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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR RODRIGUEZ, Defendant and Appellant.	B196535 (Los Angeles County Super. Ct. No. YA062740)

APPEAL from a judgment of the Superior Court of Los Angeles County, William R. Hollingsworth, Judge. Affirmed, as modified.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Salvador Rodriguez appeals from the judgment entered after his conviction by a jury on one count of murder and three counts of attempted murder with true findings by the jury on related gang and weapon enhancement allegations. Rodriguez contends he was prejudiced by the erroneous admission of a videotaped interview of a witness who testified against him at trial and by the trial court's refusal to allow him to reopen testimony. He also challenges the calculation of his sentence. We modify the judgment to correct his sentence and, as modified, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Shooting*

On the night of December 19, 2004 Rene Elias and Alberto Aragon, members of a tagging crew known by its initials "SAP," were spray-painting walls on Imperial Avenue near Van Buren Street in south Los Angeles. Rene's brother, Luis Elias,[1] and Alex Contreras were parked and waiting for them nearby in a green Buick. As a white van with brown stripes drove by, Rene and Aragon headed back to the waiting car. The van stopped in front of the Buick about 30 to 40 feet away; and two people, a tall, brown-skinned male with a shaved head, wearing a white shirt and holding a chrome revolver, and a short, Hispanic male wearing a hooded sweater, got out. The man with the gun began shooting as Rene climbed into the back seat and Aragon reentered the front passenger seat of the Buick.[2] Luis, the driver, ducked to avoid the gunshots, and began backing down the street. After driving away, the young men flagged down a police car. Aragon, who had been hit in the head by a single gunshot, was dead.

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[1] Because Rene and Luis share the same last name, we refer to them by their first names, not out of disrespect but for convenience and clarity. (*Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 188, fn. 13.)

[2] A woman driving past the scene largely confirmed this account of the shooting, although she mistook Rene, who wore his hair long, for a woman. Some testimony suggested there may have been a third person who got out of the van and that at least two weapons were fired. These factual variances do not affect the resolution of this appeal.

2. *The Investigation*

In an initial interview with Los Angeles Sheriff's Department detectives after the shooting, Rene described the shooter as a tall, slim, dark-complexioned male about 18 years old wearing a white shirt and gray pants. Luis gave a similar description, adding that the shooter's head was shaved. The second shooter, also a brown-skinned male, was very short, "almost like a kid." Rene reviewed some photographs in a book provided by the detectives but stated he could not identify anyone.

Several days after the shooting deputy sheriffs observed graffiti in two different places in the neighborhood that appeared to refer to the shooting. The first stated, "RIP SAP Jackel," which was understood to mean "Rest in peace, SAP tagger Jackel," the moniker for Aragon. The second featured the letters "CRS," a reference to a local gang known as the Crazy Riders, followed by the letters "SAP," which had been crossed out, and the number 187, a reference to the Penal Code section for murder. A deputy reported this graffiti to the detectives investigating the Aragon murder, who interpreted it to mean a CRS member had killed, or had wanted to kill, an SAP member.

About the same time, Detective Michael Valento, a deputy sheriff assigned to the Lennox station gang detail, reviewed another deputy's report of a December 1, 2004 incident at a home three blocks from the scene of the shooting. The deputy had interviewed a number of young men at the home, including Rodriguez, who admitted his membership in the CRS gang, and Gabriel Flores, who was a member of a tagging crew known as a rival of SAP's. In a conversation with the reporting deputy, Valento was told the deputy had logged the license plate of a white van parked in front of the home. After tracing the license plate, Valento learned the van was registered to Flores's father. Valento drove to the residence and photographed the van.

In an interview with detectives on December 29, 2004, Rene identified the van in the photograph as the one involved in the shooting and stated he was certain about the identification. He also stated he had seen someone who looked like the shooter with other members of the CRS gang at an automobile body shop located on Vermont Avenue

at 95th Street.[3] According to Rene, CRS and SAP had been "slashing" or crossing out each other's graffiti for the past month.

