that the victims fired a gun. To draw an inference that the victims were

shooting is pure speculation. (*People v. Valdez* (2004) 32 Cal.4th 73, 116 [speculation is insufficient to warrant an instruction; the evidence must be substantial].)

Second, there was no evidence, direct or circumstantial, that showed that Bernal "*actually* . . . believed he was in imminent danger of death or great bodily injury." (*In re Christian S., supra*, 7 Cal.4th at p. 771; see *People v. Minifie* (1996) 13 Cal.4th 1055, 1065 [defendant claiming self-defense must " ' "prove his own frame of mind" ' "].) According to Cortez, Bernal was calm both before and after the shooting, and was focused on avoiding capture, directing Cortez to drive to a specific location after the shooting. There was no evidence that he was shaken by the encounter with the victims. Therefore, we find that no substantial evidence warranted instructions on self-defense or imperfect self-defense.

Bernal also contends the trial court should have given provocation instructions. Provocation operates in two ways. First, it can reduce first degree murder to second degree murder if the defendant formed the intent to kill in direct response to provocation and acted immediately without deliberation or premeditation. Second, it can reduce murder to manslaughter if the defendant was subjectively provoked to kill, and a person of average disposition (an "objective" person) would have been provoked to kill. Provocation to reduce a killing to second degree murder is a purely subjective inquiry whereas provocation in the context of voluntary manslaughter contains both a subjective and objective element. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.)

We first examine provocation sufficient to reduce a murder to voluntary manslaughter. "Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter -- a lesser included offense of murder." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) Heat of passion will also reduce attempted murder to attempted voluntary manslaughter. (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.) Heat of passion has both objective and subjective components. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) The defendant must subjectively act in the heat of passion. (*Ibid.*) But the claimed provocation must be

sufficient to cause a reasonable person under the same circumstances to act rashly, without deliberation and reflection, from passion rather than from judgment. (*Carasi*, at p. 1306.) The provocation must be such that a "reasonable person in defendant's position would have reacted with homicidal rage." (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1086.) A defendant may not " ' "set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused . . . ." ' " (*Cole*, at p. 1216.)

Here, there was no evidence of legally sufficient provocation to warrant a voluntary manslaughter instruction. Notwithstanding the evidence that the victims and Bernal may have engaged in "where are you from" gang banter, and gang members are prone to violent overreactions, an ordinary person does not become homicidally enraged when another person claims an affiliation with a rival "organization." Requiring the instruction would effectively adopt a "reasonable gang member" standard, which is clearly not the law.

We next examine provocation sufficient to reduce deliberate and premeditated first degree murder to second degree murder (when the evidence is not sufficient to reduce the crime to involuntary manslaughter). If the jury finds that the defendant "formed the intent to kill as a direct response to . . . provocation and . . . acted immediately" without deliberation or premeditation, the offense is reduced to second degree murder. (*People v. Wickersham* (1982) 32 Cal.3d 307, 329 (*Wickersham*), disapproved on another ground by *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Provocation sufficient to mitigate a murder to second degree murder requires only a finding that the defendant's subjective mental state was such that he did not deliberate and premeditate before deciding to kill. (*People v. Fitzpatrick*, *supra*, 2 Cal.App.4th at pp. 1295-1296.)

Here, there was overwhelming evidence that Bernal harbored the intent to kill before any exchange between him and his victims. Although there was some evidence of an exchange of gang challenges between Bernal and his victims (see *Wickersham*, *supra*, 32 Cal.3d at p. 329 [the fact that heated words were exchanged between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance]), there is no

evidence that this exchange provoked Bernal to kill Guzman and attempt to kill Emanuel. (*People v. Johnson* (1993) 6 Cal.4th 1, 42-43 [provocation instruction only warranted if defendant formed the intent to kill as a *direct* response to such provocation and acted *immediately* to carry it out].) Bernal went into rival gang territory with a gun, and initiated a confrontation with supposed rival gang members. It is clear from this evidence that he had formed his intent to kill before any provocation by his victims.

