People v. San Nicholas

2006 | Cited 0 times | California Court of Appeal | February 28, 2006

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OPINION

Marc Anthony San Nicolas and Lawrence Alvarado appeal from the judgment following conviction by jury of the second degree murder of Robert Morales (Robert).[1] San Nicolas received a prison term of 15 years to life for the murder and for having a firearm with two prior prison terms, although the enhancements for the two prior prison terms were stricken for sentencing purposes. (See Pen. Code, §§ 187, 667.5, subd. (b), 12021, subd. (a).)[2] The court ordered Alvarado to prison for 40 years to life for the murder and street terrorism charges, enhanced with allegations he personally used and discharged a firearm and that he committed the murder to benefit a criminal street gang. (See §§ 186.22, subd. (a) & (b), 187, 12022.5, subd. (a), 12022.53.)

On appeal, San Nicolas contends the evidence is insufficient to support the murder charge, attacking several key aspects of the prosecution's case: the corroboration of the accomplices' testimony, the uncharged but alleged conspiracy, and the underlying threat to fight. In relation to this last point, San Nicolas argues the trial court erred in its jury instruction regarding a misdemeanor that resulted in the death. He also contends the court erred by failing to accurately instruct sua sponte on involuntary manslaughter (as a lesser included offense) and on a corollary to the general rules of self-defense, an issue on which Alvarado joins. Alvarado extends the point by contending the trial court erroneously rejected his pinpoint instruction. Then both defendants attack the prosecution's argument as misstating the law; and they contend the prosecutor erred when he refused to grant immunity to Raul Morales (Raul), an error allegedly compounded by the trial court's subsequent refusal to bestow judicial use immunity on him or to impose a sanction on the prosecution in the form of an adverse inference. They characterize the trial court's orders regarding cross-examination as unreasonably restricting their right to confront and cross-examine the accomplice, Martinez. They also attack the court permitting the prosecution to cross-examine Alvarado on subjects that allegedly fell within the attorney-client privilege. We affirm.

FACTS

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In July 2000, a mere "airy word" again "disturb'd the quiet of our streets" (Shakespeare, Romeo and Juliet, (1594) act. 1, sc. 1, lines 96-98) when members of the Fullerton Tokers Town gang (Tokers) came across an irregular assemblage of the Baker Street gang (BS), inside an apothecary's shop. Ray Martinez and Hubert Varela, the Tokers, were offended, particularly after a BS bully "sucker-punched" Varela, a rather vulgar substitution for slapping his cheek with a glove. Once outside, the Tokers discovered they were outnumbered and declined the BS invitation to "rumble." Grumbling, the Tokers retreated from the street but not from the war, as Varela immediately phoned a friend who, although not a member of the Tokers, was a friend of several of them and had the nickname of "Psycho." Thus, "Psycho" San Nicolas entered the stage.

San Nicolas drove up to Varela in his red Lumina, and Varela told him of the disrespectful thumbing[3] they had received at the hand of the BS bullies. San Nicolas, eager for a fight, yelled, "Let's go!" Martinez followed Varela into the car, and the three sped into the night, directly to Iris Court, the bastion of BS home life.

En route, San Nicolas reached into a door compartment, withdrawing a revolver and offering it to Varela. Varela declined it. Before arriving at BS territory, they picked up another Toker, Lawrence Alvarado-known as Woody in the gang-from a motel nearby. Then they rolled down the windows, turned up the volume on their stereo and cruised into the BS cul-de-sac sporting dark sunglasses and shaved heads.

Families were out, playing in their yards and in the street. Several men were playing wiffle ball: Sergio Montanez, Raul and his brother, Robert, as well as their neighbor, Jimmy. Raul was a regular BS member, and Robert and Montanez were former members, having aged beyond the typical period for gang activity.

San Nicolas turned into the street, and Varela conspicuously "threw" a Tokers gang sign. Montanez yelled back that they should show some respect because of the children who were present. He motioned for them to follow him, but San Nicolas gestured that Montanez-and, by now, Raul who had joined him-should retreat to a nearby alleyway. While Montanez ordered the children to move away, he and Raul ran toward the Lumina just as it turned into that drive.

San Nicolas and Alvarado leaped from the car with Varela and Martinez close behind. Robert, in company with one or two other BS members, approached the car, and one of them carried some kind of club. Varela threw a beer can at Robert while Varela's Toker cohorts, San Nicolas and Alvarado, drew their guns. Without any further movement from any BS member, Alvarado started firing. The BS irregulars wisely retreated, but even as they turned to run, Alvarado fired off five more rounds, one of which entered Robert from the back and mortally wounded him, puncturing both lung and heart.

The four Tokers jumped back in the car and accelerated away with Raul throwing a metal wheel

spacer at the retreating car. Varela, Martinez and San Nicolas assailed Alvarado for shooting without provocation, and he apologized for "jumping the gun." Returning to Alvarado's motel, he cleaned his gun and gave it to Varela to dispose of it.

Alvarado and San Nicolas left the area a few days later, traveling to Las Vegas with their girlfriends. While there, a Las Vegas patrol officer attempted to stop their car for speeding, but San Nicolas refused to comply, leading the authorities in a high speed chase into California. At one point in the chase, San Nicolas slowed the car so that Alvarado and his girlfriend could jump from it, and they ran into the desert. However, the extreme July heat drove them back to a populated area where they were arrested.

San Nicolas continued the high speed chase, driving into on- coming traffic, running other vehicles off the road and leading multiple law enforcement agencies on a wild-goose chase for over 140 miles. Officers placed "spike strips" on the roadway to stop the car, which was effective in puncturing one of the tires on the Lumina, but that didn't stop San Nicholas: He continued driving on the tire rim alone. A California Highway Patrol officer finally maneuvered around him, causing San Nicholas's car to roll over, landing in an upside-down position. Both San Nicholas and his girlfriend were found inside the car, along with a Smith and Wesson .357 revolver, and Alvarado's notebook with gang style writing and the incriminatory statement, "We won't stop until that casket drops. OC 13."

After his arrest, Alvarado telephoned his home, speaking with Sandra Castaneda and telling her that he "told them the truth, that [he] did it."[4] According to Castaneda, he was crying and sounded very sincere.

Anthony Sosnowski, a Fullerton Police Department Detective, testified as an expert in the field of gang culture, customs and behavior. He described the Fullerton Tokers Town gang as a Hispanic gang originating in the 1940's in a neighborhood holding a reputation for pervasive marijuana use: thus, the name of Tokers. The gang was generational in nature, with families raising their children in the gang. As of 2000, experts estimated membership in Tokers to exceed 400, with approximately 100 of them in active participation. The gang's primary criminal activity consisted of robberies and aggravated assaults.

In the early 1980's, one of the Tokers families decided to branch out on their own. They moved to the Baker Street neighborhood, but continued their gang lifestyle as the Westside Fullerton gang, dubbing their emerging clique, Baker Street. The center of their life was the 2300 block of West Iris Court, which was named West Baker Street at the time of their arrival. The city later changed the street's name in the hopes of inhibiting BS monopoly of the place. As of July 2000, there were about 30 members comprising BS.