On the evening of December 30, 2004 a patrolling sheriff's deputy saw fresh graffiti on a bus stop depicting the letters "CRS." The deputy approached a group of Hispanic males standing nearby to inquire about the graffiti. When they saw the patrol car, the members of the group scattered into an adjacent parking lot. Because the deputy had observed one of the men, later identified as Edwin Morales, holding a revolver that he discarded as the deputy approached, the deputy chased Morales and detained him. Morales, who was on probation for felony possession of a sawed-off shotgun, was arrested on a charge of possession of a loaded handgun while on probation. Rodriguez was also interviewed at the scene and acknowledged his membership in the CRS gang, but was not arrested.

The revolver recovered from the parking lot, a stainless steel .357 magnum, contained six bullets and matched the description of the gun used in Aragon's murder.[4] The next day Morales was interviewed by Detective Valento and two detectives from the sheriff's homicide unit investigating Aragon's murder. In a videotape that was played for the jury at trial, Morales denied he was a member of CRS and claimed to know nothing about the gun, insisting he had never touched it. Instead he told the detectives he had run because he had been smoking marijuana, also a potential probation violation, and had thrown the joint, not the gun, to the ground as he ran toward the parking lot. The detectives pressured him to talk more openly, warning him the revolver had been used in a murder and had been seen in his possession and clearly implying he could be charged with the murder, even though they later acknowledged at trial he did not resemble the

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[3] According to testimony at trial, Rodriguez's father owned the body shop, which was frequented by Rodriguez and at least four of his brothers, in addition to other CRS members.

[4] At trial a ballistics expert testified the bullet fragments retrieved from Aragon's head were fired by the gun recovered on December 30, 2004. No fingerprints were found on the gun or on the bullets.

description of either perpetrator. Morales continued to deny any knowledge about the gun or the murder, and the interview was terminated.

Detective Valento initially left the room with the other detectives. When he returned to escort Morales back to his holding cell, Morales offered to talk to Valento if Valento would help him. After Valento restarted the video camera, Morales told him his mother lived in the apartment building he had been standing near when he was arrested. While waiting for his mother, Morales said, he had been with his nephew, a CRS gang member; Rodriguez, a CRS member Morales knew as "Lazy"; Rodriguez's brother Manuel, known as "Flaco";[5] and another gang member Morales knew as "Red Eyes." As they stood and talked, Flaco raised his shirt to reveal a gun tucked into his waistband; and Lazy said he had "done another job with that one." Lazy, Flaco and Red Eyes had been driving around and saw some "enemies" tagging a wall on Imperial. Lazy got out and shot someone from SAP in the head. Morales told Valento Lazy and Flaco were CRS members and he was afraid they would target him or his family for retribution. He also identified photographs of Lazy, Flaco and other CRS gang members and told Valento Lazy stayed with his girlfriend, the sister of Gabriel Flores, at the Flores home. After the interview, Morales directed Valento to the Flores home where the white van was parked.

On January 4, 2005 Detective Valento and the homicide detectives again interviewed Rene and Luis Elias. Valento inserted photographs of the Rodriguez brothers in the collection of photographs for Rene to review. Rene, however, refused to look at the book, stating he was afraid to leave his children without a father. He would not indicate whether he recognized a particular photograph Valento pointed out to him.

A search warrant was executed at the Flores home on January 11, 2005. Deputies found two notebooks containing gang symbols and graffiti and photographs depicting Salvador Rodriguez displaying CRS gang signs. The white van, in which spray paint

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[5] A deputy sheriff testified Manuel Rodriguez had acknowledged his gang membership and moniker in a stop some months before the murder. The deputy recorded Manuel's height at the time as 5 feet, 4 inches. Manuel Rodriguez was tried concurrently with Salvador Rodriguez but is not a party to this appeal.

cans were found, was also impounded. Rodriguez was arrested following the search. Another search warrant was executed at the Rodriguez family home, where deputies found bullets for a .357 magnum revolver.