Moreover, there is no reasonable probability that Bernal would have received a more favorable outcome if the instruction had been given. (See *Breverman, supra*, 19 Cal.4th at p. 165; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Provocation causes the defendant to act rashly, impulsively or without careful consideration. The jury here was instructed with CALCRIM No. 521, which explains the degrees of murder. That instruction tells the jury that a "decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." Thus, the jury was aware that if Bernal acted rashly or impulsively, he was guilty of only second degree murder. Nevertheless, the jury convicted Bernal of first degree murder, showing they did not believe he acted rashly or impulsively. (*People v. Chatman* (2006) 38 Cal.4th 344, 392 [error in failing to give lesser included offense instruction is harmless when jury necessarily decides the factual question posed by the omitted instructions adversely to defendant under other properly given instructions].)

6. Accomplice Testimony

Cortez contends the trial court should have instructed the jury, sua sponte, to view Bernal's comments to Tejeda with caution, as set forth in CALCRIM No. 334. We need not address this argument as to Cortez, having already determined that other errors prejudiced her. Still, Bernal joins in this argument (Cal. Rules of Court, rule 8.200(a)(5)). He did not provide any individualized analysis about how Cortez's testimony (or which testimony) tended to incriminate him. Therefore, any claim of error was waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [a brief must contain reasoned argument and legal authority to support its contentions or the court may treat the

claim as waived].) In any event, as discussed *ante*, the case against him was much stronger than the case against Cortez, and any error was necessarily harmless.

DISPOSITION

The judgment against Cortez is reversed. The judgment against Bernal is affirmed.

FLIER, J.

I CONCUR:

RUBIN, Acting P. J.

People v. Cortez et al.

B233833

GRIMES, J., Concurring and dissenting.

I concur in the affirmance of the judgment of conviction of defendant Rodrigo Bernal. However, I respectfully disagree with my colleagues' conclusion that defendant Norma L. Cortez's conviction must be reversed.

1. Prosecutorial Misconduct

I do not find the prosecutor's statements during his rebuttal, when viewed in context, amount to prosecutorial misconduct. After correctly stating "proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt," the prosecutor exhorted the jury to consider the evidence when he then argued, "I submit to you what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.' " This comment did not lower the burden of proof; it emphasized *imaginary* doubt is not *reasonable* doubt, and such a characterization of the burden of proof is a correct statement of the law. (See CALCRIM No. 220.)

I am not persuaded there is a reasonable possibility the jury construed the prosecutor's comments to permit conviction despite reasonable doubts. The court properly instructed the jury on the correct standard of proof. The jury was instructed that "[p]roof 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." The jury was also instructed that "[y]ou must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jury followed the court's instructions absent evidence to the contrary. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 37.)

The conclusion the trial court "implicitly endorse[d]" the prosecutor's statement of the law by overruling defendant's objection is unwarranted. The prosecutor made the

challenged statement only after defense counsel equated proof beyond a reasonable doubt with proof sufficient for a mother to convict her own son. Given these conflicting statements of the standard, the jury likely discounted counsels' comments as argument, and followed the trial court's instructions.

2. CALCRIM No. 361

My colleagues conclude Cortez did not fail to explain or deny the evidence against her. I disagree, finding Cortez failed to explain or deny a considerable body of evidence against her. Cortez failed to plausibly explain the peculiar circumstance that, as an innocent church-going woman, she agreed to take a man half her age, whom she had known only a year, and who she knew associated with the Rockwood gang and *always carried a gun*, "for a ride to pick up some money"; then permitted an unfamiliar teenage friend of his dressed in gang attire to get in the car without anything being said about why he was there; then, instead of going directly to a location where the money was to be paid, she took directions from Bernal where to drive without knowing the destination; and finally, why she drove Bernal and his friend away from the scene of the shooting and waited for them to stash the gun and come back and get in her car.