According to Sosnowski, all traditional Hispanic gangs focus on respect-as they interpret the word-as the single most important aspect of gang life. Their characterization of respect requires

them to maintain and project the reputation of the gang as strong and preeminent. This reputation is besmirched if a rival member enters into their territory, or if one of their members fails to support the gang in any confrontation with others.

The Tokers have customary tattoos and stylized graffiti. Alvarado sported a tattoo-"FTTR"-that meant that Fullerton Tokers Town gang was superior to all other gangs. Another of his tattoos meant "my crazy life," a common one for Tokers. Based on all the information about Alvarado that Sosnowski reviewed, including the notebook found in San Nicolas's car, materials seized from Alvarado's home, and Alvarado's tattoos and statements, the detective concluded Alvarado was an active member of the Tokers gang.

Sosnowski concluded, when posed with a hypothetical question detailing facts such as those in this case, that the drive into Iris Court by San Nicolas, et al., was retaliatory action by the Tokers for the incident in the drug store. Alvarado was supporting his gang, and San Nicolas was acting as a gang member-although not an actual member of the Tokers-in this "payback" project.[5] On the other side, Sosnowski concluded Raul was an active BS member, and Montanez and Robert were former active members, having retired to "emeritus" status in BS due to their age.

Both Alvarado and San Nicolas[6] testified in their own defense, notwithstanding that Alvarado was on probation at the time of the murder, and San Nicolas had prior felony convictions for possessing firearms while a felon. San Nicolas stated he was in prison when he got the tattoos and was never a member of the Fullerton Tokers Town gang, although he had heard of the group while in high school. He was interested in guns which explained why he happened to have one with him that day, notwithstanding that his status as a felon barred him from possessing any weapons.

Alvarado admitted on the stand that he was a Toker, having been "jumped in" the year before. His only "family" was the people he knew in his Fullerton neighborhood, as his mother was a heroin user, and he lived most of his young life "on the street." He had met San Nicolas a short while before, and San Nicolas rented the motel room in which Alvarado was staying along with his girlfriend. When San Nicolas heard from Varela that BS had roughed up his friend, he offered to drive them over to Iris Court so that nothing "stupid" would happen, a possibility if young gang members did the driving. He had the gun in his car simply to protect himself if danger appeared at Varela's place. On arrival at Iris Court, he could see several men approaching his car, and one of them was armed with a baseball bat. He was unaware that Varela had thrown a gang sign and felt very threatened when the men appeared to be advancing on the four of them. Holding his gun downward, he was shocked to hear four or five shots. When one of the approaching men threw a metal disk at his car, he became frightened for his own safety.

The four of them ducked back into the car, and San Nicolas sped away, demanding to know where Alvarado had gotten a gun and why he had fired. Moreover, San Nicolas had no idea that someone had been shot. He did not discover that a man had died until the following day.

Alvarado testified similarly, adding that he got a gun earlier that year at a cheap price and kept it with him for protection, although he had not informed any of his friends of its existence. He admitted the spiral notebook found in San Nicolas's car belonged to him but denied that any of the writings had anything to do with the Tokers gang. Likewise, he got the tattoos for fun, but not to identify him with the Tokers.[7] On the day in question, he joined San Nicolas, Martinez and Varela in the Lumina because he thought they were just "cruising." He realized there was something else going on when the car turned into Iris Court, but no one had said anything to him in the car. When the car circled the cul-de-sac, Alvarado spotted some men gesturing, which made him fear that trouble was brewing. Suddenly, men from the street were encircling the car, and a red jeep was blocking their car from the rear. Alvarado got out at the same time as did San Nicolas. He could see that San Nicolas was carrying a large gun, and that two of the approaching men carried weapons of some sort. Alvarado drew his gun but stated he never pointed or aimed it; he merely pulled the trigger at random. He only recalled firing the gun once, but his memory was not clear. As he ducked back into the car, one of the men threw a metal disk, and it hit the door that closed between him and them.

Driving back to the motel, Alvarado apologized to the other three men, admitting he had "messed up." He felt very badly after hearing that someone had died. A few days later, Alvarado and San Nicolas, in company with their two girlfriends, departed for Las Vegas. It was a planned outing for San Nicolas and his girl, and Alvarado decided, on the spur of the moment, to join them.

San Nicolas testified he "lost it" when he saw the police car trying to stop him. He knew he would be sent back to jail because he had a gun in the car and was on parole. He had not planned to try and elude the police; it just happened.

A clinical psychologist, Dr. Michael Mantell, testified for the defense that individuals placed in particularly stressful situations commonly react spontaneously either to fight or flee. This expert testimony was the basis of the defense claim that Alvarado's choice to fire his gun was not a deliberated act but was merely an instinctive reaction to the BS ambush.

Both defendants presented evidence that painted the BS as more violent and aggressive than the Toker gang, and that BS had been alerted to the events that had transpired at the drugstore earlier in the day. Thus, the BS members were on the lookout for any Tokers and ready for mortal combat.

DISCUSSION

I. San Nicolas's Individual Issues

A. Sufficiency of Evidence

San Nicolas brought a motion for acquittal at the end of the prosecution's case (see § 1118.1),

contending the evidence was insufficient to connect him with the crime because the corroboration of the accomplices' testimony was inadequate. (See generally § 1111.)[8] Without sufficient corroboration, the jury could not consider the accomplices' testimony at all, and without it, the evidence was insufficient as a matter of law. Moreover, he contends there was a dearth of evidence showing he aided and abetted the initial challenge to fight, which served as the basis for the natural-and-probable- consequences theory supporting his murder conviction. We disagree.

Review of a denial of a motion for acquittal involves an examination of the record as of the point in the trial when the motion was made.[9] (See People v. Smith (1998) 64 Cal.App.4th 1458, 1464.) In that review, the substantial evidence test is employed. (See People v. Cuevas (1995) 12 Cal.4th 252, 261.) Thus, the evidence must be viewed in the light most favorable to the verdict (see People v. Williams (1997) 16 Cal.4th 635, 678), and we must draw all reasonable inferences from that evidence in support of the judgment. (See People v. Barnes (1986) 42 Cal.3d 284, 303.)

To sustain a conviction when an accomplice's testimony has been used to prove the charge, such testimony must be corroborated by other evidence connecting the defendant with the offense. (See § 1111, fn. 6, ante.) However, the corroboration may be established solely by circumstantial evidence and need be only slight, although it must implicate the defendant in the crime's commission. It need not prove every element of the crime, merely that it establishes the accomplice's credibility on the issue of the defendant's complicity. (See People v. Rodrigues (1994) 8 Cal.4th 1060, 1128; People v. Zapien (1993) 4 Cal.4th 929, 982.)