On January 13, 2005 Detective Valento, accompanied by the assistant district attorney assigned to the case, again interviewed Morales. This interview was also videotaped. During the first portion of the interview, Morales recounted the statements he had previously made to Valento concerning Rodriguez's description of the shooting. After Morales finished answering questions about the case, Valento and the prosecutor advised him he would have to testify in court and that Rodriguez, his brother Manuel and Gabriel Flores had been arrested and charged with murder "because of a bunch of other circumstances." Because Morales's name was not yet "out there," they said, if he was willing to work with them, he and his family could be moved to a different residential area for their safety. When Morales admitted he was afraid, the prosecutor explained, "move your mom, move you, and then, you know, we're hoping that you'll cooperate with us, because . . . you've been totally truthful, you said what happen[ed], you said your prints weren't going to be on the gun, they're not on the gun. And so . . . we'll never have to file the case on you, but we do want to know that you're going to cooperate with us." The prosecutor continued, "We're just trying to tell you that, you know, you were helpful, you were honest, so we're going to let the gun thing slide, but we got to know that you're going to cooperate. So do you feel like either of us are threatening you in any way?" Morales answered he did not feel threatened but wanted to talk with his mother before committing to testify for the prosecution. The prosecutor reiterated the suspects did not yet know about Morales; and Valento concurred, stating he would never do that because "they" could go "switch" his mother "right now." Valento and the prosecutor also warned Morales to stay out of the gang life when he moved because he would be killed if he came back to the neighborhood. They concluded the interview after discussing logistics related to moving Morales's family.

3. *The Trial*

Rene and Luis Elias and Alex Contreras all testified reluctantly at trial and professed to remember little about the night of the shooting. Rene volunteered he was drunk that night and had been drunk frequently during that period of time. None of the victims identified Salvador Rodriguez or his brother Manuel as the perpetrators. Excerpts from the videotapes of Rene's and Luis's interviews with the detectives were played for the jury, and transcripts of those excerpts were marked as exhibits and provided to the jury.

Morales testified for the prosecution. In support of his testimony, and with no objection from the defense, the prosecutor played the entire videotape of his first interview with detectives. Predictably, he was subjected to intensive cross-examination, most of it focused on his own motivation to avoid being charged with murder and the People's grant of immunity in exchange for his testimony. The defense also impeached him with inconsistent statements he had made during his second interview with Detective Valento and the prosecutor. The prosecutor then called various sheriff's deputies as witnesses, who recounted the results of their investigation. Finally, she called Valento to testify and proffered the videotape of the second interview she and Valento had conducted of Morales. Defense counsel objected to use of the videotape, arguing it was improper on numerous grounds, particularly because it included the prosecutor's statements vouching for Morales's truthfulness. The trial court overruled the objections. After the tape was played, the court denied a defense motion to strike the tape in its entirety but offered to caution the jury not to consider as evidence any statements made by the prosecutor. The defense accepted the instruction, albeit reserving multiple objections to the evidence.[6] At the close of the People's case, defense counsel renewed their objections. The prosecutor offered to submit herself for cross-examination and justified the admission of the tape under Evidence Code section 356, relating to use of an

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[6] The transcript of the videotape provided to the jury was edited to remove the prosecutor's statements related to Morales's truthfulness.

entire communication after a part has been received in evidence, or as a prior consistent statement. The court denied the defense motion to exclude the tape.

Rodriguez did not testify in his own defense. One of his brothers, Ismael, a former CRS member, and a second CRS member each testified Morales himself was a member of CRS known as "Diablo," an allegation Morales had denied under cross-examination. Rodriguez's sister, Maria, testified she saw Detective Valento speaking to Rene, Luis and Contreras in an aggressive manner. According to her, Valento swore at them and directed them to accuse Rodriguez. On redirect Valento denied swearing at the witnesses, stating he had always had a friendly relationship with them.

The jury convicted Rodriguez on one count of murder (Pen. Code, § 187, subd. (a))[7] and three counts of attempted murder (§§ 187, subd. (a), 664) and also found true the allegations a principal had personally discharged a firearm causing death or great bodily injury as to the murder count (§ 12022.53, subds. (d), (e)(1))[8] and had personally discharged a firearm in the commission of the attempted murders (§ 12022.53, subds. (c), (e)(1)). In addition, the jury found true the allegation the offenses had been committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). Rodriguez was sentenced to an aggregate state prison term of 165 years to life.