She failed to explain why she did not think it strange that Bernal invited his teenage friend to get into her car without telling her why he was joining them; why she permitted him to get in the car; and why, as a mature woman, she took orders from a young associate of the Rockwood gang. Respondent points out Cortez implausibly testified Bernal got out of her car two blocks away from the shooting, shot the victim multiple times, then got back into her car, all without her ever stopping her car; if that were the case, how was Marvin B. able to note her license plate and identify her in a lineup as the driver of the car from two blocks away? She also failed to plausibly explain why she waited for Bernal after the shooting, stating first she was scared, and then "I don't think I did anything wrong. I was giving somebody a ride."

My colleagues conclude Cortez's weak and implausible explanations for the evidence against her do not warrant the instruction, because plausibility "is not the test." (Maj. opn. *ante*, at p. 16.) However, at least two cases have found plausibility *is* a

proper consideration in giving the instruction. (See *People v. Mask* (1986) 188 Cal.App.3d 450, 455 [the instruction is warranted "if the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible"]; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392-393.) Cortez's credibility was directly at issue, and the instruction correctly informed the jury that in assessing the reliability of her testimony, they could consider whether it was significant that she gave vague and implausible answers to obvious questions. (See CALCRIM No. 361.)

3. Evidence Code Section 1230

My colleagues agree that because Bernal's statements to his nephew were not testimonial, they did not violate the confrontation clause and were therefore admissible so long as they fell within an exception to the hearsay rule. (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571, 573-574.)

Generally, the hearsay exception for the admission of statements against penal interest is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441; see also *People v. Duarte* (2000) 24 Cal.4th 603, 612 ["Under the rule of *Leach*, a hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.' "].) However, a statement that inculpates the declarant and other individuals need not be excluded so long as the statement is not exculpatory, self-serving, or collateral. (*People v. Samuels* (2005) 36 Cal.4th 96, 120 (*Samuels*).) In *Samuels*, the defendant asked James Bernstein to murder her husband, and once Bernstein had done so, she solicited two other men to murder Bernstein. At the defendant's trial, a witness testified Bernstein told him, " 'He had done it and Mike . . . had helped him. *And that* [*the defendant*] *had paid him.*' " (*Id.* at p. 120, italics added.) On appeal, the defendant contended the italicized portion of these remarks was an attempt to shift blame to her, and were therefore not statements against Bernstein's penal interest. (*Ibid.*)

The Supreme Court held the entire statement was properly admitted as a declaration against penal interest, notwithstanding the reference to the defendant, because the "admission, volunteered to an acquaintance, was specifically disserving to Bernstein's interests in that it intimated he had participated in a contract killing—a particularly heinous type of murder—and in a conspiracy to commit murder. Under the totality of the circumstances presented here, we do not regard the reference to [the] defendant incorporated within this admission as itself constituting a collateral assertion that should have been purged from [the witness's] recollection of Bernstein's precise comments to him. Instead, the reference was inextricably tied to and part of a specific statement against penal interest." (*Samuels*, *supra*, 36 Cal.4th at p. 121.)

Here, Bernal's remarks were made in a private conversation between Bernal and his younger nephew, Oscar Tejeda, the day after the shooting. Bernal told Tejeda he "went with some lady to go shoot somebody." Bernal admitted he did the shooting. Bernal further told Tejeda "yesterday we went and we shot at two 18s." Bernal said the "driver was a girl." Viewed in context, it is clear Bernal's statements are in no way exculpatory, self-serving, or collateral. He admitted he was the one who pulled the trigger. Like *Samuels*, to the extent the remarks discuss Cortez's involvement in the shooting, these remarks were not collateral, and were in fact quite damaging to Bernal because they implied he and Cortez together set out to commit a driveby shooting, which is probative of premeditation and the existence of a conspiracy to commit murder. (*Samuels*, *supra*, 36 Cal.4th at p. 121; see also *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176-177.)

Cortez's reliance on *Lawley* is misplaced. In that case, the defendant contended the trial court's *exclusion* of evidence of an out-of-court statement was an abuse of discretion. The trial court admitted, as a declaration against penal interest, the declarant's statement that he was hired and paid to kill the victim (implying defendant did not commit the killing), but did not admit a statement by the declarant that it was the Aryan Brotherhood that paid him to commit the killing, finding the latter statement was not against the declarant's penal interest. The court concluded that "nothing about *who*

hired Seabourn to kill Stewart made Seabourn more culpable than did the other portions of his statement. Defendant argues the excluded portion of the statement would have specifically inculpated Seabourn in the additional crime of conspiracy with the Aryan Brotherhood, but the argument fails to recognize that *any* murder for hire partakes of the elements of conspiracy; thus, Seabourn's naming of the Aryan Brotherhood was not specifically disserving of his interests." (*People v. Lawley* (2002) 27 Cal.4th 102, 154 (*Lawley*).)