Varela and Martinez were the two accomplices for which San Nicolas makes his contention. Their testimony established that the incident at the drugstore earlier in the day was the triggering event for the payback ride. Varela testified he phoned San Nicolas, and then informed him of the trouble when he drove up. Varela also testified that San Nicolas offered his gun to Varela as he got in the car, which Varela refused. San Nicolas then picked up his friend, young Alvarado (see fn. 5, ante), informing him they were going "over there," and then drove all four of them to Iris Court.

Independent witnesses established that San Nicolas drove his car in the cul-de-sac of Iris Court, the center of BS territory. They also testified as to the uniformity of the conduct of all four occupants of the car, consistent with a planned confrontation to fight. They established that a passenger in that car-Varela-threw a gang sign upon making eye contact with the men in Iris Court, corroborating the accomplice testimony that the entire trip was an organized payback for the BS insult in the drugstore.

Specifically, Montanez testified as a prosecution witness that he was playing wiffle ball with his brothers-Raul and Robert-and a neighbor, Jimmy. Suddenly, an unknown car-San Nicolas's Lumina-drove into the cul-de-sac occupied by four males and slowed to a crawl. All four occupants turned and made eye contact with Montanez and his companions, and one of the car's passengers threw a gang sign at them. The gang sign indicated they were members of the Tokers Town gang. Montanez responded by yelling at them to "show some respect" because children were present.[10] The

passenger who threw the hand signal then motioned for Montanez, et al., to come towards the car. After directing the kids away from the car, Montanez noticed the car pull into an alleyway, and the driver of the car stepped outside his door with a revolver in his hand which he aimed up the alley. Suddenly, he heard a barrage of shots, but it was not coming from the driver's gun. Montanez and Robert immediately started running away, but Robert suddenly clutched his side. He had been shot in the back.

Although Montanez formerly was a member of BS and still socialized with its members, he no longer considered himself a member of any gang. Notwithstanding this disassociation, he knew that no member of another gang could enter Iris Court without BS members interpreting their presence as a challenge to fight. Moreover, BS and the Tokers were rival gangs.

Maribel Barrera testified that she was driving a car directly behind the Lumina on that late afternoon. She saw the driver get out of the car with a gun in his hand and "start[] shooting." An obviously hostile witness, Barrera failed to remember any of the information she gave to the police on the night of the incident.[11] However, her statements on the earlier occasion established she saw the driver get out of the car immediately after the passengers alighted. Although unsure in the earlier interview whether it was the driver or one of the passengers, she recalled one of them pulled out a black gun and started shooting. The driver was older than the others and had a "pot belly." At trial, Barrera maintained it was the driver who pulled out the gun and aimed it towards the men in the street intersecting the alley. Likewise, she remembered at trial that someone from the backseat of the car waved his hand, and then some men who were standing on a grassy area started motioning towards the men in the car as if to say, "what's up?"[12] She refused to identify anyone as an occupant of the car although she identified a photograph of San Nicolas's car as the one she saw that night, and the gun from that car as appearing to be the same as the gun she saw in the hand of the driver.

These descriptions of the driver of the car circumstantially identified San Nicolas as that driver. He responds that mere suspicion of guilt is insufficient to satisfy the corroboration requirement for accomplice testimony. (See generally 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial § 103, p. 140.) As San Nicolas was never present at the initial fight in the drugstore, and only Varela and Martinez testified they told San Nicolas of the incident, he contends the independent evidence connected him only with driving some friends on a public street in a neighborhood unknown to him.

But proof beyond a reasonable doubt of every element of the offense is not required under section 1111. "The corroboration need not extend to all elements of the offense, nor to every detail in the testimony of the accomplice. It need not be strong; it is sufficient if it tends, in some slight degree, to implicate the defendant. It need not be direct; circumstantial evidence is sufficient if the connection of the defendant with the crime may be reasonably inferred therefrom. . . ." (3 Witkin, Cal. Evid., supra, § 104, pp. 141-142.)

Circumstantially, San Nicolas was established by independent testimony to be the driver of a car with

the Tokers in it. He slowed the car to a stop while he and his passengers made eye contact with the rival gang members, moving on only after the men were motioned to confront them. He was armed with a gun that he aimed at apparent members of that rival gang. He did not remain seated in the car when it pulled into the alley. On the contrary, he got out of the car with the drawn gun at the same time as his gang-member passengers alighted, and stood next to his car for a fast getaway. Although no one identified him in court, he was found to meet the description of the driver, and he was in possession of the car and the gun that were identified as the ones used in the payback plan.

Finally, Montanez's description of Robert's death was completely consistent with the accomplices' testimony of the death. These facts circumstantially identify San Nicolas as a partner in the plan to retaliate against BS for striking his friend Varela, and for having actively participated in that plan which resulted in the death of Robert. (See People v. Narvaez (2002) 104 Cal.App.4th 1295, 1303-1304 [accomplice testimony by driver of getaway car sufficiently corroborated by defendant's possession of property stolen in the planned robbery a week after its commission].) Thus, the corroboration requirement was adequately met.

San Nicolas responds that there is insufficient evidence that he knowingly aided and abetted the challenge to fight, the crime triggering the natural-and-probable-consequences theory of liability for murder. Likewise, he argues there is no evidence that he knew of, or agreed to the crime of challenging another to fight, which are elements essential to support the uncharged conspiracy theory. Without the accomplices' testimony, all that was shown was that he drove some friends to a neighborhood when he happened to have a gun with him. No independent evidence proved he knew anything of the events of that afternoon, and without that knowledge, no evidence connected him with any plan of breaching the peace by challenging another to fight. All the prosecution showed was that he was with associates under suspicious circumstances. (See People v. Sanders (1995) 11 Cal.4th 475, 534-535; People v. Robbins (1915) 171 Cal. 466, 476.)

As noted above, direct proof is not required. (See People v. Rodrigues, supra, 8 Cal.4th at 1128.) More importantly, San Nicolas's actions following the crime filled in any gaps essential for corroboration: He fled to Las Vegas with his cohort-in-crime, Alvarado. When the police attempted to stop his speeding car, he took them on a 140-mile wild goose chase. A reasonable interpretation of such actions was that San Nicolas was conscious of his own guilt, "`an implied admission which may properly be considered as corroborative of an accomplice's testimony. [Citation.]'" (See People v. Zapien (1993) 4 Cal.4th 929, 983.) San Nicolas's self-serving explanation that he was merely trying to prevent arrest for being a felon in possession of a firearm when he careened across two states was clearly rejected by the jury, and we concur in that assessment.

B. Jury Instructions

(1) Misdemeanor Resulting in a Death

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San Nicolas contends the trial court erred when it instructed the jury he could be liable for second degree murder if he aided and abetted a misdemeanor which had as its natural and probable consequence the death of Robert. Moreover, he contends no evidence was presented that he aided and abetted any such misdemeanor.

The instruction in question was CALJIC No. 3.02, modified to apply to this case. It provided, "One who aids and abets another in the commission of a crime is not only guilty of that crime but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant Marc San Nicolas guilty of the crime of murder as charged in count II, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of challenging to fight was committed; [¶] 2. That the defendant aided and abetted that crime; [¶] 3. That a co- principal in that crime committed the crime of murder; and [¶] 4. The crime of murder was a natural and probable consequence of the commission of the crime of challenging to fight. [¶] Whether a consequence is `natural and probable' is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A `natural consequence' is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. `Probable' means likely to happen." (CALJIC No. 3.02 (2000 rev.) as given.)