CONTENTIONS

Rodriguez contends (a) numerous statements in the unredacted videotape were inadmissible hearsay and unduly prejudicial under Evidence Code section 352, and their admission into evidence violated his federal constitutional rights to due process and confrontation; (b) the trial court's cautionary instruction did not cure the prosecutor's

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[7] Statutory references are to the Penal Code unless otherwise indicated.

[8] Section 12022.53, subdivision (e)(1), creates an exception to the personal use requirement of section 12022.53, subdivisions (b) through (d), stating, "The enhancements provided in this section [concerning use or discharge of a firearm] shall apply to any person who is a principal in the commission of an offense if both of the following are plead and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

improper vouching for Morales's credibility; (c) the court erred in refusing to allow his counsel to reopen the defense case and examine a final witness; (d) the court improperly sentenced him to a consecutive 10-year term on the criminal street gang enhancement; and (e) the abstract of judgment must be corrected to reflect the proper terms of the restitution and parole revocation fines.

DISCUSSION

1. *Admission of the Entire Videotape Did Not Unduly Prejudice Rodriguez or Violate His Constitutional Rights*

We review a trial court's determination as to the admissibility of evidence for abuse of discretion (*People v. Rowland* (1992) 4 Cal.4th 238, 264; *People v. Karis* (1988) 46 Cal.3d 612, 637) and the legal question whether admission of the evidence was constitutional de novo (*People v. Cromer* (2001) 24 Cal.4th 889, 893-894; *People v. Mayo* (2006) 140 Cal.App.4th 535, 553).

a. *There was no violation of Rodriguez's right to confrontation*[9]

Rodriguez contends the admission of the videotape, which itself constituted hearsay[10] and was inadmissible unless admitted pursuant to a valid exception, violated his Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*). In *Crawford* the United States Supreme Court held use of an out-of-court statement that is testimonial in nature is prohibited by the Sixth Amendment's confrontation clause, whether or not the statement is inherently reliable or meets an established exception to the hearsay rule, unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the

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[9] We do not separately address Rodriguez's contention his due process rights were violated because that argument presumes the evidence was inadmissible under some state rule of evidence. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [misapplication of state law constitutes deprivation of liberty interest in violation of due process clause].)

[10] See Evidence Code, section 1200, subdivisions (a) ("'[h]earsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted"); and (b) ("[e]xcept as provided by law, hearsay evidence is inadmissible").

witness. (*Crawford,* at p. 61 ["[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rule of evidence, much less to amorphous notions of 'reliability'"].) The Supreme Court later provided some guidance as to when statements are testimonial and when they are not: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224].)

The statements contained in the challenged videotape were unquestionably testimonial in nature. Nonetheless, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. . . ." (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.) Both Morales and Detective Valento testified at trial and were cross-examined at length about various inconsistencies in their testimony. Moreover, although it is rare for a prosecutor to be called as a witness, the prosecutor stated she was willing to be cross-examined about her statements, an opportunity defense counsel declined.

Cognizant of this limitation, Rodriguez argues the declarants' citation of statements made by other witnesses during the course of the interview constitute separate *Crawford* violations. Rodriguez, however, fails to identify particular statements he believes were made by those otherwise unknown declarants. The portion of the videotape defense counsel most vigorously opposed was the discussion among Morales, Valento and the prosecutor regarding the need to relocate Morales and his family. The underlying assumption of danger to Morales and his family did not result from an uncredited, out-of-court statement but instead from the experience of all three individuals

with criminal street gangs. There was no single statement or threat that would violate the tenets of *Crawford* or the confrontation clause.[11]

b. *The trial court did not abuse its discretion in refusing to strike the prosecutor's comments about Morales's truthfulness*

Rodriguez challenges as improper vouching the prosecutor's taped comments to Morales that he had been "totally truthful" and "honest" in his statements about the murder. "'[A] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or] her office behind a witness by offering the impression that [he or] she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [the prosecutor's] comments cannot be characterized as improper vouching.'" (*People v. Stewart* (2004) 33 Cal.4th 425, 499, quoting *People v. Frye* (1998) 18 Cal.4th 894, 971, italics omitted.)