Lawley addressed a different aspect of the declaration against penal interest exception to the hearsay rule, finding the trial court had not abused its discretion in *refusing* to admit statements that did not further inculpate the declarant. I find the trial court here did not abuse its discretion in concluding all of Bernal's statements inculpated him, because his statements about Cortez implied premeditation and a conspiracy to commit murder, whereas Bernal's statements about his conduct alone did not fully convey the scope of the crime.

My colleagues find Bernal's statements were not sufficiently trustworthy to be admissible against Cortez as a statement against penal interest. As the majority noted, "[t]here is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.) Although Tejeda provided various words and phrases to describe what Bernal said to him, and said he could not remember the precise words Bernal used, the gist of all the statements was Bernal and Cortez went together into rival gang territory to shoot someone, Bernal did the shooting, and Cortez did the driving.

The record does not suggest any motive for Bernal to lie about Cortez's participation in the shooting when Bernal confided in a trusted family member. Moreover, Bernal's statement "we went" to shoot someone is not untrustworthy

speculation about Cortez's state of mind. Although his statement supports an inference as to Cortez's intent, nothing in this statement purports to explain what she was *actually thinking*. Rather, he explained what they *did*, when other evidence in the record amply supported the inference that Cortez knew of Bernal's objective before setting out with him. Accordingly, there is nothing speculative about Bernal's statement. Therefore, I find the trial court's conclusion that the statements were trustworthy was not an abuse of discretion. (See *People v. Brown* (2003) 31 Cal.4th 518, 536.)

The trial court also did not abuse its discretion under Evidence Code section 352 when it admitted the statements. Section 352 vests the court with discretion to exclude evidence, where the probative value of the evidence is outweighed by the probability that its admission will necessitate undue consumption of time, pose a substantial danger of undue prejudice or confusion of the issues, or mislead the jury. A trial court's ruling to admit or exclude evidence under section 352 is reviewed for abuse of discretion. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373.)

In this case, the trial court reasonably concluded the evidence was not unduly prejudicial, and was probative of Cortez's active participation in the crimes. Although it was certainly damaging to Cortez, the evidence corroborated other evidence that already pointed to Cortez's guilt, such as eyewitness testimony that they saw her driving and heard her say "Where you guys from?" and "Let them have it." We should not interfere with the trial court's discretion unless it was clearly abused. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65-66.)

Because the majority found reversible prejudicial error due to prosecutorial misconduct, instructing the jury with CALCRIM No. 361, and the admission of Bernal's statements to his nephew, the majority found it unnecessary to discuss the other purported errors asserted by Cortez, to which I turn now.

4. Accomplice Testimony

Cortez contends the trial court should have instructed the jury, sua sponte, to view Bernal's comments to Tejeda with caution, as set forth in CALCRIM No. 334. A trial court should give CALCRIM No. 334 when an accomplice testifies, and that

testimony tends to incriminate the defendant. (*People v. Howard* (2008) 42 Cal.4th 1000, 1021-1022; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.) The instruction informs the jury an accomplice's testimony must be viewed with caution, and the jury may not convict a defendant on the accomplice's testimony alone. Rather, the accomplice's testimony must be corroborated by independent supporting evidence. (See CALCRIM No. 334.)

An accomplice's testimony may include " 'all oral statements made by an accomplice or coconspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances.' " (*People v. Williams* (1997) 16 Cal.4th 153, 245; see also *Lawley*, *supra*, 27 Cal.4th at p. 160.) Statements are not "suspect" when they are trustworthy and reliable, such as when they fall within an exception to the hearsay rule. (*People v. Jeffery* (1995) 37 Cal.App.4th 209, 218.)

