In the Supreme Court of the State of California

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

Case No. S211915

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

Appellant Norma Cortez and Rodrigo Bernal murdered sixteen-year-old Miguel Guzman and attempted to murder nineteen-year-old Emanuel Zuniga, neither of whom were gang members or associates, while the victims were walking in the neighborhood where they lived.[1] Appellant lived in Rockwood gang territory and associated with its members, including Bernal. On the day of the crimes, appellant drove into a rival gang's territory with Bernal in the passenger seat. Appellant slammed on the brakes of her car when she saw the victims and yelled, "Where you from?" After she and Bernal both yelled at the victims, she said, "Let them have it." Bernal got out of the car and shot at the victims, killing Guzman.

[1] Respondent refers to only Cortez as "appellant" since the issues on review do not concern Bernal.

Appellant and Bernal were each convicted of premeditated murder and attempted premeditated murder, with firearm and gang enhancements. They were each sentenced to 50 years to life in state prison. (2CCT 521-526, 540-541.[2])

The majority opinion of the Court of Appeal affirmed Bernal's convictions, but reversed the judgment against appellant, finding three prejudicial errors. Justice Elizabeth Grimes dissented on all three grounds.

STATEMENT OF THE CASE

A. Prosecution Evidence

1. The September 3, 2008, Drive-By Shooting

Guzman and Zuniga, who were close childhood friends, both lived near the intersection of Bonnie Brae and 5th Street in Los Angeles in September 2008. (3RT 1257-1261, 1274-1275; 5RT 2422.) A significant amount of graffiti for the 18th Street gang could be seen in the area, and 18th Street gang members "hung out" there. (2RT 906-908; 3RT 1261-1262.) Neither Zuniga nor Guzman were 18th Street gang members. (3RT 1262, 1292; 5RT 2504-2506.)

On September 3, 2008, David Ramos, who also lived in the area of Bonnie Brae and 5th Street, was outside his residence when he heard someone "slamming" on the brakes of a car. He saw a light beige, four-door car with appellant driving and Bernal in the front passenger seat. A smaller person or child might have been in the back seat. (2RT 950-952, 976, 986-988, 1013-1014.)

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[2] Respondent refers to appellant's clerk's transcript as "CCT" since Bernal had a separate clerk's transcript.

When the car stopped, Zuniga and Guzman were crossing 5th Street, near the corner at Bonnie Brae. Zuniga heard a woman ask, "Where you guys from?" (3RT 1263-1265.) Zuniga turned around and saw the car with a female driver (appellant), Bernal in the front passenger seat, and a male in the back seat. The driver's window was down. (3RT 1264-1265, 1285-1291.) Both appellants yelled at Guzman and Zuniga. (2RT 952-957, 977.)

Zuniga heard a woman say, "Let them have it." Bernal got out of the car. (3RT 1266-1268, 1306, 1319.) As he got out, he pulled a dark colored gun from his waist, put his left hand on the roof of the car, and started shooting across the roof at Guzman and Zuniga. Marvin Barhona, another eyewitness to the shooting, saw Bernal briefly run across the street, chasing the victims as he continued to fire. Guzman did not have a gun, and no one shot back at Bernal. (2RT 957-960, 973, 977-978, 986, 991-992, 997, 1001-1014, 1016; 3RT 1266-1271, 1306, 1319.) Zuniga ran inside a building at 504 South Bonnie Brae. (3RT 1269-1271.)

After the final gunshot, the beige car moved a couple of feet forward and then stopped as Bernal, who was trying to put the gun back inside his waistband and get in the car at the same time, yelled, "Hold on. Hold on." Bernal got in and yelled, "Let's go. Let's go." They drove south on Bonnie Brae. (2RT 961, 982, 1014.) Ramos called 911 and gave a partial license plate number to the 911 operator. (2RT 961-963.)

2. The Investigation

Los Angeles Police Officers arrived at the scene at approximately 4:15 p.m. Guzman was on the ground on 5th Street, unconscious and bleeding from his mouth. (2RT 633-640.)

Because the shooting happened in the 18th Street gang's territory, other officers drove to an area controlled by Rockwood, a known rival gang, to investigate. At approximately 4:15 p.m., those officers saw a car matching the description and license plate number of the suspect vehicle

stopped in the middle of Witmer Street, in front of 401, with its hazard lights on. Appellant was in the driver's seat. She was the only occupant. (2RT 656-659, 662.)

Detective John Motto located six expended cartridge casings and one projectile, or expended bullet, in the street. Five of the casings were found on Bonnie Brae, and one was found on 5th Street. (2RT 665-666, 669-678, 682.) Bullet impact marks were found only on the side of the street where Guzman and Zuniga had been. (2RT 671-674, 904-905, 912, 933-934.) The bullet casings were expended from a nine millimeter semiautomatic firearm, and four reflected the brand "RP" on the base. (2RT 674-683, 921-922, 934.)

Detective Motto went to South Witmer where appellant was detained. He found a live round of ammunition, or an unfired bullet, on the front, passenger side floorboard of the Saturn. The bullet was a nine millimeter luger and had the same "RP" stamp that was on four of the casings found at the shooting scene. (2RT 683-686.) The car was registered to appellant at a residence on Westmoreland. (2RT 902-903.) A statement was taken from appellant at the time of her arrest. (5RT 2436.)

After Bernal's arrest on September 4, 2008, Detective Arteaga spoke with Bernal's nephew, Oscar Tejeda, outside Bernal's sister's apartment, which was one building over from Bernal's residence. As a ruse, the detective said Bernal admitted to officers that he told Tejeda about the shooting. Tejeda then admitted that Bernal had told him that Bernal had shot "two 18s" the previous day. (3RT 1510-1512, 1515-1516; 4RT 2103-2107, 2113, 2135.)

In a recorded interview at the police station a short time later, Tejeda told detectives that Bernal came to his apartment that day. Bernal said that

he and appellant went to shoot at two 18th Street gang members the previous day.[3] (2CCT 276-282, 284-287, 295, 299, 306-308, 313; 3RT 1542, 1549-1551.) Bernal described himself as the shooter and appellant as the driver. He explained that appellant was arrested by police while she was parked outside a building waiting for him. (2CCT 286-294, 300-302.)

Tejeda confirmed in the interview that Bernal was a Rockwood gang member who went by the moniker "Scooby." He also knew that Rockwood and 18th Street were rivals. (2CCT 282-283, 313.)

Guzman's cause of death was determined to be a through-and-through gunshot wound. The bullet entered the left side of his abdomen, traveled through his liver and heart, and then exited his body. (5RT 2701-2707; Peo. Exh. No. 99.)

Prior to trial, appellant and Bernal were identified by several witnesses to the shooting. Barhona and Juan Hernandez[4] identified appellant as the driver in field show-ups the night of the shooting. (2RT 1017, 1020-1025, 1029; 5RT 2418-2419, 2445.) Zuniga identified Bernal in a six-pack photographic lineup ("six-pack") and again at the preliminary hearing. (3RT 1282-1286.) Edwin Cuatlacuatl was not identified as being involved, but Detective Motto had information that he was a Rockwood member who was involved in a "skirmish" with 18th Street gang members approximately two weeks before the shooting. (5RT 2434-2435.)

3. The Letter Confiscated from Bernal While in Custody

While Bernal was in custody awaiting trial, he attempted to send a letter out of his jail facility to Jose Birrueta, a Rockwood member whose

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[3] At trial, Tejeda denied that Bernal made any such admissions and claimed he lied to police about Bernal's statements because he thought Bernal had already confessed. (3RT 1516-1518, 1566.)

[4] Hernandez could not be located for trial. (5RT 2445.)

moniker was "Nene." (4RT 2205-2210, 2216, 2218-2220; 5RT 2497-2501.) Bernal asked Birrueta to talk to appellant at Lynwood Jail and get her to "change her story" if she was "against him." He wrote, "they don't have anything on both of us," and asked Birrueta to "brainwash her, talk to her, convince her to say I was not with her ...." Bernal also asked Birrueta to talk to Zuniga, whom Bernal characterized as the "other fool" who was "snitching" him out. (4RT 2216-2217.)

4. Gang Testimony

Gang expert Officer Antonio Hernandez testified about gang culture and the Rockwood gang in particular, including its territory and primary activities. (5RT 2469-2471, 2473-2474.) He explained the rival 18th Street gang claimed territory bordering Rockwood's territory. (5RT 2491-2492, 2499.)

Officer Hernandez explained that gang members increased their status in a gang by "putting in work," or committing crimes and spraying graffiti. (5RT 2475-2476.) Members earned respect within and for the gang by causing others to fear them. (5RT 2477-2479.) It was a sign of strength for gang members to commit assaults in rival gang territory. (5RT 2485-2486.)

Gangs often used drive-by shootings as a means of committing assaults against their enemies. A "mission" was a term used primarily by Hispanic gangs to mean that a member was told to "put in work" and given a planned task or crime to carry out. (5RT 2480, 2762-2763.)

Officer Hernandez explained that it was common for gang members to ask, "Where you from?," just before a confrontation. It was not a real question. The person who asked the question had already made up his or her mind about what would happen and planned to assault the person asked. (5RT 2717-2718.)

Gangs viewed people who cooperated with police as enemies and labeled them as "snitches." Gangs commonly retaliated against people who

cooperated with police by threatening, assaulting, or even killing them. (5RT 2479, 2762-2763.)

Bernal was a known and admitted Rockwood member who went by "Scooby" and "Woody." (3RT 1327-36, 1340-1343, 1350, 1353-1356; 5RT 2497-2501.) Officers had contacted Bernal on more than 20 occasions near 1st Street and Westmoreland, a Rockwood gang "stronghold." (3RT 1329-1335, 1340-1343, 1350, 1353-1354.)

When presented with a hypothetical based on the circumstances of the instant case, Officer Hernandez believed the shooting would benefit the Rockwood gang. When a gang member went into a rival gang's territory, there was always the likelihood of and plan to confront a rival gang member. (5RT 2718-2721.) It was never safe for a gang member to casually cross into a rival gang's territory. (5RT 2480-2481.)

B. Defense Evidence[5]

In a recorded interview with police the night of the shooting, appellant gave conflicting statements about the events that day. (7RT 3635-3650; 2CCT 360-463.) She told police that she lived on Westmoreland and was only giving her neighbor, Bernal, a ride to pick up money that day. He directed her where to go. They picked up his friend, a minor who was dressed in "gangster attire," and she continued driving at Bernal's direction. Bernal and his friend got out of the car on Third Street, saying they would catch up to her. As she continued driving, she heard gunshots, but did not know what happened. (2CCT 381-385, 389, 391-395, 399.)

After officers said that appellant's version of events did not match what other witnesses said and asked for the truth, she said she did not know what she was "going to get into." (2CCT 403-405.) She "didn't see

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[5] Respondent omitted Bernal's evidence since the issues on review do not apply to him.

anything" if Bernal and his friend committed the shooting (2CCT 407), and did not know if Bernal had a gun at the time of the shooting, but knew he always carried one. (2CCT 421.)

After officers said that Guzman died and was only 16, appellant denied knowing what would happen and claimed she "got caught up." (2CCT 425-427.) She said Bernal "hit up" the victims, yelling, "Where you from?," just before the shooting. The victims yelled, "18th Street." Bernal yelled, "Rockwood," back. Appellant kept saying, "Let's go," to Bernal, but he got out of the car. She did not want to look and kept driving. (2CCT 428-429, 445-446.) She knew Bernal shot at the victims. (2CCT 445.) Appellant also admitted that Bernal got out of her car on Bonnie Brae, not Third Street. (2CCT 454.)