The trial court concluded the prosecutor's comments here, made in the context of negotiating immunity for Morales in exchange for his testimony against Rodriguez, did not cross the line described by the Supreme Court in *Stewart* and *Frye*. We agree. A claim similar to Rodriguez's argument was rejected by the Supreme Court in *People v. Williams* (1997) 16 Cal.4th 153. The defendant contended the prosecutor had improperly vouched for a prosecution witness who testified about the defendant's involvement in the charged crime when the prosecutor stated the witness had "cut a deal" with the prosecution, agreeing to testify "truthfully and honestly" in return for being allowed to plead guilty to robbery on certain charges pending against him. As the Court stated in

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[11] Detective Valento's disclosure "they all went to jail and . . . got filed on for murder today because of a bunch of other circumstances" is not such a statement. Defense counsel was free to cross-examine Valento about that statement but elected not to do so for obvious reasons.

Williams, "'[i]mpermissible "vouching" may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.'" (*Id*. at p. 257.) On the other hand, "'Prosecutorial assurances, *based on the record,* regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper "vouching," which usually involves an attempt to bolster a witness by reference to facts *outside* the record.'" (*Ibid.*)

Rodriguez does not address this important distinction and seems to argue any comment by a prosecutor regarding the truthfulness of a witness is inherently forbidden. That is not the law. Furthermore, even were we more troubled by the nature of the prosecutor's comments on the tape, the trial court prudently (and correctly) admonished the jury the statements of the prosecutor (or any other lawyer) did not constitute evidence to be considered by the jury in reaching its decision. We find no abuse of discretion by the trial court on this ground.

c. *The trial court did not abuse its discretion in admitting Morales's statements under Evidence Code sections 1236 and 791, subdivision (b)*

Evidence Code section 1236 provides, "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." Evidence Code section 791 provides, "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

The People assert Morales's statements relating to his fear of retribution by CRS against him and his family were properly admitted as prior consistent statements. We agree. Defense counsel attempted to impugn Morales's professed fear of retribution by suggesting Morales was simply trying to avoid a murder charge and to place responsibility for the crime on the Rodriguez brothers. Unquestionably, some of Morales's initial statements to Valento were susceptible to this interpretation. For instance, Morales acknowledged he did not want to be charged with a murder he did not commit and expressly requested "help" from Valento in a manner that could well be understood as a request for immunity from prosecution, statements with which he was properly impeached. However, the mere fact Morales harbored more than one motive to fabricate is not determinative under section 791. "[A] prior consistent statement is admissible if it was made before the existence of any one or more of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witness's testimony." (*People v. Hayes* (1990) 52 Cal.3d 577, 609; see *People v. Cannady* (1972) 8 Cal.3d 379, 388.)

The crux of the admissibility issue under Evidence Code section 791 is Rodriguez's contention Morales's statements in the second interview were made after, and not before, his motive to fabricate arose. However, Morales's fear of retribution against himself or his family if he talked to detectives or testified at trial arose only upon the prosecutor's decision to call Morales as a witness, thus revealing his identity to CRS. In *People v. Noguera* (1992) 4 Cal.4th 599, 630, the Supreme Court cautioned that "the focus under Evidence Code section 791 is the specific agreement or other inducement suggested by cross-examination as supporting the witness's improper motive." (See also *People v. Jones* (2003) 30 Cal.4th 1084, 1106-1108 [trial court properly admitted consistent statement of witness made before plea bargain struck and thus before existence of one of alleged grounds for bias].) Here, Morales's statements during the second interview preceded the prosecutor's formal offer of immunity to Morales, and Morales's acceptance of that offer.