Later in the instructions, the trial court defined the elements of the crime of challenging another to fight, which was the named underlying crime triggering the liability. (See CALJIC No. 16.260, as given.) San Nicolas contends that the underlying crime-breach of peace-was so trivial in light of the heinous result, that this dichotomy should take it well outside the boundaries of the natural-and-probable-consequences theory of liability. He cites language in People v. Prettyman (1996) 14 Cal.4th 248, at page 269, as authority for this limitation on the doctrine's application. Additionally, he emphasizes that the statutory language of section 192, subdivision (b) provides that only a manslaughter conviction occurs when a death results from a misdemeanor crime. (See § 192, subd. (b).)[13]

San Nicolas concedes that a misdemeanor can trigger a murder conviction, noting such was authorized in People v. Solis (1993) 20 Cal.App.4th 264. Nonetheless, he argues the Solis situation distinguishes it from his own. In Solis, the trial court had found that murder was reasonably foreseeable from the offense of brandishing a weapon. Thus, the court permitted the jury to consider if the death resulted from the offense and if the prosecution had proven it. (Id. at pp. 272-273.) Similarly, in People v. Montes (1999) 74 Cal.App.4th 1050, the court permitted the jury to find attempted murder from a "simple assault and breach of the peace" because they stemmed from an ongoing rivalry between two violent gangs. (Id. at p. 1054.)

When the misdemeanor offense is not merely trivial and the serious result is reasonably foreseeable under the circumstances, the Prettyman limitation is not applicable. (People v. Montes, supra, 74

Cal.App.4th at pp. 1054-1055.) However, San Nicolas characterizes his situation as a very minor and trivial incident with a mere hand signal constituting the entire challenge. Thus, he argues, the Prettyman limit should apply.

The test for application of the natural-and-probable- consequence theory of liability is "`"an objective one. . . ."The issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." [Citation.]'" (People v. Culuko (2000) 78 Cal.App.4th 307, 327.)

As noted in Culuko and Montes, it is for the jury to decide whether the facts and circumstances of the incident as proven by the evidence are such to apply the doctrine. As long as the incident is serious enough for the reasonable interpretation that the serious offense is a foreseeable consequence of the other, the issue becomes one for the jury to resolve. It is not a mere review of the statutory elements of the underlying crime (see People v. Lucas (1997) 55 Cal.App.4th 721, 732 ["We cannot look to the naked elements of a target crime but must consider the full factual context which the defendant faced. . . ."]) that must be considered, or even a statistical review of convictions resulting from lesser crimes. (Id. at p. 732, fn. 2.)

The issue is ultimately one for the jury to decide. (People v. Nguyen (1993) 21 Cal.App.4th 518, 531.) As stated in Montes, a breach of the peace is not such a trivial matter when it involves the ongoing conflict between violent gangs. That is what is before us. San Nicolas characterizes his personal involvement as limited to associating with a friend who, unbeknownst to him, was carrying a gun and opened fire without provocation and against San Nicolas's expectations. But that characterization was rejected by the jury which found that an objective review of the facts would have apprised a reasonably prudent man in like circumstances that a payback hit was planned. Considering San Nicolas drove into a neighborhood cul-de-sac-a location into which an innocent driver would be highly unlikely to wander-and slowly drove by a group of men, making eye contact and driving to an alleyway to which his passenger pointed after making a threatening gesture, his protestations of ignorance are most unconvincing, irrespective of the fact San Nicolas was not a member of Varela's gang.

C. Involuntary Manslaughter

San Nicolas contends the jury should have been instructed that if it found he had engaged in a misdemeanor that somehow resulted in death, he was responsible for only involuntary manslaughter. (See § 192, subd. (b), commonly referred to as the "misdemeanor-manslaughter" rule.) Moreover, the jury expressed confusion over the issue of the requisite mental state for the offense. In response, San Nicolas contends, the trial court erred by not re-instructing on the involuntary manslaughter liability at that time. We disagree.

The trial court is required to instruct sua sponte on all lesser included offenses to those charged (see People v. Barton (1995) 12 Cal.4th 186, 203) unless the evidence fails to warrant that instruction. (See People v. Mendoza (2000) 24 Cal.4th 130, 174.) The trial court respected this requirement by informing the jury that involuntary manslaughter was a lesser included offense to the possible murder charge if it found the defendant engaged in a breach of the peace, resulting in a death. (See CALJIC Nos. 8.45 (2001 rev.) and 17.10, as given.)[14]

The jury inquired of the court regarding instructions on more than one occasion. One jury question related to the issue of voluntary manslaughter as a lesser included offense to murder. Specifically, the jury asked the following: "We, the jury in the above entitled action request the following: Question (concern): What is the specific incremental standard(s) required to meet the implied malice elements - murder in the 2nd degree as compared to the [conscious] disregard for life requirement in voluntary manslaughter finding? Restated (general question): What is the specific standard(s) required to make the "jump" from voluntary manslaughter to murder 2nd degree? /s/ Foreperson." (Sic.)

San Nicolas contends that, although the jury's question was limited to the distinction between voluntary manslaughter and murder, the court was required to expand its response to include involuntary manslaughter as the only proper lesser included offense to the murder charge, as section 192, subdivision (b) permits only involuntary manslaughter under the misdemeanor-manslaughter rule.

The Attorney General's response was two-fold: First, if there was any error in the court's response, it was waived by the parties as both counsel stipulated that the court's response was appropriate. Invited or waived error by a party bars that party from raising the issue on appeal. (See generally People v. Bunyard (1988) 45 Cal.3d 1189, 1234; People v. Kageler (1973) 32 Cal.App.3d 738, 745-746 [failure to object to court's response to jury question "cures any possible error" in the responsive instruction].) Second, the response by the court was correct, and without further requested modification by the defense, San Nicolas's complaint on appeal fails on the merits. Both responses are persuasive, and we address both because San Nicolas couches his argument in terms of ineffective assistance of counsel if the stipulation bars his argument here.

The court responded to the jury's question with the following written directive, entitled "Conscious Disregard for Life - Murder and Manslaughter Distinguished." The body of the response stated, "The conscious disregard for human life elements present in both implied malice second degree murder and voluntary manslaughter are different in that the conscious disregard for life in voluntary manslaughter is a less culpable mental state because defendant is acting either (1) upon sudden quarrel or heat of passion; or (2) in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. The burden is on the prosecution to prove malice aforethought, a necessary element of murder. Stated another way, the burden is on the prosecution to prove beyond a reasonable doubt that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the actual but unreasonable belief in the necessity

to defend oneself against imminent peril to life or great bodily injury."

Under section 1138,[15] the court has a responsibility to answer any question posed by the jury concerning "any point of law arising in the case[.]" However, it may refer the jury to correct instructions already given, if those instructions are full and complete. (See People v. Davis (1995) 10 Cal.4th 463, 522.)