Appellant's trial testimony differed from both statements she gave to police on several points. She again denied being a gang member or having aided and abetted the shooting, and claimed she was merely giving Bernal a ride so that he could pick up some money. (3RT 1876; 7RT 3370-3373, 3401-3402, 3406.)

According to appellant's testimony, Bernal directed her to a location near the area of Bonnie Brae and Alvarado where they stopped and picked up Cuatlacuatl. At Bernal's continued direction, appellant drove to the intersection of 5th Street and Bonnie Brae. As they approached the intersection, appellant saw Guzman and Zuniga making gang signs and shouting "18th Street." (7RT 3373-3379, 3420, 3424, 3426, 3459-3460.) Appellant denied that anyone from her car said anything to them. Bernal got out without her stopping the car. Zuniga made a reaching motion like he was "getting a gun." She then heard several gunshots. (7RT 3376-3379, 3424, 3427.)

Bernal got back into the car and directed her to a location on Witmer. When she turned around, Bernal and Cuatlacuatl were out of the car.

Appellant waited for Bernal to return. (7RT 3380-3382, 3385, 3430, 3455-3456.) Police arrived within ten minutes. (7RT 3386-3387, 3441-3442.)

Appellant testified that she had lied to police during her interview for approximately one hour because she was scared. (7RT 3389-3392, 3450, 3664-3665.) After that first hour, she said that someone in her car, but not her, asked, "Where you from?," when they saw Guzman and Zuniga. One of the victims said, "18th Street." Bernal yelled "Rockwood," then got out of the car just before appellant heard gunshots. (7RT 3399-3400, 3454, 3658-3659.)

Appellant described Bernal as a nice, friendly person. She did not believe he was a gang member and had never known him to be violent. She then admitted telling police she heard he "beat the hell out of someone" and believed he carried a gun "all the time." (7RT 3382-3384, 3446-3448.)

Appellant said she knew the Rockwood gang was in the area where she lived. Later, she denied knowing whether there was gang activity where she lived or in the area where Guzman was shot. (7RT 3382-3384, 3393, 3424, 3452.)

At trial, after watching the interview video, appellant admitted she had not told police that Guzman and Zuniga provoked the incident or that Zuniga reached for a gun. She maintained that Guzman was "throwing up" gang signs. (7RT 3427, 3650-3652.)

Appellant's ex-husband, Schuyler McBride, testified they were married for approximately 12 years, until 1997, and had three children together. (6RT 3006-3011.) Neither McBride nor appellant were in a gang, but there was gang activity all over in the area where they lived and they had friends and relatives in gangs. (6RT 3006-3012, 3014-3019.) Their son, Steven McBride, also testified that appellant was not in a gang and

attended church.[6] (7RT 3302-3307, 3326.) He knew the Rockwood gang operated on Westmoreland (7RT 3307-3311), and said that appellant had been concerned for his safety from the time of her arrest up until trial (8RT 3993-3994).

The pastor and another attendee of appellant's church, New Hope Ministries, testified they had no reason to believe appellant was involved with gangs. Their church was involved with outreach programs related to gang members, people who had been released from jail, drug addicts, and people on skid row. Appellant was involved in some of the outreach services and attended bible study. (7RT 3620-3623, 3628-3630.)

Kimi Lent was a gang intervention specialist who worked with gang members trying to leave gangs or those who were on probation and parole by offering services and assistance with finding jobs. (6RT 3135-3138.) She testified that gang members sometimes acted independently of the gang and might engage in spontaneous acts of violence. (6RT 3153.) A gang member who approached someone and said, "Where you from?," was confronting that person. There was no friendly interpretation of the phrase, but there were not always outbreaks of violence when the phrase was used. (6RT 3156-3157.)

Gang members did not normally carry out missions with non-gang members or commit crimes with older, non-gang members. (6RT 3153, 3158-3159.) When presented with a hypothetical situation based on the facts of the case, Lent ultimately said she would need more facts, but admitted it was possible the crime would benefit the Rockwood gang. (7RT 3351-3355, 3357.)

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[6] Respondent refers to Steven McBride by his first name to avoid confusion with his father.

SUMMARY OF THE ARGUMENT

Contrary to the majority opinion of the Court of Appeal, this Court should reaffirm the rule that CALCRIM No. 361, the standard instruction addressing a defendant's failure to explain or deny facts, is applicable where a defendant's testimony is implausible or contains logical gaps. The instruction traditionally has been applied anytime a defendant fails to explain or deny facts, regardless of whether she does so by completely failing to address evidence or by giving implausible or non-responsive answers that do not truly explain or deny the adverse evidence. An answer that does not truly explain or deny evidence affects a defendant's credibility in the same manner as a complete failure to respond. In fact, bizarre or implausible answers will often be more damaging to a defendant's credibility than no answer at all. The rule adopted by the majority opinion, however, permits a jury to consider the effect of a failure to explain or deny facts only in the latter situation, which defies common sense.

The rule adopted by this Court, permitting CALCRIM No. 361 when a defendant fails to explain or deny testimony, whether by failing to answer at all or by giving implausible answers, comports with common sense and also avoids rendering the instruction inapplicable in almost all cases. If CALCRIM No. 361 were permitted only when a defendant failed to respond at all to adverse evidence, it would rarely be given because defendants are unlikely to choose to testify but say nothing when posed with questions and cross-examination is seldom limited to only discrete points.

Further, CALCRIM No. 361 was warranted here because appellant failed to explain or deny several critical prosecution facts. Her testimony was implausible in many respects or contained logical gaps, and she did not directly respond to or explain several points. For example, she claimed she drove Bernal around for up to three hours without knowing where they

were going; claimed not to know Bernal was the shooter even though he fired from the passenger side and across the roof of her car; said she never stopped the car at the scene although Bernal got out of her car, committed the murder, and got back in; gave varying implausible responses about why she waited for Bernal while he hid the gun after the shooting; and claimed to have little knowledge of any gang activity or behavior, but then said the victims threw gang signs and provoked the shooting. Appellant additionally denied yelling at the victims, but did not explain the prosecution evidence showing she was the only woman in the car and a woman yelled, "Where you guys from?" She further failed to directly answer some of the prosecutor's questions, including whether Cuatlacuatl was dressed like a gang member.

In any event, a proper prejudice analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836 ("*Watson*") demonstrates that any instructional error was patently harmless for the following reasons: (1) CALCRIM No. 361 is a permissive instruction which, by its own terms, does not apply unless the jury determines the defendant failed to explain or deny evidence; (2) the instruction does not direct the jury to draw any particular type of inference, it simply states the jury decides meaning of any failure to explain or deny evidence; (3) the court instructed with CALCRIM No. 200, directing the jury to follow only those instructions that apply to the facts of the case; (4) the court instructed with CALCRIM No. 362, on willfully false or misleading testimony, which permitted the same, if not a more damaging, assessment of appellant's testimony; and (4) the evidence against appellant was strong.

Next, the majority opinion of the Court of Appeal clearly erred in finding the trial court abused its discretion in admitting Bernal's declaration against interest (Evid. Code, § 1230). The majority opinion found Bernal's statement to his nephew while in the family home – we went to shoot at

two 18th Street gang members, Bernal shot, and appellant drove – to be untrustworthy solely because the statement amounted to "speculation" on appellant's state of mind. However, Bernal stated only what they *did*. As such, the majority opinion should have followed this Court's ruling in *People v. Samuels* (2005) 36 Cal.4th 96, that a declaration against interest may be admitted *in its entirety* even if it also incriminates a non-testifying defendant, as long as the statement is not exculpatory, self-serving, or collateral. In any event, any error was harmless given the strong evidence of appellant's guilt.

Further, the majority opinion would have been unable to find prejudicial prosecutorial misconduct if it had followed this Court's well-settled precedent. In response to defense counsel's erroneous argument that proof beyond a reasonable doubt was proof so strong a mother would convict her own child, the prosecutor stated on rebuttal that the jury's belief had to be, not imaginary, but based on the evidence. A prosecutor's statement is to be viewed in the context of the argument as a whole and, here, the trial court properly instructed on reasonable doubt, the prosecutor referred the jury back to the reasonable doubt instruction, and the prosecutor re-read a portion of that instruction before making the complained-of comment. Reviewing courts are also to presume that jurors understand and follow the trial court's instructions, and the jury here had been told to follow the court's instructions if anything the attorneys said conflicted. Finally, as the comment was innocuous at worst and the evidence against appellant was strong, a proper application of this Court's precedent demonstrates that any misstatement was harmless under any standard.

Additionally, since there were no errors to cumulate, or only minor harmless errors at worst, appellant was not denied a fair trial due to the cumulative impact of any errors. Accordingly, the judgment of the Court of

Appeal, overturning appellant's first degree murder and attempted murder convictions, should be reversed.

ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED WITH CALCRIM NO. 361, ADDRESSING A DEFENDANT'S FAILURE TO EXPLAIN OR DENY TESTIMONY, BECAUSE THE INSTRUCTION APPLIES WHERE A DEFENDANT'S RESPONSES ARE IMPLAUSIBLE OR CONTAIN LOGICAL GAPS

CALCRIM No. 361 allows a jury to consider a defendant's failure to explain or deny adverse evidence, if she could reasonably be expected to have done so based on the circumstances, and to decide the meaning and importance of any such failure when assessing her credibility. The instruction traditionally has been, and logically should be, applied anytime a defendant fails to explain or deny facts, regardless of whether she does so by completely failing to address evidence or by giving implausible or non-responsive answers that do not truly explain or deny the adverse evidence.

The trial court in the present case instructed the jury in accordance with CALCRIM No. 361[7] as follows:

> If the defendant Norma Cortez failed in her testimony to explain or deny evidence against her and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt.

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[7] CALCRIM No. 361 informs the jury of the principle set forth in Evidence Code section 413, which states as follows:

> In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

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.

(8RT 4227-4228.) As shown below, the instruction was properly given.

A. The Court of Appeal's Conflicting Application of CALCRIM No. 361 Where a Defendant's Testimony Is Implausible or Contains Logical Gaps

On at least two occasions, this Court has found that an instruction on the failure to explain or deny evidence applies when a defendant's testimony is bizarre, implausible, or contains logical gaps.[8] (*People v. Belmontes* (1988) 45 Cal.3d 744, 784 ("*Belmontes*"), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 ("*Doolin*"); *People v. Redmond* (1981) 29 Cal.3d 904, 911 ("*Redmond*").) In *Belmontes*, the Court found that CALJIC No. 2.62 applies to bizarre or implausible answers, and specifically held the instruction applied there because the defendant's testimony could not be reconciled with the prosecution's eyewitness testimony and physical evidence. (*Belmontes*, *supra*, 45 Cal.3d at p. 784, citing *People v. Mask* (1986) 188 Cal.App.3d 450, 455 ("*Mask*").) In *Redmond*, this Court held that CALJIC No. 2.62 was warranted, inter alia, because the defendant's description of the infliction of the victim's wound could not be reconciled with the physical evidence. (*Redmond*, *supra*, 29 Cal.3d at p. 911.) The Court explained, "It is entirely proper for a jury, during its deliberations, to consider logical gaps in the

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[8] Most of the published cases on point addressed CALJIC No. 2.62, the predecessor to CALCRIM No. 361. While the wording of the instructions differs to some extent, the instructions are essentially the same in substance and have been treated as one in the same by the Court of Appeal. (See *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067 ("*Rodriguez*").)

defense case, and the jury is reminded of this fact by [CALJIC No. 2.62]." (*Ibid.*)

At least four lower court decisions have similarly found the failure to explain or deny instruction to be applicable where a defendant's testimony contains logical gaps or is implausible or non-responsive. (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1030 ("*Sanchez*") [addressing logical gaps]; *Mask, supra*, 188 Cal.App.3d at p. 455 [bizarre or implausible answers]; *People v. Roehler* (1985) 167 Cal.App.3d 353, 393-394 ("*Roehler*") [logical gaps]; *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1120-1122 ("*Haynes*") [implausible and non-responsive answers].)