Rodriguez argues further Morales never articulated fear of retribution on his own behalf until Valento and the prosecutor fostered that fear during the second interview. Although we read Morales's testimony less narrowly, even had Morales failed to specify a fear of retribution, Evidence Code section 791, subdivision (b), would authorize admission of his statements during the second interview. To borrow from our colleagues in Division Two, "given the negative nature of counsel's impeachment" of Morales, "the timing of the proffered prior consistent statement loses significance." (*People v. Williams* (2002) 102 Cal.App.4th 995, 1011.) The *Williams* court acknowledged "an exception to the Evidence Code section 791 requirement that the prior consistent statement must have been made before an improper motive is alleged to have arisen." (*Williams*, at p. 1011.) "'Different considerations come into play when a charge of recent fabrication is made *by negative evidence* that the witness did not speak of the matter before when it would have been natural to speak,' and the witness's silence is alleged to be inconsistent with trial testimony. [Citation.] In this scenario, the evidence of the consistent statement becomes proper because '"the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story."'" (*Id*. at pp. 1011-1012.) Seen in this light, the vigorous impeachment of Morales's motivation opened the door for the prosecutor to demonstrate the scope of Morales's concerns. (Cf. Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2008) [¶] 8:1355, p. 8D-88 (rev. #1, 2007) ["[u]nless the witness'[s] credibility has been attacked (by evidence of an inconsistent statement or charge of bias or improper motive), there is *no foundation* to permit the introduction of the witness'[s] prior consistent statement"].) On such a record we are reluctant to second-guess the decision of the court to admit Morales's statements concerning his fear of retribution during the second interview.

d. *Evidence Code section 356 authorized the trial court to admit the portion of the videotape concerning Morales's immunity from prosecution*

The People justify the admission of the remainder of the videotape, in particular the comments of Detective Valento and the prosecutor relating to potential retribution against Morales for his testimony, under Evidence Code section 356. This section provides, "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Rodriguez protests this section does not justify admission of these portions of the videotape because his own counsel limited his use of the interview during cross-examination to a specific portion of the videotape (impeaching Morales's assertion at trial Flaco was present at the shooting) unrelated to the detective and prosecutor's later comments.

Rodriguez, however, misperceives the scope of section 356 in this situation. As our colleagues in Division Eight have explained, "Section 356 is sometimes referred to as the statutory version of the common law rule of completeness. [Citation.] According to the common law rule: '"[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance."'" (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3 (*Parrish*).) "The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood. Section 356 is founded not on reliability but on fairness so that one party may not use 'selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.'" (*Id.* at pp. 272-273.)

Consequently, "'"[i]n applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with,* the admission or declaration in evidence. . . .'"'" (*People v. Harris* (2005) 37 Cal.4th 310, 334-335; accord, *Parrish*, *supra*, 152 Cal.App.4th at p. 274.)

For purposes of analysis here, the "subject of inquiry" initiated by the defense included both Morales's motivation to testify against Rodriguez, a motivation the defense had characterized as focused on avoiding a murder charge, and his acceptance of the prosecutor's offer of immunity. Toward that end, the defense elicited testimony from Morales that he knew he could have been charged with unlawful possession of the gun and, possibly, the murder committed with the gun, and had been granted immunity from prosecution for his testimony at trial. Because those statements potentially presented a misleading picture of Morales's motivation, as well as the basis for the immunity offered by the prosecutor, the prosecutor was in turn permitted to offer evidence necessary to make those out-of-context statements understood. (Cf. *People v. Harris*, *supra,* 37 Cal.4th at pp. 334-335 [statements of unavailable victim made to police in subsequent conversation admissible "for the nonhearsay purpose of placing [the victim's] statements into context"; "the jury is entitled to know the context in which the statements . . . were made"].)

The need to correct a misimpression left by the defense's cross-examination using selective excerpts of a witness's prior statements is a matter particularly within the trial court's discretion. We are unwilling to find an abuse of that discretion in this instance.

e. *The trial court did not abuse its discretion in admitting the tape over defense counsel's objection under Evidence Code section 352*

Under Evidence Code section 352 a court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate

undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Rodriguez argues the portion of the tape discussing the need to relocate Morales's family was unduly prejudicial and was largely fostered by Detective Valento and the prosecutor. We disagree. Morales consistently expressed fear for his mother and pregnant girlfriend and conceded in later conversations a corresponding concern for the rest of his family, including himself. Morales's concerns were validated by the conduct of the victims, whose palpable reluctance to testify candidly at trial reinforced the inference of a tangible threat from CRS. The trial court apparently concluded defense counsel's impeachment of Morales's motives justified admission of the tape and vitiated any unduly prejudicial impact on the jurors.