The court responded directly to the question asked by this jury. San Nicolas contends it was inadequate because it failed to alert the jury of possible alternatives other than the two over which the jury expressed confusion.

The jury did not request information or clarification as to all possible alternative verdicts. It was focused on the actual distinctions between voluntary manslaughter and murder under the theory of a conscious disregard for life. Nothing in the court's response eliminated the jury's possible consideration of other lesser included offenses; it only addressed the single issue raised in the jury's question. "We find no reasonable likelihood that, given these instructions, the jury did not understand what types of [other] criminal activity it could consider." (People v. Seaton (2001) 26 Cal.4th 598, 687.)

San Nicolas focuses on his own testimony to the exclusion of any other when he concludes that he was merely criminally negligent when he drove Varela over to BS headquarters to find the party responsible for hitting him earlier in the day. He characterizes his conduct as being merely a helpful buddy, with no idea what might ensue. The fact he was carrying a gun-and he increased his odds of winning by picking up another Toker before driving to the very heart of the enemy gang's territory-belies this characterization. Moreover, Varela and Martinez both noted the eagerness with which San Nicolas expressed his desire to drive Varela to the BS gangland.

Irrespective of the overwhelming evidence of San Nicolas's knowledge, the issue remains: Did the trial court adequately respond to the jury's question? Yes, it did. And San Nicolas's trial counsel agreed when he stipulated to the written response.

I. Right of Self-Defense

San Nicolas takes umbrage with the trial court's instructions regarding the right of self-defense. He contends the basic instruction that was given was wrong, and the prosecution exacerbated the problem by stressing in argument the very point misstated by the court. He concedes the court gave a myriad of instructions concerning self-defense and imperfect self-defense (see CALJIC Nos. 5.12, 5.13, 5.14, 5.15, 5.16, 5.17, 5.31, 5.50, 5.52, 5.54, 5.55, 5.56, 8.50, as given), but focuses on only three: CALJIC Nos. 5.54, 5.55, and 5.56, as given. These three instructions discussed the right to defend oneself in the context of initial aggressors or mutual combatants. It is this point over which San Nicolas contends he was denied a fair trial: He argues he was not an initial aggressor or mutual

combatant, yet these instructions informed the jury he had no right to defend himself, depicting him as one.

The court informed the jury that the "right of self-defense is only available to a person who initiated an assault if he has done all the following: [¶] 1. He has actually tried, in good faith, to refuse to continue fighting; [¶] 2. He has clearly informed his opponent that he wants to stop fighting; and [¶] 3. He has clearly informed his opponent that he has stopped fighting. [¶] After he has done these three things, he has the right to self-defense if his opponent continues to fight. [¶] The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense. [¶] The right of self-defense is only available to a person who engages in mutual combat if he has done all the following: [¶] 1. He has actually tried, in good faith, to refuse to continue fighting; [¶] 2. He has clearly informed his opponent that he wants to stop fighting; [¶] 3. He has clearly informed his opponent that he has stopped fighting; and [¶] 4. He has given his opponent the opportunity to stop fighting. [¶] After he has done these four things, he has the right to self-defense if his opponent continues to fight." (CALJIC Nos. 5.54, 5.55, 5.56, as given.)

The jury retained the power to determine whether San Nicolas was an initial aggressor or mutual combatant. The prosecutor argued he was an aggressor, but that was within the purview of argument based on the evidence. The jury could reject that interpretation of the evidence and decide, as argued by San Nicolas and Alvarado now, that the BS members were the aggressors when they advanced on the car in the alleyway. The court instructed the jury that anyone "threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene." (CALJIC No. 5.50, as given.)

Specifically, San Nicolas denounces the prosecutor's argument invoking CALJIC No. 5.56 that mutual combatants cannot stand behind self-defense when one of them is killed because both parties agreed to fight one another. That rule is the state of the law. (§ 197, subparagraph 3; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 75, pp. 409-410.) Nonetheless, both defendants point us to an exception to that rule carved out in People v. Quach (2004) 116 Cal.App.4th 294, contending it bars use of CALJIC No. 5.56 in situations in which the victim's response to the mutual combat is so sudden, extreme and perilous that no opportunity exists for the other party to convey declination of combat. They conclude that the trial court failed in its sua sponte duty to instruct the jury on all material instructions pertaining to their defense which they summarize as an assertion of either self-defense or imperfect self-defense in the face of oncoming assailants.

In Quach, a group of people, rather equally composed of two rival Asian gangs, emerged from a bar.

An argument broke out between Quach-the apparent leader of one of the gangs-and a member of the rival gang. Although numerous accounts failed to agree as to who drew a weapon first, shots were exchanged between both men. The testimony was cloudy at best, but it appeared that the rival drew first and perhaps even fired before Quach drew his gun. Based on this very narrow set of facts, we determined that CALJIC No. 5.56 probably misled the jury to believe Quach had no right to defend himself, even though the jury might have derived the correct test through application of other instructions. The corollary to the general rule regarding mutual combatants or initial aggressors is that "`when a defendant engages in a simple assault and his opponent responds with deadly force so suddenly that the person cannot withdraw, a defendant may immediately use deadly force in self-defense.'" (People v. Quach, supra, 116 Cal.App.4th at 301; see also 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 75, p. 410.)

However, the narrow facts supportive of the corollary were absent in this case. Whether the jury found San Nicolas as an initial aggressor or a mutual combatant, there is no reference to any "sudden, perilous and extreme" reaction by the men in the Iris Court cul-de-sac. If anything, they responded defensively by approaching the car, one of them with some sort of club. Moreover, the men in the car did not engage in a mere simple assault: They emerged from the car armed, and began shooting with nothing more being done by the pedestrians. After the shooting by Alvarado, one of the BS members obtained and threw a metal disk. However, nothing done by the Iris Court residents was anything more than what would be expected when one gang challenges its rival to a fight.

Both San Nicolas and Alvarado carried guns from the outset. Contrary to their characterizations on appeal, they were not slowly driving away when ambushed by dangerous armed men. Nothing in the record, even as presented by their testimony, would support the interpretation necessitating a sua sponte instruction on the corollary to the general rule found in CALJIC No. 5.56. (See People v. Moore (2002) 96 Cal.App.4th 1105, 1116 ["the general rule is that a trial court need give a requested instruction concerning a defense only if there is substantial evidence to support the defense. (In re Christian S. (1994) 7 Cal.4th 768, 783.)"].) If San Nicolas desired an amplification of CALJIC No. 5.56 to address his potential defense variation, it was incumbent on him to propose and craft such a modification. (See People v. Grassini (2003) 113 Cal.App.4th 765, 777.) "`[T]he trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. . . . Thus, the court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.'" (People v. Garvin (2003) 110 Cal.App.4th 484, 488-489 [instruction regarding antecedent threats made by a victim is not required sua sponte when court gives standard instructions regarding self-defense; duty is on defense to proffer more specific or amplified issues to the general ones in self-defense case].)