Nevertheless, the majority opinion in the present case ruled that trial courts may instruct with CALCRIM No. 361 only where a defendant completely fails to address adverse evidence. (Opn. at 14-15.) The majority relied on *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469 ("*Lamer*"), and *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 ("*Kondor*"), without addressing any of the above-noted contrary authority. (Opn. at 13, 15; see RB 58-59 [noting conflict].) The majority found error here because appellant "generally" explained her actions the day of the murder and the plausibility of her answers "[wa]s not the test" for application of the instruction. (Opn. at 14-15, citing *Kondor, supra*, 200 Cal.App.4th at p. 1469.)

Without addressing prior conflicting authority, the Court of Appeal in *Kondor* had found that the test for application of a failure to explain or deny instruction is "not whether the defendant's testimony is believable," and determined the instruction is "unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear." (*Kondor, supra*, 200 Cal.App.3d at p. 57.) Although this Court made a contrary ruling in *Belmontes* two months later, *Lamer* and the majority opinion here followed *Kondor* without

acknowledging *Belmontes* or any other conflicting authority. (Opn. at 13-15; *Lamer*, *supra*, 110 Cal.App.4th at p. 1469.) As set forth below, this Court should reaffirm that CALCRIM No. 361 is warranted when a defendant's testimony contains logical gaps or is bizarre or implausible.

B. CALCRIM No. 361 Should Apply When a Defendant's Testimony Is Implausible or Contains Logical Gaps Because Such Testimony Is Inherently a Failure to Explain or Deny Facts

This Court should reaffirm that CALCRIM No. 361 applies when a defendant's answers contain logical gaps or are implausible or non-responsive because such answers are inherently a failure to explain or deny facts. An implausible answer that only superficially accounts for a defendant's activities does not truly *explain* adverse evidence and is thus the functional equivalent of no explanation at all. There is no reason to distinguish a complete failure to respond to evidence from an answer that has the same effect. (See *Haynes*, *supra*, 148 Cal.App.3d at pp. 1120-1121 [defendant's implausible responses about his and sexual assault victim's actions did not constitute true explanations or denials of prosecution evidence]; see, e.g., *Belmontes*, *supra*, 45 Cal.3d at p. 784 [implausible testimony warrants instruction, and defendant failed to explain or deny evidence because his testimony was implausible compared with testimony of prosecution witnesses and physical evidence].)

The Court of Appeal in *Haynes* illustrated the point in finding support for a failure to explain or deny instruction where the defendant's answers were non-responsive and implausible. There, when asked why he gave a false name and address while registering at a motel where the crimes occurred, the defendant answered, "'[I]t's not uncommon for a person that goes to a motel to not use his true name.'" (*Haynes*, *supra*, 148 Cal.App.3d at pp. 1119, 1121.) The Court of Appeal stated, "We doubt that such an expression of opinion regarding the characteristics of motel users in general,

'explains' why the speaker so chose to conduct himself on a given specific occasion." (*Ibid.*) The court also addressed the defendant's implausible claim that the victim left the motel room "sexually satisfied" and "simply walked away in a strange and 'raunchy' part of town," rejecting his offer for a ride, finding it was not an "explanation" and, "if anything, it constituted an admission of an incriminating fact, rather than its denial." (*Ibid.*) As *Haynes* demonstrates, an implausible or non-responsive answer is a failure to explain or deny adverse evidence.

Moreover, CALCRIM No. 361 reminds the jury that it may consider the defendant's failure to explain or deny facts when assessing her credibility. (See *Redmond, supra*, 29 Cal.3d at p. 911.) A bizarre or highly implausible explanation might very well be more damaging to a defendant's credibility than no answer at all, yet the *Kondor/Lamer* rule applied by the majority opinion, here, would permit CALCRIM No. 361 to be given only in the latter situation. Such a rule defies logic. (See, e.g., *Haynes, supra*, 148 Cal.App.3d at pp. 1121-1122 [implausible answers do not truly explain or deny prosecution facts]; CALCRIM No. 226 [informing jury that, in evaluating witness testimony, it may consider anything tending to prove or disprove truth, including whether testimony was reasonable when considering the other evidence and whether other evidence proved or disproved the testimony]; see also Evid. Code, § 780, subds. (a) & (b) [in determining witness credibility, jury may consider witness's demeanor while testifying, the manner in which he testifies, and the character of his testimony].) Indeed, under the *Kondor* rule adopted by the majority opinion, *any answer* no matter how non-responsive, implausible, or improbable would preclude instruction with CALCRIM No. 361.

In making its sweeping ruling, *Kondor* relied on a statement in *People v. Saddler* (1979) 24 Cal.3d 671 ("*Saddler*"), that a contradiction is not a failure to explain or deny, and extrapolated it to mean that any answer,

regardless of how improbable, precludes a failure to explain or deny instruction. (*Kondor*, *supra*, 200 Cal.App.3d at p. 57.) However, *Saddler* demonstrates only that a simple contradiction, alone, may not amount to a failure to explain or deny evidence. (*Saddler*, *supra*, 24 Cal.3d at pp. 682-683 [finding the instruction to be inapplicable because defendant's testimony that he sometimes smoked Kool cigarettes, but never requested them, was only a contradiction of one officer's testimony that defendant sometimes requested Kool cigarettes].)

Later, in *Belmontes*, the Court distinguished conflicts that were "tangential, collateral or of little importance" from those on "crucial points," equating the latter to a failure to explain or deny evidence. (*Belmontes*, *supra*, 45 Cal.3d at p. 784 [detailing the irreconcilable conflicts between defendant's description of events, including how the victim's wounds were inflicted, and the testimony of prosecution eyewitnesses and the autopsy surgeon, and then concluding that implausible testimony warrants a failure to explain or deny instruction].) Accordingly, *Belmontes* clarifies that implausible testimony or testimony otherwise creating "crucial points of conflict," versus collateral or tangential contradictions, amounts to a failure to explain or deny evidence. (*Ibid.*, citing *Mask*, *supra*, 188 Cal.App.3d at p. 455 [finding contradiction, alone, does not warrant CALJIC No. 2.62; "[h]owever, if the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible" the instruction is warranted].)

The *Kondor/Lamer* rule adopted by the majority opinion is not only contrary to this Court's authority, the majority of Court of Appeal cases, and common sense, but would render CALCRIM No. 361 inapplicable in almost all cases. It would be highly unusual for a defendant to choose to testify and then refuse to answer questions. The more likely scenario is that the defendant would provide answers, such as those provided by appellant,

that simply contradict the prosecution evidence or that do not explain or deny the facts because the answers are so bizarre or implausible to a reasonable person given the other evidence presented.

The only other situation where the instruction would apply if the *Kondor/Lamer* view were adopted would be when a defendant's direct testimony is limited and does not permit for cross-examination on certain topics. (See *Saddler*, *supra*, 24 Cal.3d at p. 679.) As this Court has explained, however, although cross-examination is restricted to the scope of the direct examination, "when a defendant takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide." (*Ibid.* [also noting the difference between a case where defendant gives an alibi defense, i.e., a general denial, and where defendant's testimony was limited to a denial of an alleged admission].) Thus, under the rule adopted by the majority opinion here, CALCRIM No. 361 would apply only in rare cases where a defendant limited her direct testimony to a very specific issue or completely refused to answer questions.

On the other hand, this Court's affirmation of the *Belmontes/Redmond* rule – that CALCRIM No. 361 is warranted where a defendant does not explain or deny facts either by failing to respond at all to prosecution evidence or by giving implausible or non-responsive answers – would be consistent with common sense principles as well as the normal rules governing a jury's assessment of witness credibility, and would avoid rendering the instruction inapplicable in almost any case.

C. The Trial Court Properly Instructed the Jury with CALCRIM No. 361 Because Appellant Failed to Explain or Deny Testimony

Trial courts have a duty to instruct on the "general principles of law relevant to the issues raised by the evidence. [Citations]." (*People v.*

Breverman (1998) 19 Cal.4th 142, 154, internal quotations omitted; *Saddler*, *supra*, 24 Cal.3d at p. 681.) Courts also have a "correlative duty to 'refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.'" (*Saddler*, *supra*, 24 Cal.3d at p. 681, quoting *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10.) Moreover, "'before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference[.] [Citation.]'" (*Saddler*, *supra*, 24 Cal.3d at p. 681, quoting *People v. Hannon* (1977) 19 Cal.3d 588, 597.) This Court reviews claims of instructional error independently. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *Rodriguez*, *supra*, 170 Cal.App.4th at p. 1066.)

The trial court in the present case properly instructed the jury with CALCRIM No. 361 because appellant failed to explain or deny several critical portions of the prosecution evidence. Her testimony was riddled with implausible statements and logical gaps, and she either did not directly answer or gave vague responses to several of the prosecutor's questions. The fact that she may have "generally" responded to questioning (see Opn. at 13-15) does not preclude a finding that she failed to explain or deny many points, whether by completely failing to respond or giving answers so implausible that she did not truly explain or deny the evidence. (See Dis. Opn. at 2-3 [finding appellant "failed to explain or deny a considerable body of evidence against her"].)

First, appellant's "general" response about her conduct the day of the shooting was implausible. As succinctly stated in Justice Grimes's dissent:

> [Appellant] 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.

(Dis. Opn. at 2, italics in original.)

Indeed, when the prosecutor asked appellant why she gave Bernal a ride, she said she believed that he was only getting money from a friend. She implausibly claimed, however, that she did not know the pick-up location and she drove Bernal around at his direction, without knowing where they were going, apparently for approximately three hours.[9] (7RT 3417-3418.) Appellant then testified that she did not know why the minor got in her car and did not ask because, "I didn't care." (7RT 3415.)

Appellant further denied yelling anything from the car. However, she admitted she was the only woman in her car at the time and failed to explain the testimony of both Zuniga and Ramos that a woman was yelling from the car. (7RT 3454-3455; see, e.g., *Redmond*, *supra*, 29 Cal.3d at p. 911 [CALJIC No. 2.62 warranted due, inter alia, to "the variance between the description of [the victim's] wound as 'downward and inward' and

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[9] She did not account for a three-hour time discrepancy initially, adamantly stating the events occurred much earlier, then agreed she could have been mistaken when the prosecutor later presented her with the time of her arrest. (See 7RT 3406-3407, 3436-3437.)

defendant's version of an 'upward' thrust caused by [the victim's] fall on the knife"].)