As discussed *ante*, Bernal's statements to his nephew were not testimonial, and fell within the hearsay exception for statements against penal interest. Accordingly, I conclude the trial court had no obligation to give an accomplice testimony instruction.

5. Ineffective Assistance of Counsel

Cortez contends she received ineffective assistance of counsel when her attorney failed to object to the admission of evidence of the meaning of her "three dots" tattoo. She claims the evidence was inadmissible character evidence of her supposed propensity to do drugs and live a life of crime. "Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. [Citations.] This right 'entitles the defendant not to some bare assistance but rather to *effective* assistance.' [Citation.]" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466.) In order to demonstrate ineffective assistance of counsel, Cortez must show that counsel's performance fell below an objective standard of reasonableness, *and* that she was prejudiced by counsel's performance. (*Id.* at p. 467.)

At trial, gang expert Antonio Hernandez was questioned about the meaning of the three dots tattoo. When asked "[w]hat does that [tattoo] mean within [gang] culture?" he testified that the tattoo signifies the "crazy life," meaning that its bearer is living a life of drugs, drinking, and crime. He denied the tattoo "necessarily mean[s] they are a gang member." However, he testified it is a common tattoo for gang members and associates. Someone is a gang associate if they hang out with gang members, but have not been formally admitted into the gang.

When the prosecutor sought to admit an exhibit displaying Cortez's tattoos (the three dots tattoo among others), defense counsel asked for an offer of proof. The prosecutor responded the tattoos showed Cortez had "a relationship with the gang culture," and the evidence was offered in anticipation of her defense that she was innocently caught up in the shooting and was not a gang member. The prosecutor sought to introduce evidence that Cortez "is getting tattoos that identify with that culture." Defense counsel stated, "I didn't object to the 'my crazy life' triple-dot tattoo because I know there's some gang relation, but the other tattoos my client has is 'Cortez' on her back with some rose thorns underneath it . . . . The other one is a tribal band on her wrist. There's no indication that has anything to do with gang culture."

Evidence Code section 1101, subdivision (a) provides that "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." However, section 1101, subdivision (b) permits admission of such evidence when it is relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. It is well settled that gang evidence is highly probative of intent and motive. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 277.)

Cortez contends the evidence was not gang evidence, and was merely evidence of her propensity to live a life of crime and drugs. She has construed Hernandez's testimony too narrowly. Hernandez testified that Cortez's tattoo is common among gang members *and associates*. While he also opined Cortez was not a gang member, his testimony—coupled with the other evidence adduced at trial—clearly demonstrated

that Cortez associated with gang members. This association belies her claimed "surprise" that Bernal started shooting in rival gang territory, and is therefore probative of her intent.

Because the evidence was clearly admissible, any objection would have been meritless, and Cortez cannot demonstrate prejudice. Moreover, she cannot demonstrate prejudice because there is no reasonable probability Cortez would have gotten a better result without the tattoo evidence, given the strong evidence of her guilt. (*People v. Walker* (2006) 139 Cal.App.4th 782, 808.) Witnesses saw her driving, and heard her yelling gang challenges. She also knew Bernal always carried a gun.

6. New Trial Motion

After the verdicts, Cortez moved for a new trial under Penal Code section 1181, subdivision 6, reasoning there was insufficient evidence to support the verdict. She also raised other bases for the motion, which are not at issue on appeal. Specifically, she contended that the trial court improperly admitted Bernal's statements to his nephew (§ 1181, subd. 5), and that her due process rights were violated when the trial court limited the length of her closing argument. At the hearing on the motion, the trial court and the attorneys devoted significant time to discussing the admission of Bernal's out-of-court statements to his nephew, and discussed the sufficiency of the evidence issue only in passing. The trial court commented, "I do think there was sufficient evidence for a jury to make the decision in this case. Unfortunately, for Ms. Cortez, the jurors chose to believe the people's witnesses regarding what she did and what she said at the time of the shooting." The court denied the motion. Apparently acceding the sufficiency of the evidence, defense counsel stated, "In regards to the sufficiency of the evidence, the court was present." The court responded, "Sure." This was the extent of the discussion by counsel and the court.