Alvarado responds that he did request a pinpoint instruction which the trial court refused. Specifically, he asked the court to tell the jury that a "defendant has no obligation to curtail his []

activities to avoid an encounter with a person who may attack him []. Therefore, a person does not forfeit his . . . right to self-defense simply by driving by another person on a public street even if the person driving by has reason to believe that the other party may initiate an assault by shooting at the passing automobile." Alvarado declares that this pinpoint instruction encapsulated his theory of defense, and the trial court's refusal to give it deprived him of his only defense to the charge. (See generally People v. Wright (1988) 45 Cal.3d 1126, 1137.)

The trial court is only required to instruct the jury with legally correct statements of law that are not confusing, duplicative or argumentative. (See People v. Berryman (1993) 6 Cal.4th 1048, 1079; People v. Mincey (1992) 2 Cal.4th 408, 437.) Moreover, pinpoint instructions are permitted when they describe "`the theory of the defense'" but not if they "highlight `specific evidence' as such." (People v. Earp (1999) 20 Cal.4th 826, 886.) Alvarado's request rested on the factual point that he had not physically assaulted anyone before he started firing into the pedestrians. It failed to acknowledge that liability could have rested on a challenge to fight, thus invoking the legal theory that he and his cohorts were enticing the rival gang into mutual combat. Thus, it failed to correctly state the law.

Moreover, the distinction between factual argument and a defense theory can be a thin but still definite line. For example, in Mincey, supra, 2 Cal.4th at page 437, the defense sought to have the jury instructed that if the infant victim's death resulted from a "misguided, irrational and totally unjustified attempt at discipline rather than torture[,]" it was not premeditated torture-murder.[16] The defense also wanted the jury to know it could consider the severity of the victim's wounds in its assessment of premeditation and intention to inflict extreme pain, but not without considering that such severity was consistent with "heat of passion or a misguided, irrational and totally unjustifiable attempt at discipline . . . ."[17] (Ibid.) In rejecting both of these instructions, the Supreme Court stated that such statements were "factually based argument[s] directed at an attempt to negate the element of intent. It is not a legal defense." (Id. at p. 438; see also People v. Earp, supra, 20 Cal.4th at pp. 886-887 [pinpoint instructions detailing a third party's possible culpability were properly rejected because they "`invite[] the jury to draw inferences favorable to one of the parties from specified items of evidence, . . .'"].)

Likewise here. Alvarado's proposed instruction was not a legal theory of defense but a factual argument, focusing on those facts to which he and San Nicolas testified and disregarding all inconsistent or contrary evidence. As such, the trial court was not arbitrary in rejecting it. (See People v. Earp, supra, 20 Cal.4th at pp. 886-887.)

Moreover, the court had already given pattern instructions relating to the various theories of self-defense and imperfect self- defense. (See CALJIC Nos. 5.12-5.17, 5.50, 5.52, 5.54-5.56, as given.) Therefore, whatever legal point was interwoven with the facts in Alvarado's requested instruction, it was more clearly presented in the straightforward format of the pattern instructions. Rejecting the crafted argument was proper: It contained very little in correct legal theory, and what was there merely duplicated that already given in the correct instructions. (People v. Berryman, supra, 6 Cal.4th

at pp. 1079-1080.)

II. Mutual Arguments

A. Prosecutorial Error

San Nicolas joins with Alvarado in attacking the prosecutor's argument as a misstatement of law. As noted in the preceding discussion, the prosecutor characterized the two of them as initial aggressors or mutual combatants and insisted they had no right of self-defense. To each of these statements in argument, the defense objected to the prosecutor's language painting them as initial aggressors or mutual combatants, but the objections were overruled. In this appeal, San Nicolas and Alvarado characterize the issue as one of evidentiary insufficiency: The evidence revealed that they were only "looking for a fight" and never actually initiated any assaultive conduct. Merely desiring a fight, they contend, cannot constitute either aggression or mutual combat. Thus, the record is without any evidence to support the instructions found in CALJIC Nos. 5.54-5.56, and the prosecutor's argument directly misled the jury into believing neither defendant had a right to defend himself.[18]

The instructions given by the court were correct statements of law. The prosecutor relied on those instructions in his arguments, and, absent any suggestions by the defense to amplify or modify them with the corollary to the general instructions on self-defense, the prosecutor was quite justified in doing so.[19]

Prosecutorial error occurs when misleading or deceptive conduct or language by the prosecutor "infects the trial with such unfairness as to make the conviction a denial of due process." (People v. Morales (2001) 25 Cal.4th 34, 44; see Darden v. Wainwright (1986) 477 U.S. 168, 181.) However, even if a prosecutor's conduct fails to require reversal under federal constitutional limits, it can still constitute prosecutorial error under state law "if it involves `the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (People v. Farnam (2002) 28 Cal.4th 107, 167.)

A prosecutor cannot misstate the law. (See People v. Meneley (1972) 29 Cal.App.3d 41, 61.) On the other hand, a prosecutor has broad leeway to argue the facts and the law in a manner most supportive of his or her theory of the case. The defendants argue that a person can want to fight someone, but if that person does nothing to start the fight, he or she is not an aggressor. Thus, they contend, the prosecutor's argument was misleading and denied them the opportunity to defend themselves at trial on this very basic point: Just because they wanted to fight or intended to fight or desired to fight, the law does not bar them from defending themselves when assaulted by another. Thoughts are not penalized; only a direct assault on another warrants the label of aggressor. However, no authority is provided to support this last statement.[20]

Moreover, the defendants distort the prosecutor's argument. The prosecutor never stated that the

defendants' mere thoughts rendered self-defense unavailable to them. The prosecutor's statements included the concept that both an act and an intent were essential elements to constitute aggression under CALJIC Nos. 5.17 and 5.55. As the prosecutor explained in his argument, "An aggressor gives up the right to self-defense when he goes out and becomes an aggressor. . . . You go out looking for a fight and you find a fight, you can't come to a court later and say, `But I acted in self- defense.'" (Emphasis added.) As phrased here, it is clear the prosecutor included actions on the part of the aggressor as well as his or her intent before concluding he or she was an aggressor. The law does not permit a contrived defense of self to one who kills. Moreover, the prosecutor never ordered the jury to find the defendants were aggressors as a matter of law. He argued they were aggressors because they went to BS headquarters to take revenge for the "slight" suffered by a Toker earlier in the day; they went there armed and in a manner enticing the rival gang members to engage in a fight by slowly driving into the cul-de-sac with the windows down, blasting music from the car's stereo, sporting dark sunglasses and "throwing" a Toker Town hand signal. Considering the expert's and accomplices' testimony that such conduct was a challenge to fight in gangland terminology, such bravado cannot be characterized as mere thought.