When the prosecutor asked appellant about the shooting scene, she implausibly said that Bernal got out of the car, the shooting occurred, and he got back in, all without her ever stopping the car. (7RT 3425-3431; Dis. Opn. at 2.) She claimed she continued driving slowly, without stopping, despite being scared by the gunshots. (7RT 3430-3431.) Appellant did not explain how, if the car was still moving, Bernal was able to enter and exit without at least getting injured; how he could have fired the gun while standing outside the door and with his hand on the roof of the car; how Barhona and Hernandez were able to get a good enough look at her to identify her; or how Ramos was able to not only see that she and Bernal were yelling over each other at the victims, but also to correctly record her license plate number. (See Statement of the Case, *ante*; see, e.g., *Belmontes*, *supra*, 45 Cal.3d at p. 784 [CALJIC No. 2.62 warranted where defendant said victim came directly to his door and would not have had time to open the car trunk first, but failed to explain conflicting testimony of a witness, corroborated by a disinterested neighbor, that victim had attempted to open trunk first; defendant's version of events further failed to account for defensive wounds on the victim's body or noises he would have heard from infliction of wounds]; *Mask*, *supra*, 188 Cal.App.3d at p. 455 [CALJIC No. 2.62 warranted because defendant's explanation that he was dropped off at friend's house and then rode his bicycle to two other locations, did not account for three-hour time period].)

Appellant's testimony was particularly implausible and further contained a logical gap when she claimed she did not believe Bernal was the shooter. (7RT 3431-3441.) All of the eyewitnesses identified him as the shooter, and appellant was clearly in the car with him. She admitted the gunshots occurred only after Bernal got out of her car and stopped when he

got back in. (7RT 3431, 3438-3439.) She claimed that she saw Zuniga reach for a gun from across the street as she drove by (7RT 3427), but she somehow missed Bernal pulling a gun from his waist *as he got out of her car*, shooting at Guzman and Zuniga *from the passenger side and across the roof of the car*, chasing Guzman while continuing to shoot, and then putting the gun away as he got back into the car (2RT 957-960, 973-974, 986, 1007-1009; 3RT 1266-1271, 1306, 1319). (See, e.g., *Sanchez*, *supra*, 24 Cal.App.4th at p. 1030 [CALJIC No. 2.62 warranted where defendant gave detailed and specific testimony about his alcohol and cocaine consumption the day of murder, but claimed lack of recall regarding inculpatory details]; *Roehler*, *supra*, 167 Cal.App.3d at pp. 393-394 [CALJIC No. 2.62 warranted where defendant's presence at scene rendered his claimed lack of knowledge of what occurred a logical gap in the evidence].)

Appellant testified that she only knew "something bad" happened and wondered why Bernal had gotten out of the car. (7RT 3439.) According to her testimony, although an unexpected shooting had just occurred, in which she and Bernal were at least witnesses and possibly intended victims, there was no discussion in her car of what had just happened. (7RT 3431-3441.)

While CALCRIM No. 361 is warranted only if the defendant has or reasonably should have the personal knowledge necessary to explain or deny the evidence (*Saddler*, *supra*, 24 Cal.3d at. 681), the instruction is not precluded simply because a defendant denies knowledge. (But see Opn. at 15.) In *Roehler*, for example, the Court of Appeal held that CALJIC No. 2.62 applied where, despite defendant's presence at the scene, he claimed not to know what caused his wife and stepson to lose consciousness and drown when their small boat capsized. (*Roehler*, *supra*, 167 Cal.App.3d at p. 394.) The prosecution evidence showed the victims suffered pre-mortem head injuries from a small instrument and then drowned, it was extremely

difficult to cause the boat to capsize, the defendant was not injured and was an excellent swimmer, and he had recently obtained life insurance policies for both victims. (*Id.* at pp. 363-364, 366-371.) Noting that the jury could not draw unfavorable inferences if the defendant did not have the necessary knowledge, the court found the converse also to be true, stating "it would seem that a defendant's claim not to know is a credibility question; the state of his knowledge, what it was reasonable to expect that [the defendant] *would* know, given the circumstances in which he was, was within the province of the jury to determine." (*Id.* at p. 394, citing *Redmond*, *supra*, 29 Cal.3d at p. 911.)

Likewise, CALCRIM No. 361 was warranted here because appellant's claimed lack of personal knowledge about certain facts was incredible given her presence at the scene. By all accounts, appellant was the driver and Bernal was the front passenger in her car at the time of the shooting. Bernal was the shooter and he fired the first few gunshots from the passenger side and across the roof of appellant's car, with one hand still on the car. Under the circumstances, appellant's incredible claims she did not know Bernal was the shooter or how a bullet ended up on her passenger-side floorboard, "while a denial of sorts," created logical gaps that warranted a credibility determination by the jury pursuant to CALCRIM No. 361. (*Roehler*, *supra*, 167 Cal.App.3d at p. 394 [explaining that defendant's claimed lack of knowledge of what occurred, "while a denial of sorts, cannot be logically equated with an alibi placing him across town" given his presence at the scene].)

Appellant also did not plausibly explain why she waited for Bernal on Witmer after the shooting. (See Dis. Opn. at 2.) During direct examination, she said she waited because she was scared. Then, she said she thought Bernal was only picking up money. (7RT 3385.) However, appellant did not explain why she would have thought he was simply

continuing on with their original plan to pick up money, immediately after they had been involved in an allegedly unexpected shooting and given that he already had an opportunity to pick up the money when they stopped *at the same location before the shooting*. (2CCT 383-384.) She further implausibly testified that, even though she knew something "bad" had happened, she did not believe she had done anything wrong when police arrived, was not sure if police were there in relation to the shooting, and she was simply going to move her car out of their way. (7RT 3385-3386.)

When the prosecutor cross-examined appellant about her reasons for waiting for Bernal, she said she was afraid of him, but did not explain why, especially given that she claimed to believe he was not the shooter, thought he was only picking up money, and earlier testified she thought he was nice. (7RT 3382, 3385, 3431, 3439-3440.) She denied that Bernal gave her orders that day; however, when asked whether she followed his directions without questioning him, she responded only by saying she was scared. (7RT 3438; see Dis. Opn. at 2 [she failed to explain why "as a mature woman, she took orders from a young associate of the Rockwood gang"].) The prosecutor specifically asked appellant why she waited once Bernal and the minor got out of the car, given that she was alone and could have left. At that point, she said, "because I don't think I did anything wrong. I was giving somebody a ride." (7RT 3442; see Dis. Opn. at 2.) Later, appellant said she did not leave because she thought Bernal would get mad. (7RT 3654-3655.)

Appellant at times claimed to have little or no knowledge of gang activity or behavior, gang territories, or that Bernal was a gang member, but at other times testified the victims threw gang signs before Bernal shot at them, she knew Bernal was a Rockwood member who went by "Scooby," she knew 18th Street's area by its graffiti, and knew she lived in Rockwood territory. (7RT 3382-3384, 3424, 3442, 3446-3448, 3452, 3661, 3663,

3981-3982.) In context, her claims of having little or no knowledge of gang culture or territories, but then suddenly understanding the victims were throwing gang signs and knowing 18th Street marked its boundaries with graffiti, for example, were implausible and not simply inconsistent.

There were also more minor points where appellant failed to directly answer questions. For example, she was evasive at trial when asked whether Cuatlacuatl was dressed like a gang member, despite telling officers during her interview that he wore "gangster attire" (2CCT 391-392). At trial, the prosecutor asked appellant whether Cuatlacuatl was dressed like a gang member. She responded, "He was wearing a very loose shirt." The prosecutor asked three more times and each time she said, "The way kids dress now, yes," or "I see so many kids dress like him." (7RT 3415-3416; but see Opn. at 15 [finding she answered the question].)

The foregoing is rife with examples of appellant's failure to explain or deny facts. At the very least, her testimony sufficiently warranted instruction with CALCRIM No. 361 so that the jury could decide whether it believed she failed to explain or deny facts and, if so, whether it affected her credibility.

D. Any Error Was Patently Harmless

Even assuming CALCRIM No. 361 was not warranted here, appellant cannot show that an outcome more favorable to her was reasonably probable. The majority opinion found that appellant suffered cumulative prejudice from this instructional error and two other errors. However, it did not engage in a prejudice analysis of CALCRIM No. 361 (Opn. at 15), with the exception of one sentence in its later cumulative error analysis: "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" (Opn. at 19-20). A prejudice analysis under *Watson*, *supra*, 46 Cal.2d at

page 836, demonstrates that any error was patently harmless due to the safeguards included within CALCRIM No. 361 itself, the other instructions given by the trial court that mitigated any potential prejudice, and the strong evidence of appellant's guilt. (See *Saddler*, *supra*, 24 Cal.3d at p. 683 [applying *Watson* to erroneous instruction with CALJIC No. 2.62 and including assessment of instruction itself, other instructions given, and strength of the evidence]; *Lamer*, *supra*, 110 Cal.App.4th at p. 1472 [same]; *Rodriguez*, *supra*, 170 Cal.App.4th at p. 1067 [finding that *Saddler* applies with equal force to CALCRIM No. 361 and CALJIC No. 2.62].)

First, 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. The instruction states that "if" the jury finds the defendant failed to explain or deny evidence, it may consider that failure in evaluating the evidence. (See *Saddler*, *supra*, 24 Cal.3d at p. 680 [under CALJIC No. 2.62, "inferences are permissible only *if the jury* finds that defendant failed to explain or deny facts"], italics in original; *Lamer*, *supra*, 110 Cal.App.4th at p. 1472 [error is "routinely" found harmless due to instruction's permissive language].)

Although CALCRIM No. 361 permits the jury "to draw a negative inference" (Opn. at 19), it neither tells the jury to do so nor tells it what kind of inference, if any, to draw. The instruction states that, if the jury finds the defendant failed to explain or deny facts, "you may consider (his/her) failure to explain or deny in evaluating that evidence[,]" and "*it is up to you to decide the meaning and importance of that failure*." (CALCRIM No. 361, italics added.) In fact, the language in CALJIC No. 2.62, telling the jury it could draw an "unfavorable" inference, was not included in CALCRIM No. 361. (See CALJIC No. 2.62 ["you may take that failure into consideration as . . . indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant

are the more probable"]; see also *Saddler*, *supra*, 24 Cal.3d at p. 685, fn. 2 (Conc. Opn. of Bird, C.J.) [advising that future versions of CALJIC No. 2.62 should more closely track Evidence Code section 413, which "leaves entirely with the jury the determination of what inferences to draw"].)

CALCRIM No. 361 additionally includes language favorable to the defense, cautioning that a defendant's failure to explain or deny a fact "is not enough by itself to prove guilt" and that "[t]he People must still prove the defendant guilty beyond a reasonable doubt." (See *Lamer*, *supra*, 110 Cal.App.4th at p. 1472 [finding similar language in CALJIC No. 2.62 was "favorable to the defense" in cautioning that the instruction does not create presumption of guilt, by itself warrant an inference of guilt, or relieve the prosecution of burden of proof]; see also *Saddler*, *supra*, 24 Cal.3d at p. 680; *Rodriguez*, *supra*, 170 Cal.App.4th at p. 1067 [CALCRIM No. 361 retains language similar to that in CALJIC No. 2.62 preserving presumption of innocence and explaining prosecution's burden of proof].)