2. *The Trial Court Did Not Abuse Its Discretion in Refusing To Reopen Testimony*

Rodriguez argues his right to present witnesses in his defense was improperly curtailed when the trial court refused to allow him to reopen testimony, the morning after his defense had rested, to rebut Detective Valento's denial he had cursed and yelled at Rene Elias. In support of the request to reopen, Rodriguez's counsel stated the proposed witness, a lawyer who had represented Gabriel Flores at the preliminary hearing, would testify he heard Rene state that Valento had been "threatening and cursing me." As the trial court later explained, he denied the motion because "the offer of proof was he was going to quote [Rene Elias], and I kept it out . . . ."

"In determining whether a trial court has abused its discretion in denying a defense request to reopen, the reviewing court considers the following factors: '(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.'" (*People v. Jones, supra,* 30 Cal.4th at p. 1110.)

Under the circumstances in this case, we see no abuse of the court's discretion. Whatever corroboration this testimony may have offered to support Maria Rodriguez's testimony Valento had pressured Rene Elias to lie on the stand, as proffered, the

testimony would have been inadmissible hearsay. It was not the court's responsibility to advise counsel how the evidence might be presented in an admissible form or introduced in a different manner.[12]

3. *The Trial Court Erred in Sentencing Rodriguez to a Consecutive Term of 10 Years on the Gang Enhancement*

Section 186.22, subdivision (b)(1), requires the trial court to impose certain additional, consecutive terms of imprisonment to the punishment prescribed for a felony committed for the benefit of a criminal street gang—the additional term being 10 years for a violent felony (§ 186.22, subd. (b)(1)(C)), except as specified in section 186.22, subdivision (b)(4) or (5). In place of the 10-year sentence enhancement, section 186.22, subdivision (b)(5), provides any person who for the benefit of a criminal street gang commits a felony punishable by an indeterminate life term "shall not be paroled until a minimum of 15 calendar years have been served."

Rodriguez contends, and the People agree, the trial court erred in sentencing him to a consecutive term of 10 years for the section 186.22, subdivision (b)(1)(C) enhancement on count 1 (first degree murder).

An unauthorized sentence may be corrected at any time regardless of whether an objection was made in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 854.) Section 186.22, subdivision (b)(5), provides for a minimum parole eligibility term of 15 years for "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life." Because Rodriguez was sentenced to a 25-years-to-life term for first degree murder on count 1, the parole eligibility restriction contained in subdivision (b)(5) applied; and the 10-year sentence enhancement set forth in subdivision (b)(1)(C) should not have been used. (*See People v.*

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[12] Much of Rodriguez's argument on this point is directed to the prosecutor's reference to the defense's failure to call a different witness who had been identified as present during Valento's alleged tirade. The appeal, however, challenges the court's evidentiary ruling, not the prosecutor's comments. Accordingly, we do not address those comments.

Lopez (2005) 34 Cal.4th 1002, 1009-1011.) Accordingly, the 10-year enhancement must be stricken.

Whether the abstract of judgment with respect to the sentence for count 1 must be corrected not only by striking the 10-year enhancement but also by including the minimum parole eligibility term of 15 years pursuant to section 186.22, subdivision (b)(5),[13] as Rodriguez and the People suggested in their original briefing, however, depends on whether imposition of that minimum parole eligibility term is barred by section 12022.53, subdivision (e)(2), which provides, "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."[14] As discussed, although the case was tried on the theory Rodriguez was the shooter with respect to at least some of the victims (there was some testimony at least two weapons were fired), the jury was asked to determine only whether Rodriguez was a principal in each of the offenses and in each offense one of the principals had personally discharged a firearm in violation of section 12022.53 within the meaning of subdivision (e)(1). Accordingly, subdivision (e)(2) precludes imposition of both the firearm-use enhancement and the minimum parole eligibility term in count 1 (and counts 2, 3 and 4, as well) if section 186.22, subdivision (b)(5) creates "[a]n enhancement for participation in a criminal street gang."[15]

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[13] "Imposition" of a 15-year minimum parole eligibility term on count 1, for which Rodriguez received a 25-years-to-life base term plus a 25-years-to-life firearm enhancement, will not extend the minimum parole date per se but is a factor that may be considered when the Board of Parole Hearings determines his release date. (See *People v. Lopez*, *supra*, 34 Cal.4th at p. 1009.)