The defendants take exception to the prosecutor's use of the alternative factual scenario to the aggressor-contriving-self-defense theory: that is, mutual combat. Under CALJIC Nos. 5.55 and 5.56, a mutual combatant cannot rely on self-defense unless all four conditions are met: (1) the combatant has "tried, in good faith, to refuse to continue fighting; [¶] (2) he has clearly informed his opponent that he wants to stop fighting; [¶] (3) he has clearly informed his opponent that he has stopped fighting; and [¶] (4) he has given his opponent the opportunity to stop fighting." (CALJIC No. 5.56, as given.) The prosecutor argued that if the defendants engaged in a mutual combat, they could not rely on self-defense in this case. Moreover, argued the prosecutor, they were not mutual combatants at all. The Tokers went out looking for the fight with BS, taunting them into approaching the car so the curious BS members would be hit by the armed Tokers who would come out shooting. There was nothing erroneous about the prosecutor's alternative arguments.

The instructions were correct statements of law, particularly in light of CALJIC No. 5.55, which provides that the "right of self- defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (CALJIC No. 5.55 (2005 ed.), as given.) The prosecutor's statements were consistent with those instructions-especially CALJIC No. 5.55-albeit under an interpretation of the evidence in a light most advantageous to the prosecution. Finally, the jury was likewise instructed that if "anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with [the court's] instructions on the law, [each juror] must follow [the court's] instructions." Thus, had a juror possibly misconstrued the argument in the manner feared by the appellants, that juror was ordered to follow the court's instructions instead.

No error occurred here.

A. Refusal to Grant Immunity

During the trial, the prosecution did not call Raul as a witness. Nonetheless, the court appointed counsel to advise Raul in the event his testimony was desired by the defense because of the potential for self-incrimination under a "provocative act" theory. After consulting with counsel, Raul invoked his privilege against self- incrimination as to any and all questions relating to the events in July 2000. The defense responded with a motion to compel immunity for Raul based on the representation of his potential testimony as set out in a police report. The prosecutor refused to grant immunity.

In the alternative, the defense requested that the trial court issue a grant of judicial immunity. The court refused, stating "there is no statutory authority in California . . . [because] the proffered testimony is [not] necessarily clearly exculpatory." The defense then requested, as a further alternative, a factual finding adverse to the prosecution that would be given to the jury in the form of an instruction.[21] The court refused this request as well. The defense contends (1) the prosecution erred when it refused to grant immunity; and (2) the court erred when it refused the grant of judicial immunity or the alternative adverse finding.

A criminal defendant holds no power to mandate a grant of immunity to a defense witness, irrespective of that witness's anticipated testimony. (See People v. Lucas (1995) 12 Cal.4th 415, 459.) And it is not prosecutorial misconduct (or error) for the prosecutor, as characterized by the defense, to "interfere[] with defendant's right to present a defense" by refusing a grant of immunity.[22] (Ibid.)

Finally, a trial court does not possess the "`"inherent power" to confer immunity on a witness called by the defense.'" (People v. Lucas, supra, 12 Cal.4th at p. 460.) In expressing its doubt that such power exists, our Supreme Court noted that the "one jurisdiction that recognizes such a power, we have observed, also recognizes that `"the opportunities for judicial use of this immunity power must be clearly limited; . . . the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity . . . .[¶] The defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses."' [Citations.]" (Ibid.)

Thus, whether the trial court could have granted immunity to Raul is still very much in question.[23] (See People v. Samuels (2005) 36 Cal.4th 96, 127.) However, its refusal to grant immunity, assuming such power exists, must be controlled by the test cited in Lucas. The issue becomes whether the defense bore its burden in showing Raul's anticipated testimony was "both clearly exculpatory and essential to the defendant's case." (People v. Lucas, supra, 12 Cal.4th at p. 460.)

The defense desired to call Raul as a defense witness for the express purpose of establishing that men

in the Iris Court area were running towards the Lumina just prior to the shooting in such a way as to corroborate the version of events described by Alvarado and San Nicolas in their testimony, particularly to support their allegations of fear. In Raul's statement to the police, he described that he and his brother, Robert-former and present BS members-were following the car out of "curiosity" as it turned into the alleyway.

Assuming this testimony would have been forthcoming from Raul, it failed to meet the threshold requirements of clear exculpation and crucial bearing. Raul's testimony was merely duplicative and thus not crucial because Montanez already testified to every point Raul mentioned in his police statement. Montanez actually testified that he held a wiffle ball bat in his hand when the car turned into the cul-de-sac. He then said that he and Robert ran towards the Lumina as it turned, and that Raul was on the roof to retrieve the wiffle ball when the car first made its appearance in the cul-de-sac, resulting in Raul's belated appearance in the alley area. In other words, Raul's testimony would not have been as helpful as the testimony already given by Montanez.

Moreover, Raul's testimony was not clearly exculpatory as he was an admitted member of the defendants' rival gang and brother of the decedent. His entry into the alleyway was subsequent to that of Montanez, who was adjacent to Robert at the time of the shooting. Thus, Raul's account at best would not have been as helpful to the defense as that already given by Montanez, and Montanez's testimony was clearly not exculpatory since it cemented the prosecution's case.

The defendants respond, however, that the trial court should have granted at least their request for an adverse finding instruction if it declined to grant immunity. The sole authority provided for such an action was United States v. Tory (9th Cir. 1995) 52 F.3d 207 at 211. However, no such adverse finding instruction was ever considered, much less ordered, in Tory. The sole issue was whether the defense was entitled to argue that the prosecution could have produced stronger evidence than that which it chose to present. (See Evid. Code, § 412.)[24] Finally, the defendants have failed to show in any way that Raul's testimony would have been stronger or more credible than that already given by Montanez and the remaining witnesses. In sum, no error occurred relating to Raul's testimony.

B. Restrictions on Cross-Examination

The defendants make two contentions regarding the trial court's orders controlling cross-examination. As to Alvarado's cross- examination of the accomplice, Martinez, they characterize the court as being unduly restrictive. As to the court's controlling the prosecutor's cross-examination of Alvarado, they characterize it as being erroneously broad, permitting inquiry into areas covered by the attorney-client privilege.

1. Undue Curtailment

Alvarado argues that certain evidentiary objections posed by the prosecutor, and sustained by the

court, effectively eliminated his full cross-examination of Martinez. The three areas in which the court sustained objections were Martinez's plea agreement,[25] his understanding of that plea agreement, and that Martinez suffered from depression. On the first occasion, defense counsel asked Martinez about the signed plea agreement and then commenced to read a written agreement into the record. The prosecutor objected, arguing there was no foundation "to read this statement[,]" although the actual change-of- plea form had been numbered for identification at the time of Martinez's direct examination. The court sustained the objection. The second incident occurred when defense counsel inquired of Martinez if he "had actually heard stories in the neighborhood about young men going to trial and being convicted for something they didn't do . . . ." The prosecutor objected, asserting the question called for hearsay. The court sustained the objection, although defense counsel had responded that he was attempting to show Martinez's state of mind and any answer was not elicited for the truth of any matter asserted. Finally, the defense counsel asked Martinez if he suffered from depression, to which the prosecutor objected on relevance grounds and for which the court sustained the objection.[26]

As to the first incident, the defendants contend a full understanding of any accomplice's plea agreement is essential to cast the accomplice-witness in an accurate light. They conclude they were prevented from exploring Martinez's agreement, and his understanding of that agreement, by the court's ruling. (See generally Giglio v. United States (1972) 405 U.S. 150, 153-155; United States v. Mayans (9th Cir. 1994) 17 F.3d 1174, 1184.) However, the court informed the jury Martinez was an accomplice as a matter of law and that his testimony was to be viewed with distrust. Moreover, all the terms of the agreement were discussed extensively, although the form itself was never admitted into evidence. Finally, it was made clear in other questions that Martinez was receiving a much-less-serious penalty for the reduced charge than that faced by the defendants in exchange for his testimony.