The instruction, in essence, simply reminds jurors of a common sense principle they would likely apply even in the absence of the instruction. (See, e.g., *Haynes*, *supra*, 148 Cal.App.3d at pp. 1119-1120 ["In the typical case [CALJIC No. 2.62] will add nothing of substance to the store of knowledge possessed by a juror of average intelligence"]; see also CALCRIM No. 226 [addressing the same general principle with regard to all witnesses].) Thus, any analysis of the language of CALCRIM No. 361 would have revealed how unlikely it was for the jury to have drawn an improper, negative inference against appellant if it found she adequately explained or denied facts.

Next, the trial court's other instructions mitigated any potential prejudice. The court instructed the jury according to CALCRIM No. 200, in relevant part, as follows:

> Some of these instructions may not apply depending on your findings about the facts of the case. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

(2CCT 481.) The court further instructed the jury to "[p]ay careful attention to all of these instructions and consider them together." (8RT 4004.)

As jurors are presumed to understand and follow the trial court's instructions, the jury would have understood from CALCRIM No. 200 as well as CALCRIM No. 361 itself that CALCRIM No. 361 was inapplicable if the jury found that appellant adequately explained or denied facts. (See *Saddler*, *supra*, 24 Cal.3d at p. 681 [finding that CALJIC No. 17.31, the predecessor to CALCRIM No. 200, along with the strength of the evidence mitigated any prejudicial effect of CALJIC No. 2.62]; *Lamer*, *supra*, 110 Cal.App.4th at p. 1472 [CALJIC No. 17.31 "mitigates any prejudicial effect related to the improper giving of CALJIC No. 2.62"]; see also *People v. Carey* (2007) 41 Cal.4th 109, 130 ("*Carey*") [jury instructions are to be read as a whole and it is presumed the jury is capable of understanding and correlating all of the instructions]; *People v. Davis* (2005) 10 Cal.4th 463, 542 ("*Davis*") [jurors are presumed to understand and follow the court's instructions].)

The trial court additionally instructed the jury with CALCRIM No. 362, on a defendant's false or misleading statements, which had the same effect as CALCRIM No. 361. CALCRIM No. 362 informed the jury that, if it found appellant intentionally made a false or misleading statement about the crime, "that conduct may show she was aware of her guilt" and "you may consider it in determining her guilt." (8RT 4228.) Appellant's implausible statements are the same statements the jury would have deemed to be false or misleading under CALCRIM No. 362. Accordingly, the jury

would have assessed the statements in the same, if not a more negative, manner under CALCRIM No. 362 in any event.

Finally, the evidence strongly demonstrated that appellant went into 18th Street territory with Bernal on a mission to shoot potential 18th Street gang members. (See 5RT 2480, 2762-2763.) Appellant was a Rockwood associate who lived in Rockwood territory. She drove Bernal, a Rockwood member who was armed with a nine-millimeter firearm, into the rival 18th Street gang's territory. As Officer Hernandez explained, it was never safe for gang members to casually enter a rival gang's territory and they did so only with a plan to assault or retaliate against rival gang members. (5RT 2479-2481.) In fact, appellant admitted her backseat passenger was Cuatlacuatl (7RT 3459-3460), a Rockwood member whom officers believed had been in an altercation with 18th Street members two weeks before the shooting (5RT 2434-2435), and she slammed on the brakes of the car as soon as she saw the victims.

Appellant was also the only woman in her car at the time of the shooting. Zuniga as well as Ramos, who was a disinterested witness, heard a woman yelling at Guzman and Zuniga. Zuniga heard appellant specifically ask, "Where you guys from?," when the car approached. The prosecution and defense gang experts agreed that asking, "Where you from?," was meant as a confrontation and was not a real question in gang culture. There was no friendly interpretation of the phrase, and the person asking the question planned to assault the person asked. (5RT 2717-2718; 6RT 3156-3157.) Accordingly, appellant announced her intent to, at a minimum, assault Guzman and Zuniga.

Further, Ramos heard appellant and Bernal yelling over each other at Guzman and Zuniga. Zuniga then heard appellant say, "Let them have it," just before Bernal shot and killed Guzman. As appellant knew Bernal always carried a gun, the only reasonable inference was that she knew she

was encouraging him to shoot Guzman and Zuniga. (See, e.g., *People v. Sanchez* (2001) 26 Cal.4th 834, 849-850 [premeditation shown, even though the particular shooting might have been spontaneous, where there was a preexisting gang rivalry and the defendant, armed with a loaded firearm, and his accomplice drove slowly by rival gang members and both sides threw gang signs before defendant fired and killed an innocent bystander].)

Given the foregoing, appellant's claim she did not know or intend that the shooting would happen strains credulity. (See *People v. Jurado* (2006) 38 Cal.4th 72, 136 ["an aider and abettor is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime"], internal quotations omitted; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) The only reasonable inference to be drawn from the evidence is that she and Bernal went on a mission into 18th Street territory looking for 18th Street gang members to assault or kill, she stopped as soon as she saw the victims, immediately followed through with her plan to confront them by yelling, "Where you from?," and then encouraged the always-armed Bernal to shoot them by saying, "Let them have it." (See Dis. Opn. at 11 ["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"].)

Moreover, police caught appellant sitting in the driver's seat of the car immediately after the shooting, while waiting for Bernal to hide the gun. An innocent person truly surprised by the shooting would not have continued waiting for the shooter once she was left alone in her car and could have easily left, and her claim they were simply continuing with their

original plan to pick up money was incredible. The only reasonable interpretation of the evidence was that she waited for Bernal because they committed the crime together and he was discarding the incriminating evidence.

Bernal's statements to his nephew and the letter he attempted to send outside of his jail facility further confirmed appellant's guilt. He told Tejeda that he and appellant committed the crimes together (2CCT 276-282, 284-287, 295, 299-302, 306-308, 313; 3RT 1523-1527), and his letter asking Birrueta to find out if appellant was against him and, if so, to get her to "change her story" and "convince her to say I was not with her" further suggested the same (4RT 2216-2217). (See Dis. Opn. at 11.)

In concluding the evidence of appellant's intent was "not particularly strong," the majority apparently gave more credence to appellant's testimony, emphasizing that "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." (Opn. at 19.) However, evidence of a defendant's intent is almost always circumstantial, and circumstantial evidence "is as sufficient as direct evidence to support a conviction. [Citations.]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; accord, *People v. Lingberg* (2008) 45 Cal.4th 1, 27; *People v. Lewis* (2001) 25 Cal.4th 610, 643 [direct evidence of intent is rare and is usually inferred from the facts and circumstances surrounding the offense].) As shown in detail above, the circumstantial evidence of appellant's intent was strong. In contrast, her testimony was incredible, implausible, and impeached several times.

As a result of the strong evidence showing appellant's intent to aid and abet the gang murder, the permissive nature of CALCRIM No. 361 as well as other safeguards contained within the instruction, and the fact that other instructions were given which would have mitigated any prejudice,

appellant cannot show that an outcome more favorable to her was reasonably probable absent CALCRIM No. 361. In fact, due primarily to the permissive nature of CALCRIM No. 361 and that trial courts also normally instruct on CALCRIM No. 200, the Court of Appeal in *Lamer* noted it was unable to find "a single case" in which the erroneous inclusion of a failure-to-explain instruction constituted reversible error. (*Lamer*, *supra*, 110 Cal.App.4th at p. 1472.) The instant case is no exception.

II. THE TRIAL COURT PROPERLY ADMITTED THE STATEMENT BERNAL MADE TO HIS NEPHEW UNDER THE HEARSAY EXCEPTION FOR DECLARATIONS AGAINST INTEREST

In holding that Bernal's declaration against interest (Evid. Code, § 1230) – his statement to his nephew that he and appellant went to shoot at two "18s," that he was the shooter, and that appellant drove – was erroneously admitted against appellant because it also implicated her (Opn. at 17-20), the majority opinion failed to acknowledge or apply the rule announced by this Court in *People v. Samuels*, *supra*, 36 Cal.4th 96, for admissibility of declarations that implicate a non-testifying defendant. (Compare Opn. at 17-20 with RB 41-43 [discussing *Samuels*] & Dis. Opn. at 3-6.) If the majority had followed *Samuels*, it would have had little choice but to find that Bernal's statement was admissible in its entirety because it was against his interest (not exculpatory, self-serving, or collateral), the portions implicating appellant were inextricably tied to and part of his statement against interest, and it was made under circumstances that this Court and the Court of Appeal have repeatedly deemed to demonstrate trustworthiness.

A. The Relevant Lower Court Proceedings

Prior to trial, appellant moved to exclude Bernal's statement to Tejeda, arguing it was inadmissible under Evidence Code section 1230 and

that exclusion under Evidence Code section 352 was warranted in any event. (Supp. RT. 23-43.) The trial court found the statement was not testimonial and agreed with the prosecutor that it was reliable and admissible without redaction. The court further ruled that exclusion under Evidence Code section 352 was not appropriate. (Supp. RT 41-43.)

At trial, Detective Arteaga testified that he spoke with Tejeda the day after the shooting. Tejeda admitted Bernal told him that Bernal had shot "two 18s." (3RT 1515-1516; 4RT 2113, 2135.) During Tejeda's interview, which was played for the jury, he said Bernal told him earlier that day that Bernal was involved in a shooting on the previous day. (2CCT 276-277; 3RT 1542, 1549-1551; 4RT 2113, 2135.) As relevant to appellant, Tejeda said, "[Bernal] said that he went shooting with some – somebody at some woman I think. I'm not sure." (2CCT 277.) Tejeda also relayed that Bernal said "he went with some lady to go shoot somebody. He was shooting[,]" and "he told me he shot." (2CCT 279.) Bernal also told Tejeda that appellant was driving while Bernal fired at the two "18s." (2CCT 280-281.)

Tejeda repeated the same general version of Bernal's statements throughout the interview (2CCT 281-283, 286-289, 292-293, 299) and also specifically relayed that Bernal said, "we went to shoot at two 18s," clarifying he shot while she drove (2CCT 281, 289), and "me and this woman, ... we went shooting some 18s, like at some 18s" (2CCT 291). Bernal also said he was inside a building when police caught appellant. (2CCT 300-301.)

Tejeda identified the woman's name as "Norma" when Detective Arteaga listed it. He also identified appellant in a six-pack as that woman. (2CCT 304-307.)

At trial, Tejeda confirmed that Bernal was like a big brother to him and they were close. He claimed Bernal did make any admissions about a

about a shooting on September 3, 2008. (3RT 1516-1518.) Tejeda said he lied to the police because he believed Bernal had already confessed. (3RT 1566.)

Tejeda admitted that Bernal was a member of the Rockwood gang. (3RT 1519-1520.) He knew appellant from seeing her at their apartment building, and had seen her and Bernal hanging out together with Rockwood gang members. (3RT 1532-1536.)

On appeal, the majority opinion held that Bernal's statement was erroneously admitted against appellant. (Opn. at 17-18.) The majority agreed the statement was "against [Bernal's] penal interest, [and] made in a setting that promoted truthfulness (a discussion in the family home between close family members)[.]" Bernal's statement, "we went" to shoot someone, however, amounted to untrustworthy speculation on appellant's state of mind. (Opn. at 18.) The majority found the error to be prejudicial, in combination with the errors addressed in Arguments I and III, without engaging in a prejudice analysis other than to state that admission of the statement permitted the prosecutor to speculate about appellant's knowledge and intent in closing argument. (Opn. at 20.)