Cortez contends the trial court abused its discretion because it applied the wrong legal standard, and accordingly failed to independently review the evidence. Under Penal Code section 1181, subdivision 6, a trial court may grant a new trial or modify the verdict to a lesser included offense when the verdict is "contrary to law or evidence."

We review the trial court's denial of a motion for a new trial under the deferential abuse of discretion standard. An abuse of discretion occurs "if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard [citations]." (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)

In determining whether to grant a motion for a new trial under Penal Code section 1181, subdivision 6, the trial court "independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' " (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) Unlike a ruling on a motion for acquittal under section 1118.1, where the trial court "evaluates the evidence in the light most favorable to the prosecution," the court extends "no evidentiary deference in ruling on a section 1181(6) motion for new trial." (*Porter*, *supra*, at pp. 132-133.)

Cortez interprets the court's comments as improper deference to the jury's verdict, and an abdication of its duty to independently review the evidence. However brief the court's comments were, it is clear the sufficiency of the evidence issue only merited a brief discussion, given the priority counsel placed on the other issues presented by the motion (such as Bernal's out-of-court statements). Cortez has taken the court's comments out of the larger context of the issues presented by the motion and attributed unwarranted meaning to them. Viewed in the proper perspective, it is obvious the trial court independently evaluated the evidence, and explicitly found the evidence was sufficient. When defense counsel alluded to the court being "present" for the trial to evaluate the sufficiency of the evidence, the court appeared to acknowledge its proper role as the 13th juror. The court's other comments about the jury are surplusage, and do not show the court used an incorrect legal standard. "Although it would have been preferable for the court to have been more specific, stating it was denying the motion based on its independent weighing of the evidence, its failure to do so and its use of less than artful language cannot be equated with having applied the wrong standard." (*People v. Price* (1992) 4 Cal.App.4th 1272, 1275 [finding the court did not apply the wrong legal standard when it stated " 'I think the evidence was

sufficient, and I think that the jury—there was enough evidence there for the jury to do what the jury did . . .' "].) Therefore, I find no abuse of discretion.

7. Strength of the Case

Lastly, I disagree with my colleagues' view that "[t]he case against Cortez was close and not particularly strong" (Maj. opn. *ante*, at p. 20). In her testimony, Cortez admitted many of the essential facts supporting her conviction (that she was driving Bernal around, heard gunshots when he got out of the car, permitted him to get back in the car, and waited in the car when he got out and told her to wait for his return after he hid the gun used in the shooting). The inconsistent explanations she gave police during her interview, and the inconsistencies and implausibility of her trial testimony, impugned her credibility and undermined the persuasive value of her pastor's testimony that she attended Bible study and was involved in outreach programs. It was undisputed that she associated with members of the Rockwood gang (and no one testified her association was in support of any gang outreach program for her church or otherwise). According to her ex-husband, Cortez was street smart about gangs and knew what gangs are all about. As the prosecutor argued in closing, although Cortez was not a typical gang member, there was no rational explanation for her conduct, other than that she knew what was going to happen when she drove Bernal into rival gang territory.

Other evidence supported her intent to aid in a gang murder, such as Bernal's statements to his cousin that Bernal and a woman had gone to "shoot somebody," the letter Bernal wrote in jail to a friend asking him to find out if Cortez was "against" him and if so to tell her to "change her story," Cortez's willingness to drive Bernal around into rival gang territory knowing that Bernal always carried a gun, and witness testimony that Cortez yelled gang challenges and "Let them have it" at the scene of the shooting.

Accordingly, I would affirm Cortez's conviction.

GRIMES, J.

DECLARATION OF SERVICE

Case Name: **People v. Norma Lilian Cortez, et al.** No.: **S**_____

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 9, 2013, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On July 9, 2013, I caused the original and thirteen (13) copies of the **PETITION FOR REVIEW** in this case to be served on the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102** via **On Trac**, overnight service.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 9, 2013, at Los Angeles, California.

Lisa P. Ng
Declarant

Signature

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