[14] We invited the parties to discuss this issue at oral argument and permitted the filing of supplemental letter briefs addressing the effect, if any, of section 12022.53, subdivision (e)(2), on Rodriguez's sentence. (See Gov. Code, § 68081.)

[15] Striking the concededly improper 10-year street gang enhancement on count 1 reduces Rodriguez's aggregate sentence to, in effect, 155 years to life. A decision the 15-year minimum parole eligibility term is inapplicable to the consecutive life terms for

The Supreme Court has in several cases emphasized the difference between an "enhancement"—"an additional term of imprisonment added to the base term" (Cal. Rules of Court, rule 4.405(c))—and an "alternate penalty provision" specifying a different, increased sentence for the underlying offense itself. (*People v. Jefferson* (1999) 21 Cal.4th 86, 101; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898-899.) The Court has expressly held the 15-year minimum parole eligibility term now found in section 186.22, subdivision (b)(5), is an alternate penalty provision, not an enhancement, "because it is not an 'additional term of imprisonment' and it is not added to a 'base term.'" (*Jefferson*, at p. 101; accord, *People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7 ["[s]ection 186.22, subdivision (b)(5) is an alternate penalty provision that applies to any gang-related underlying felony 'punishable by imprisonment in the state prison for life'"]; *Robert L.*, at pp. 899-900 [the subdivision provides "an alternate increased sentence in the form of a higher minimum eligible parole date, for certain felonies punishable by life that were committed for the benefit of a criminal street gang"].) Accordingly, although we acknowledge the issue is not free from doubt (see, e.g., *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282 [§ 12022.53, subd. (e)(2), prevents imposition of the 15-year minimum term specified in § 186.22, subd. (b)(5), as well as expanded liability under § 12022.53, subd. (e)(1), unless defendant personally used the firearm]), we conclude imposition of the 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5), is proper as to all four counts in this case.[16]

4. *The Abstract of Judgment Must Be Corrected To Reflect the Proper Fines*

Rodriguez contends, and the People concede, the abstract of judgment incorrectly reflects restitution and parole revocation fines in the amount of $800. At the time of sentencing, the trial court imposed a $200 fine as to each component. Because the

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attempted premeditated murder imposed on counts 2, 3 and 4, which were each further enhanced by 20 years pursuant to section 12022.53, subdivisions (c) and (e)(1), would further reduce his sentence to, in effect, 131 years to life—a difference with no practical significance.

[16] A closely related issue is currently pending in the Supreme Court in *People v. Brookfield*, review granted January 17, 2007, S147980.

abstract of judgment must conform to the trial court's pronouncement of judgment (see *People v. Boyde* (1988) 46 Cal.3d 212, 256), we order the abstract of judgment corrected to include imposition of a $200 restitution fine pursuant to section 1202.4, subdivision (b), and imposition and suspension of a $200 parole revocation restitution fine pursuant to section 1202.45. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [abstract of judgment that does not accurately reflect judgment of sentencing court is clerical error that may be corrected by appellate court on its own motion or upon application of parties].)

DISPOSITION

The judgment is modified to strike the 10-year enhancement imposed on count 1 pursuant to section 186.22, subdivision (b)(1), and to reflect instead imposition of a 15-year minimum parole eligibility date pursuant to section 186.22, subdivision (b)(5). As modified, the judgment is affirmed. The abstract of judgment is ordered corrected to reflect (a) on count 1 the imposition of a 25-years-to-life life term, with a minimum eligible parole date of 15 years pursuant to section 186.22, subdivision (b)(5), plus a consecutive term enhancement of 25 years to life pursuant to section 12022.53, subdivision (d); (b) imposition of a $200 restitution fine pursuant to section 1202.4, subdivision (b); and (c) imposition and suspension of a $200 parole revocation restitution fine pursuant to section 1202.45. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.