Justice Grimes disagreed. She applied this Court's ruling in *Samuels* and found that Bernal's statement was admissible because the portions incriminating appellant were not exculpatory, self-serving, or collateral and were necessary to fully convey the scope of the crime. (Dis. Opn. at pp. 3-5.) Justice Grimes further found that the majority confused Bernal's actual statement, "we went to shoot someone," with a reasonable inference that could be drawn from the statement, noting he explained only what they *did*. (Dis. Opn. at 6.)

B. The Applicable Law

A trial court has wide decision to admit or exclude evidence and the court's ruling in this regard will not be disturbed absent a showing that it

exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Geier* (2007) 41 Cal.4th 555, 585 ("*Geier*"); *People v. Brown* (2003) 31 Cal.4th 518, 534 ("*Brown*").) The defendant bears the burden of showing a clear abuse of discretion by the trial court in admitting evidence. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609 ("*Cudjo*").)

Hearsay is evidence of an out-of-court statement offered to prove the truth of the matter asserted therein and is inadmissible unless it falls within an exception to the hearsay rule. (Evid. Code, § 1200.) Evidence Code section 1230 provides for an exception to the hearsay rule, as follows:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true.

The proponent of a declaration against penal interest 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." (*Geier*, *supra*, 41 Cal.4th at p. 603, internal quotes omitted; see *People v. Frierson* (1991) 53 Cal.3d 730, 745.) "In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*Ibid.*, internal quotes omitted.)

Generally, the declaration against interest hearsay exception does not include a statement or portion thereof "not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441; accord, *People v. Duarte* (2000) 24 Cal.4th 603, 612 ("*Duarte*") ["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"], internal quotations omitted.) However, a declaration against penal interest may be admitted, even if portions of the statement implicate a non-testifying defendant, as long as the statement is not "exculpatory, self-serving, or collateral" and the portion incriminating the defendant is "inextricably tied to and part of a specific statement against penal interest." (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121; accord, *People v. Tran* (2013) 215 Cal.App.4th 1207, 1219-1220 ("*Tran*"); see also *People v. Arceo* (2011) 195 Cal.App.4th 556, 576-578 ("*Arceo*") [ruling that out-of-court statements made by a non-testifying defendant that incriminate a codefendant may be admitted at a joint trial if the statements constitute a statement against penal interest]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174-177 [same] ("*Cervantes*").)

C. The Majority Opinion Failed to Follow This Court's Authority for Determining Admissibility of a Declaration Against Interest That Implicates a Non-Testifying Defendant

The majority failed to follow this Court's authority and clearly erred in ruling that Bernal's statement to Tejeda – that Bernal and appellant went to shoot at two 18th Street gang members, he shot, and she drove – was inadmissible because it also implicated appellant. This Court has ruled that a declaration against interest, which also incriminates a non-testifying defendant, may be admitted in its entirety as long as the portion incriminating the defendant is not "exculpatory, self-serving, or collateral."

(*Samuels*, *supra*, 36 Cal.4th at pp. 120-121.) Without acknowledging this rule, the majority found that Bernal's statement was inadmissible against appellant 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 untrustworthy "speculation." (Opn. at 17-18; see generally *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 [lower courts are bound by the decisions of higher courts].) In so finding, the majority not only disregarded *Samuels*, but also 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 held in *Samuels* that a statement analogous to that made by Bernal was admissible in its entirety even though it implicated the non-testifying defendant. (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121.) There, the defendant was charged in a murder-for-hire scheme for paying her daughter's boyfriend, James Bernstein, to assist in murdering her ex-husband. After the murder, Bernstein admitted his involvement to an acquaintance, David Navarro. Bernstein was then killed, also at defendant's behest. (*Id.* at pp. 101-105.) At defendant's trial, the trial court admitted Navarro's testimony, reciting Bernstein's statements, as declarations against Bernstein's interest. (*Id.* at p. 120.) Navarro testified that Bernstein told him, "'He had done it and Mike [Silva] had helped him. And that [defendant] had paid him.'" Bernstein also told Navarro that he had skimmed money off the top for himself, that he paid the balance to Silva, and that he also paid Silva in cocaine "'in lieu of the money.'" (*Ibid.*)

This Court upheld the trial court's ruling, finding that Bernstein's "facially incriminating comments were in no way exculpatory, self-serving, or collateral." (*Samuels*, *supra*, 36 Cal.4th at p. 120.) The Court found that the statement, volunteered to an acquaintance, was trustworthy and

"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." (*Id.* at pp. 120-121.) Under the totality of the circumstances, the Court held 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.*)

Similarly, here, the portions of Bernal's statement that implicated appellant were in no way exculpatory, self-serving, or collateral, and the statement was trustworthy both in content and context. The statement was directly disserving to Bernal as every portion inculpated him, he consistently assigned the most blame to himself by admitting he was the shooter, and he never attempted to shift blame to appellant. (See *Duarte*, *supra*, 24 Cal.4th at p. 611 [statement that attempts to shift blame from declarant or curry favor is self-serving and not truly against the declarant's interests]; see also *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335 [the least reliable circumstance is where declarant attempts to improve his situation by shifting blame to others].)

The portions of Bernal's statement that incriminated appellant – "we" went to shoot two 18th Street gang members and she drove – were also "inextricably tied to and part of a specific statement against penal interest." (*Samuels*, *supra*, 36 Cal.4th 120-121.) Those portions were necessary to describe the type of crime Bernal was admitting, and he increased his culpability by suggesting that he planned to and did shoot at the victims from a car driven by appellant. He suggested he planned a drive-by shooting and participated in a conspiracy to commit murder, both of which show premeditation. (See Pen. Code §§ 187, subd. (a), 189; *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]; see also *Tran*, *supra*, 215 Cal.App.4th at pp. 1219-1220 [statement that defendant shot someone and declarant helped defendant burn the car involved was properly admitted because portions incriminatory of defendant were inextricably tied to his statement against interest, showing he committed arson and was potentially an accessory to murder].)

Moreover, Bernal's statement was made in what has been deemed one of the most reliable of circumstances – a non-coercive setting between close family members. As noted, in determining the trustworthiness of a statement against penal interest, courts examine the totality of the circumstances, including the declarant's motivations and his relationship with the defendant. (*Geier*, *supra*, 41 Cal.4th at p. 603.) The most reliable situation is one where "the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 334; accord, *Arceo*, *supra*, 195 Cal.App.4th at p. 557; *Cervantes*, *supra*, 118 Cal.App.4th at p. 175.) The least reliable circumstance is where a declarant is caught by police and attempts to improve his situation by deflecting blame to a codefendant. (*Greenberger*, *supra*, 58 Cal.App.4th at p. 334, citing *Lee v. Illinois* (1986) 476 U.S. 530, 544 [106 S.Ct. 2056, 90 L.Ed.2d 514]; accord, *Arceo*, *supra*, 195 Cal.App.4th at p. 557; *Cervantes*, *supra*, 118 Cal.App.4th at p. 175.)

Here, Bernal was in his family's home the day after the shooting when he told his nephew, whom he treated like a younger brother, about the crime. Bernal frequently spent time at the apartment and came and went as he pleased. The conversation was casual and it appears Bernal was

bragging about the crime. (See, e.g., *Samuels*, *supra*, 36 Cal.4th at p. 121 [finding that non-custodial statements made to acquaintance were trustworthy]; see also *Arceo*, *supra*, 195 Cal.App.4th at p. 576 [finding defendant's act of bragging about killing to friend in casual, non-custodial setting was trustworthy because it was made in one of the most reliable of circumstances]; *Cervantes*, *supra*, 118 Cal.App.4th at p. 175 [declarant's statement, made within 24 hours of shooting and in a casual setting to lifelong friend from whom he sought medical treatment, was one of the most trustworthy of situations].)

As the majority acknowledges, Bernal's statements 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 his own actions and thoughts." (Opn. at 18.) Nevertheless, the majority held that the portions implicating appellant were untrustworthy because those portions amounted to "speculation" on her state of mind. (Opn. at 18.) Bernal, however, recited *only what they did* – "we went" to shoot at two 18th Street gang members, she drove, and he fired the gun. (See Dis. Opn. at 6 ["nothing in this statement purports to explain what she was *actually thinking*. Rather, he explained what they *did*"].) There was nothing speculative about what they did together.

Bernal's statement, "we went" to shoot two 18s, supported an inference that he and appellant planned to go together to commit the crime. (See Dis. Opn. at 6.) However, the meaning of the statement and the inferences it might or might not have supported was relevant to the evidentiary *weight* of the statement, not its *admissibility*. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1122 ("*Guerra*") [ruling that the meaning of defendant's statement, "'In my country, I do this, no problem, I go home tonight,'" concerned "'only the weight of this evidence, not its

admissibility'"], overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, quoting *People v. Ochoa* (2001) 26 Cal.4th 398, 438; *People v. Riel* (2000) 22 Cal.4th 1153, 1189 [ruling, where declarant said "they" did certain acts and it was unclear whether he included the defendant, that "[t]o warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide"]; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 834 [whether a statement qualifies as a spontaneous statement rests with the court, but whether the declarant actually perceived the events or had personal knowledge of facts contained within statement was an issue for the jury].)

Once the trial court determined that Bernal's statement qualified as a declaration against interest – because it was disserving to him, the portions incriminating appellant were not self-serving or collateral, and it was trustworthy – the parties were free to argue the meaning of the statement to the jury. It was for the jury to decide whether, in conjunction with the other evidence, "we went" meant that appellant knew and was part of the plan to shoot the victims. (Compare *People v. Bacon* (2010) 50 Cal.4th 1082, 1102-1103 [trial court does not resolve conflicts in the evidence submitted on preliminary fact questions] and *Guerra, supra*, 37 Cal.4th at p. 1122 [meaning of statement relevant to weight, not admissibility], with Opn. at 18 [finding statement inadmissible because the phrase "we went" permitted an inference, argued by prosecutor, that appellants planned together to commit the crime].)

The majority noted that personal knowledge is required for admission of a declarant's statement, and concluded that Bernal "could not speak from personal knowledge in describing Cortez's state of mind." (Opn. at 17-18,

citing *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104.) However, Bernal never commented on appellant's state of mind and he certainly had personal knowledge of what the two of them did together on the day of the shooting. He also knew what they did or did not discuss about their plans. (See Dis. Opn. at 6 [there was nothing speculative about the statement].)

The declarant's statement in *Samuels*, that "'[h]e had done it and Mike [Silva] had helped him. And that [defendant] had paid him'" (*Samuels*, *supra*, 36 Cal.4th at p. 120), certainly supported inferences that the defendant paid him specifically to kill the victim, she intended to kill the victim, and she conspired with him to do so. That statement, however, was not deemed to be speculation about the defendant's state of mind or about any conversations she might have had with the declarant. (*Id.* at pp. 120-121.)

Finally, here, Bernal included sufficient detail that matched the independent evidence. As explained in detail in Argument I, the evidence showed the appellants were associated with the Rockwood gang; they were together in the car when Bernal shot Guzman in 18th Street territory; appellant yelled a gang challenge at the victims and said, "Let them have it," to Bernal immediately prior to the shooting; and she was found in Rockwood territory in the driver's seat of the car within 10 minutes of the shooting. (See Statement of the Case, *ante*.) Under the totality of the circumstances, Bernal's statements were """so trustworthy that adversarial testing would add little to [their] reliability . . . ."""" (*Arceo*, *supra*, 195 Cal.App.4th at p. 578, quoting *Cervantes*, *supra*, 118 Cal.App.4th at p. 177, quoting *Idaho v. Wright* (1990) 497 U.S. 805, 821, 110 S.Ct. 3139, 111 L.Ed.2d 638.)

Bernal's entire statement was trustworthy in content and context. The majority's finding that the statement included speculation on appellant's state of mind is not supported by the record, and its subsequent holding that

the statement was untrustworthy and inadmissible without redaction ignored *Samuels* as well as the weight of authority demonstrating it was made in what has been deemed to be the most reliable of circumstances. Accordingly, the trial court properly found that Bernal's statement qualified as a declaration against interest.

D. The Trial Court Did Not Abuse Its Discretion Under Evidence Code Section 352 in Admitting Bernal's Statement

Under Evidence Code section 352, a trial court may exercise its discretion to exclude relevant evidence if "its probative value is substantially outweighed" by the probability of undue prejudice, undue consumption of time, confusing the issues, or misleading the jury. (See also *People v. Lewis* (2001) 26 Cal.4th 334, 374.) The trial court has broad discretion to determine whether evidence should be excluded under Evidence Code section 352. (*People v. Gurule* (2002) 28 Cal.4th 557, 654; *People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) As such, the trial court's ruling under Evidence Code section 352 will not be disturbed on appeal unless it "exceeds the bounds of reason." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

As this Court has reiterated, "Prejudice as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient." (*Doolin, supra*, 45 Cal.4th at pp. 438-439, internal quotations and citations omitted.) "Evidence is not prejudicial ... merely because it undermines the opponent's position or shores up that of the proponent . . . ." (*Ibid.*) Rather, "[t]he 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues ...." (*Ibid.*)

While Bernal's statement that appellant was the driver and she went with him to shoot two "18s" was certainly damaging to appellant's case, it was not unduly prejudicial.[10] As noted, all of the eyewitnesses told officers that a woman was driving the car. Ramos and Zuniga both heard a woman yelling, and Zuniga heard her specifically ask, "Where you guys from?," and then say, "Let them have it." Appellant 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 Bernal to hide the gun. Further, Barhona and Hernandez both identified her as the driver. Finally, the letter Bernal attempted to send outside of his jail facility further suggested that he and appellant committed the crime together. (See Statement of the Case, *ante*.) Bernal's statements to Tejeda amounted only to a general affirmation of the foregoing facts. As appellant failed to show that Bernal's statement was likely to confuse the jury or to evoke emotional bias or a verdict based on factors other than the evidence, she failed to show the trial court abused its discretion under Evidence Code section 352.

E. Any Error Was Harmless

Even if Bernal's statement was erroneously admitted, appellant cannot show that an outcome more favorable to her was reasonably probable if it had been excluded or redacted. (*Samuels*, *supra*, 36 Cal.4th at p. 121 [applying *Watson* harmless error analysis to erroneous admission of statement as declaration against interest].) As noted above (Arg. I (E)), the evidence against appellant was strong apart from Bernal's statements to Tejeda. In fact, Bernal's letter to Birrueta conveyed similar information – it

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[10] The majority did not reach the Evidence Code section 352 issue, but Justice Grimes found that the trial court did not abuse its discretion in declining to exclude the statement. (Dis. Opn. at 6.)

was an admission directly from Bernal supporting the prosecution's theory that he and appellant committed the crimes together.

As also noted, appellant's testimony was incredible, implausible, and was impeached in several respects. (Arg. I (C & E).) In addition to all of the implausible statements addressed in Argument I, she was impeached on critical points. For example, appellant initially testified she told detectives the night of the shooting that Zuniga reached for a gun, but then later admitted on cross-examination she had not made that statement to detectives. (7RT 3427, 3652.) She also admitted she was dishonest with police when she said Guzman and Zuniga provoked the shooting. (7RT 3650-3651.) Appellant further initially testified she had never known Bernal to be violent, but later admitted she heard of him being violent on a few occasions. (7RT 3442-3448.) Under the circumstances, appellant cannot show that an outcome more favorable to her was reasonably probable absent admission of Bernal's statement to Tejeda. (See Dis. Opn. at 11 [disagreeing with majority's finding that case against Cortez was "close and not particularly strong"].)

III. THE PROSECUTOR'S CLOSING ARGUMENT DID NOT LOWER THE BURDEN OF PROOF

The majority opinion's holding that the prosecutor committed prejudicial misconduct, only as to appellant, when he briefly commented on the reasonable doubt standard in rebuttal (Opn. at 10-13) is clearly erroneous when viewed in context and when the law established by this Court is applied.

A. The Relevant Lower Court Proceedings

Appellant's counsel argued during closing, "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 during rebuttal:

> 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.) Appellant's counsel objected, arguing the prosecutor's comment misstated the law. The trial court overruled the objection. (9RT 4594.)

On appeal, the majority opinion held that, by defining proof beyond a reasonable doubt as a non-imaginary belief, the prosecutor improperly lowered the burden of proof. (Opn. 10-13.) The Court found that it was reasonably likely the jury construed the prosecutor's remarks in an objectionable fashion because: the court's reasonable doubt instruction was given before the prosecutor's argument, the court implicitly endorsed the argument by overruling defense counsel's objection, 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.) The majority found that the misconduct warranted reversal of appellant's conviction, again without providing a prejudice analysis other than to briefly summarize the evidence against *Bernal*. (Opn. at 13.)

Justice Grimes disagreed with the majority that the prosecutor's comment 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 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.)

B. The Applicable Law

"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Hill* (1998) 17 Cal.4th 800, 819 ("*Hill*"), internal citations omitted; *People v. Rundle* (2008) 43 Cal.4th 76, 157 ("*Rundle*"), disapproved on other grounds in *Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; see *People v. Stanley* (2006) 39 Cal.4th 913, 952.) Where a prosecutor's conduct does not render a trial fundamentally unfair, prosecutorial misconduct occurs under state law only if that prosecutor engages in "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; accord, *Rundle*, *supra*, 43 Cal.4th at p. 157; *People v. Smithey* (1999) 20 Cal.4th 936, 960 ("*Smithey*").)

"'[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*Hill*, *supra*, 17 Cal.4th at pp. 829-830.) A prosecutor may not, for example, argue that affirmative evidence demonstrating a reasonable doubt is necessary or that a defendant has the burden of producing evidence to demonstrate reasonable doubt. (*Id.* at pp. 831-832.) The Court of Appeal has also found that a prosecutor may not

compare a finding of guilt beyond a reasonable doubt with everyday decisions made by the jurors. (See, e.g., *People v. Johnson* (2004) 119 Cal.App.4th 976, 985 [finding trial court and prosecutor improperly compared finding of guilt with jury's everyday decisionmaking, and conveyed an impression of a lesser standard of proof]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 ("*Nguyen*") [prosecutor improperly compared reasonable doubt standard with important decisions in everyday life].) Absent such misstatements, however, the prosecutor has wide latitude during argument. (See *People v. Ward* (2005) 36 Cal.4th 186, 215 ("*Ward*").)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]" (*Brown, supra*, 31 Cal.4th at pp. 553-554; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 797.) "In 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." (*Brown, supra,* 31 Cal.4th at pp. 553-554, internal quotations omitted.) The reviewing court must consider the challenged remarks in the context of the whole argument along with the jury instructions. (*People v. Schmeck* (2005) 37 Cal.4th 240, 286 ("*Schmeck*"), abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; *People v. Cole* (2004) 33 Cal.4th 1158, 1203 ("*Cole*").)

Normally, if a reviewing court finds prosecutorial misconduct, it must determine whether a result more favorable to the defendant was reasonably probable absent the misconduct. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071 ("*Wallace*"); *People v. Welch* (1999) 20 Cal.4th 701, 752-753; *People v. Bolton* (1979) 23 Cal.3d 208, 215, fn. 4 ("*Bolton*").) If the

misconduct renders the trial fundamentally unfair or otherwise vioates a defendant's federal constitutional rights, however, the reviewing court must determine if the misconduct was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824] ("*Chapman*"); *Bolton, supra*, 23 Cal.3d at p. 215.)

C. The Prosecutor's Comment During Rebuttal Neither Lowered the Burden of Proof Nor Prejudiced Appellant

In context, the prosecutor properly responded to defense counsel's erroneous argument by repeating the reasonable doubt instruction given by the trial court, and then explaining reasonable doubt only to the extent that he said the jury's belief had to be, not imaginary, but based on the evidence. The prosecutor neither compared the decision-making necessary for the jury in this case with everyday decisions nor suggested the jury could decide the case based on simple belief. (9RT 4594.) The prosecutor also did not suggest that an affirmative showing of reasonable doubt or innocence had to be made, attempt to quantify the standard, or suggest that a lesser standard of proof was appropriate. (Compare *People v. Seaton* (2001) 26 Cal.4th 598, 663 ("*Seaton*") [properly telling the jury to base its verdict on the evidence], with Opn. at 12 citing *People v. Ellison* (2009) 196 Cal.App.4th 1342, 1353 [improperly arguing reasonable doubt required jury to determine whether defendant's innocence was reasonable], *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266 ("*Katzenberger*") [improperly quantifying reasonable doubt standard by comparing it to fitting pieces of jigsaw puzzle together], and *Nguyen, supra*, 40 Cal.App.4th at p. 36 [improperly comparing reasonable doubt standard to everyday decisions and suggesting lower burden of proof].) Accordingly, his argument was appropriate. (See Dis. Opn. at 1 [comment properly "emphasized *imaginary* doubt is not *reasonable* doubt"], italics in original; see *Brown, supra*, 31 Cal.4th at pp. 553-554 [reviewing court "do[es] not

lightly infer' that the jury drew the most damaging . . . meaning from the prosecutor's statements"].)

Moreover, even if the prosecutor's brief comment could have been misconstrued as suggesting a lower standard of proof, it did not prejudice appellant. (See *Schmeck*, *supra*, 37 Cal.4th at p. 286 [court must view prosecutor's statement in context of argument as a whole]; *People v. Dennis* (1998) 17 Cal.4th 468, 522 [noting that "defendant singles out words and phrases, or at most a few sentences, to demonstrate misconduct," but courts must view the statements in context of the whole argument].) In context, 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, 4594). (See *Cole*, *supra*, 33 Cal.4th at p. 1203 [viewing prosecutor's comments during rebuttal in light of the defense arguments to which he was responding]; see Dis. Opn. at 2.) The prosecutor's comment was also very brief and made only once. (See *Brown*, *supra*, 31 Cal.4th at p. 554 [finding prosecutor's "brief and fleeting" improper comment to be harmless]; *Smithey*, *supra*, 20 Cal.4th at p. 961 [finding prosecutor's improper question non-prejudicial, inter alia, because it "constituted an isolated instance in a lengthy and otherwise well-conducted trial ..."], internal quotes omitted.)

Significantly, the prosecutor first reminded the jury that it had a copy of the reasonable doubt instruction from the court. He then re-read a portion of that reasonable doubt instruction immediately before he stated the jury's belief could not be imaginary. Finally, he emphasized that the jury's verdict had to be based on the evidence. (9RT 4594; Dis. Opn. at 1; see, e.g., *Nguyen*, *supra*, 40 Cal.App.4th at pp. 36-37 [any prejudice generated by the improper argument was dispelled by the prosecutor's directing the jury to read the instructions regarding reasonable doubt]; see

also *Seaton*, *supra*, 26 Cal.4th at p. 663 [prosecutor properly told jury to base its verdict on the evidence].)

Additionally, jurors are presumed to understand and follow the trial court's instructions. (See *Carey*, *supra*, 41 Cal.4th at p. 130; *People v. Osband* (1996) 13 Cal.4th 622, 717 ("*Osband*"); *Davis*, *supra*, 10 Cal.4th at p. 542.) This Court has repeatedly applied the presumption in finding a prosecutor's misstatements to be harmless. (See, e.g., *Schmeck*, *supra*, 37 Cal.4th at pp. 286-287 [finding trial court's reasonable doubt instruction clarified ambiguity in prosecutor's argument, explaining that "'arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law'"], quoting *Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *People v. Boyette* (2002) 29 Cal.4th 381, 436 [same] ("*Boyette*") [same]; *Osband*, *supra*, 13 Cal.4th at p. 717 [finding no prosecutorial misconduct due to proper instructions, explaining "[w]hen argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former"].)

The majority declined to apply the presumption here, noting the presumption "applies only absent a contrary showing in the record." (Opn. at 12.) It 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 12-13.) 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, e.g., *People v. Loza* (2012)

207 Cal.App.4th 332, 354-355 [finding affirmative showing, overcoming presumption that jury understands and follows court's instructions, because "the jury's questions [on the topic] demonstrate [it] did not understand that the prosecution had to prove [defendant's] intent as an aider and abettor"]; see also *People v. Avila* (2006) 38 Cal.4th 491, 600 [noting that inconsistent verdicts show mistake or confusion by jury]; Dis. Opn. at 1-2 [jury most likely discounted the attorneys' statements as argument and followed the court's instructions].)

The majority cited *People v. Burch* (2007) 148 Cal.App.4th 862, 869, in declining to presume the jury followed the trial court's instructions. (Opn. at 12.) *Burch*, however, simply restates that, "In the absence of a contrary showing in the record, we presume the jury understood and followed the court's instruction." (*Burch*, *supra*, 148 Cal.App.4th at p. 869.) *Burch* in no way suggests a "showing" that a jury did not follow a court's instructions is made simply because a trial court overruled an objection to a complained-of comment. (See *ibid.*) If the opposite were true, prejudice would be presumed anytime a trial court mistakenly overruled an objection to a prosecutor's argument. (See generally *Boyette*, *supra*, 29 Cal.4th at pp. 435-436 [applying presumption that jury followed the court's instructions and disregarded prosecutor's argument, to the extent it was improper, with no indication that trial court admonished jury or sustained any objection]; *People v. Fields* (1983) 35 Cal.3d 329, 362 [defendant was not prejudiced by prosecutor's improper appeal to sympathy or trial court's improper overruling of the defense objection to the argument].)

Before the arguments and the prosecutor's comment here, the trial court instructed the jury that proof beyond a reasonable doubt "is proof that leaves you with an abiding conviction that the charge is true" and that "[t]he evidence need not eliminate all possible doubt because everything in life I open to some possible or imaginary doubt." (8RT 4006 [CALCRIM

No. 220].) The prosecutor referred the jury back to that instruction. (9RT 4594.) The court had also instructed the jury that it "must follow the law" as stated by the court, and to do so in particular if it believed the attorneys' comments on the law conflicted with the court's instructions. (8RT 4003-4004 [CALCRIM No. 200].) Accordingly, the Court of Appeal should have presumed the jury followed the trial court's proper instructions and disregarded the prosecutor's brief statement as argument. (See *Boyette*, *supra*, 29 Cal.4th at p. 436 [finding no prejudicial misconduct, assuming prosecutor's statement that lying in wait was substitute for malice was improper, because court presumes jury followed court's instructions and jury was told to follow the court's instructions if the parties' statements of law conflicted]; see, e.g., *Katzenberger*, *supra*, 178 Cal.App.4th at p. 1269 [finding prosecutor's improper comment on reasonable doubt non-prejudicial, presuming jury relied on trial court's proper instruction on reasonable doubt]; *Nguyen*, *supra*, 40 Cal.App.4th at p. 37 [same].)

In attempting to distinguish the reasonable doubt misstatements deemed to be harmless in *Katzenberger* and *Nguyen*, the majority opinion stated that, unlike the present case, in *Katzenberger*, the trial court had re-read the reasonable doubt instruction after the prosecutor's erroneous comment. In *Nguyen*, the defendant did not object to the statement and the prosecutor directed the jury to read the reasonable doubt instruction in any event. (Opn. at 13.) Here, however, not only had the trial court already properly instructed the jury on reasonable doubt, but the prosecutor also directed the jury's attention back to that instruction and then he re-read a portion of it just before making the complained-of comment. (9RT 4594 [stating first, "Counsel talked to you about reasonable doubt. You have the instruction on that"; shortly thereafter stating, "The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt"].)

The majority speculated the jury might not have followed the trial court's reasonable doubt instruction here because it preceded the prosecutor's objectionable argument and there were no later references to it, unlike in *Katzenberger* and *Nguyen* (Opn. at 12-13), but this Court has long held that the order in which instructions are given is generally immaterial (*People v. Sanders* (1990) 51 Cal.3d 471, 519) and that the jury is presumed to understand and correlate the instructions (*Carey*, *supra*, 41 Cal.4th at p. 130). Also, as noted, this Court has clearly established that an appellate court is to assess the prosecutor's comment in the context of the argument as a whole as well as with the instructions given. (*Schmeck*, *supra*, 37 Cal.4th at p. 286.) The jury would not likely have disregarded the court's proper definition of reasonable doubt simply because it was read before closing arguments or because the prosecutor mentioned it immediately before rather than immediately after the objectionable comment.

Katzenberger and *Nguyen* also found the respective errors to be harmless for several reasons, not solely because the jury was referred back to the reasonable doubt instruction after the arguments. (*Katzenberger*, *supra*, 178 Cal.App.4th at pp. 1268-1269 [argument was harmless because the court instructed on reasonable doubt as well as to follow the court's instructions if the attorneys' statements conflicted, the jury was presumed to have followed the instructions, the court later re-read the reasonable doubt instruction, and the evidence against the defendant was strong]; *Nguyen*, *supra*, 40 Cal.App.4th 36-37 [misstatement was harmless because prosecutor directed the jury to read the reasonable doubt instruction, the trial court had already properly instructed on reasonable doubt, and the jury was presumed to have followed the court's instructions].) Both cases also involved more serious misstatements of reasonable doubt. (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1266 [prosecutor improperly quantified

reasonable doubt by comparing it to fitting pieces of jigsaw puzzle together]; *Nguyen*, *supra*, 40 Cal.App.4th at p. 36 [prosecutor improperly compared reasonable doubt to making everyday decisions such as changing lanes in a car].) The statement, here, that the jury's belief had to be, not imaginary, but based on the evidence was brief and innocuous.

Finally, as explained in detail in Arguments I and II, the evidence against appellant was strong. Specifically, the following facts showed her knowledge and intent: (1) she initiated the encounter by slamming on the car brakes and issuing a gang challenge ("Where you from?") immediately when she saw the victims; (2) she said, "Let them have it," immediately before Bernal shot; (3) she associated with Rockwood members; (4) she drove Bernal into rival gang territory knowing he was a Rockwood member and knowing he always carried a gun; (5) she waited for Bernal to return to the car after the shooting; (6) she waited for him while he hid the gun in a building shortly after the shooting; (7) Bernal told his nephew that he and appellant went to shoot two 18th Street gang members that day; (8) Bernal's letter that was confiscated by authorities implicated both himself and appellant; and (10) her testimony was incredible, implausible, and impeached several times. (See Statement of the Case, *ante*.)

Under the circumstances, appellant cannot show there was a reasonable likelihood the jury misunderstood the prosecutor's comment as lowering the burden of proof. For the same reasons, even if the prosecutor's comment was erroneous or could have been misunderstood as lowering the burden of proof, appellant cannot show an outcome more favorable to her was reasonably probable absent the statement. (See, e.g., *Ellison*, *supra*, 196 Cal.App.4th at p. 1353 [applying *Watson* harmless error analysis to comment lowering burden of proof].) In fact, given the strength of the evidence, the court's instructions, and the "brief and fleeting" nature of the prosecutor's comment, appellant cannot show that any misconduct

contributed to the verdict. (See *Chapman*, *supra*, 386 U.S. at p. 24; *Katzenberger*, *supra*, 178 Cal.App.4th at p. 1269 [finding no prejudice from comment lowering burden of proof, "even under a standard of beyond a reasonable doubt"].)

IV. THERE WERE NO ERRORS TO CUMULATE

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) The test is whether the cumulative impact of the errors deprived the defendant of a fair trial or right to due process. (*People v. Thomas* (2011) 51 Cal.4th 449, 489.) In a close case, the cumulative effect of multiple errors may constitute a miscarriage of justice (*People v. Holt* (1984) 37 Cal.3d 436, 458-459); however, "[i]f none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the . . . verdict" (*People v. Beeler* (1995) 9 Cal.4th 953, 994).

The majority opinion reversed appellant's conviction based on its finding of cumulative error, as well as on its finding of prosecutorial misconduct. (Opn. at 13, 18-20.) However, as shown in Arguments I through III, there were no errors to cumulate. Moreover, even if there were any errors, there was little potential for any prejudice to cumulate. (*Seaton*, *supra*, 26 Cal.4th at p. 675 ["The few errors we have identified were minor and, either individually or cumulatively, could not have altered the trial's outcome"]; *People v. Burgener* (2003) 29 Cal.4th 833, 884 ["Defendant has demonstrated few errors, and we have found each possible error to be harmless when considered in isolation. Considering them together, we likewise conclude their cumulative effect does not warrant reversal of the judgment"].) As this Court has stated, "A defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454.)

CONCLUSION

As demonstrated, the trial court properly instructed the jury with CALCRIM No. 361, the court properly admitted Bernal's statement to his nephew as a declaration against interest, the prosecutor's rebuttal argument did not lower the burden of proof, and any error relating to each issue was harmless in any event, whether assessed individually or cumulatively. Accordingly, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal and affirm appellant's conviction.

Dated: December 2, 2013

Respectfully submitted,

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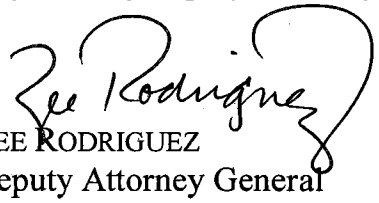

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 17,714 words.

Dated: December 2, 2013

KAMALA D. HARRIS
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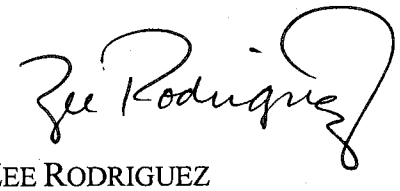

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DECLARATION OF SERVICE

Case Name: **People v. Norma Lilian Cortez** No.: **S211915**

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 collection and 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 December 2, 2013, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** 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 December 2, 2013, I caused the original and thirteen copies of the **RESPONDENT'S OPENING BRIEF ON THE MERITS** in this case to be served on the California Supreme Court by 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 December 2, 2013, at Los Angeles, California.

Lisa P. Ng
Declarant


Signature

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