Most importantly, it was not for its subject matter that the court sustained the objection. It was due to a lack of foundation, and the defense failed to even attempt to lay it, giving the court the grounds to sustain the objection. (See e.g., People v. Wade (1897) 118 Cal. 672, 675; Rignell v. Font (1928) 90 Cal.App. 730, 736-738.) Even in cross-examination, a party must comply with the normal rules of evidence. (See People v. Schwartzman (1968) 266 Cal.App.2d 870, 890- 891; Evid. Code, §773, subd. (a).) Alvarado responds that he had acknowledged the form as the one he signed pursuant to the plea agreement. The defense counsel, however, never asked him to authenticate the exhibit numbered 46 for identification; counsel merely began to read from a form not identified by the witness. Moreover, counsel was permitted to read those excerpts pertaining to the actions admitted by Martinez, all details of the anticipated testimony, and Martinez's fears and hesitations prompting him to enter into the agreement.

Similarly, on the second occasion, counsel asked Martinez a question calling for hearsay. The objection was properly sustained. (See Evid. Code, § 1200.) Finally, counsel asked Martinez whether he suffered from depression. This question followed several inquiries as to Martinez's ability to recall

the details due to the passage of time and also due to feelings of stress occasioned by his extended incarceration. The prosecutor objected only as to the question regarding depression on relevancy grounds, which was sustained. Defense counsel on appeal now contend this infringed on their presenting to the jury that Martinez suffered a "depressive disorder that may have adversely affected his ability to accurately recall and relate the circumstances surrounding the offense." However, no offer of proof or explanation was provided by trial counsel that such was the intent of the question; and the defense failed to proffer even an explanation to support the theory, much less that a future witness, expert in the field, might testify to such an effect from depression. Martinez was fully examined as to his ability to recall-which he answered was "not good at all"-thereby eliminating the defense's characterization that they were barred from exploring that aspect of Martinez's capacity.

Such evidentiary rulings lie within the trial court's broad discretion, and may provide the grounds for reversal on appeal only upon a showing of an abuse of that discretion. (See People v. Sapp (2003) 31 Cal.4th 240, 289-290.) Even if the court's ruling is shown to be error, it still requires persuasion that such error resulted in a miscarriage of justice for reversal to be warranted. (See Cal. Const. art. VI, § 13; Evid. Code, § 353, subd. (b).) "When an appellate court is called upon to decide whether such discretion has been abused, the inquiry is whether a sufficiently wide range has been allowed to test such credibility and weight rather than whether some particular question should have been allowed." (East Bay Mun. Utility Dist. v. Kieffer (1929) 99 Cal.App. 240, 261.)

No error occurred here. The court exercised its discretionary powers to control the manner in which evidence was presented. It did nothing in these rulings that actually curtailed cross-examination because the subject matter of the questions was properly pursued in other ways. It was only as to the form of the questions that the court barred the inquiry. Moreover, even if we were to assume error, it was clearly harmless because the court permitted "a sufficiently wide range [of cross-examination] to test [the witness's] credibility and weight . . . ." (East Bay Mun. Utility Dist. v. Kieffer, supra, 99 Cal.App. at p. 261.)

2. Cross-Examination of Alvarado

Alvarado argues the trial court permitted the prosecutor undue license to cross-examine him on subjects protected by the attorney- client privilege. He contends the prosecutor posed a series of questions to him for the express purpose of insinuating that counsel had prompted Alvarado to use certain words in his testimony that had already been posed by Dr. Mantell, the defense psychologist, as terms in his fight or flight response theory. However, the trial court actually sustained every objection entered by the defense to the prosecutor's questions, with one exception. The colloquy was as follows: "[The prosecutor]:

Why was it that you took the safety feature off the gun?

[¶] A: So it could be fired.

[¶] Q: Did you think that was going to help defuse the situation?

[¶] A: No. Like I said, I wasn't trying to defuse the situation. I am just saying it was instinct. I jumped in front of him. I didn't mean to say defuse. I just jumped in front of him. It was instinct to see what was going on.

[¶] Q: You are using the word `instinct' a lot, I have noticed; is that right?

[¶] [Defense Counsel]: Objection. Is that a question?

[¶] The Court: Sustained.

[¶] Q: Do you normally use `instinct' when you talk?

[¶] A: No, actually I don't. It is not a word that comes up a lot.

[¶] Q: You sat here and heard the testimony yesterday of Dr. Mantell, or whatever?

[¶] A: He said it.

[¶] Q: Yeah. Okay. Prior to hearing his testimony, had you ever heard of this flight/fight response?

[¶] A: I never heard of it.

[¶] [Defense Counsel]: Objection. Argumentative.

[¶] The Court: Overruled.

[¶] Q: You never heard of it until yesterday?

[¶] A: No.

[¶] Q: And did anybody tell you to use the word `instinct' or `automatically' when you testify?

[¶] [Defense Counsel]: Objection. Privilege.

[¶] The Court: All right. Sustained.

[¶] Q: Do you think it is helped you testify to hear the testimony of everybody else before you take your turn?

[¶] [Defense Counsel]: Objection. Improper. Irrelevant.

[¶] The Court: Sustained."

Alvarado concedes the court sustained the objections, but contends the harm was already done by the prosecutor's questions, conveying an "improper message" by their very nature. Assuming defense counsel had coached his client to use certain terminology, such prompting lessons were entirely protected by the attorney-client privilege and therefore outside the scope of proper cross-examination. Alvarado refers us to People v. Crandell (1988) 46 Cal.3d 833 as authority.

Crandell dealt with allegations of prosecutorial error in the form of comments on a defendant's invocation of his right to silence and counsel during interrogation, a matter quite distinct from issues of attorney-client privilege. Moreover, no error was found in that trial arising from the comments. (See People v. Crandell, supra, 46 Cal.3d at pp. 877-879.) Finally, in the case before us, the court sustained all the objections that might arguably have elicited matters within the privileged subject, and also instructed the jury that an attorney's questions were not evidence. (See CALJIC No. 1.02, as given.) No possible harm could have flowed from those questions, considering the court's cautionary approach. (See also Portuondo v. Agard (2000) 529 U.S. 61, 64-73 [prosecutor could properly argue that defendant tailored his testimony in response to hearing all other witnesses before taking the stand].)

The judgment is affirmed.

WE CONCUR: ARONSON, J., IKOLA, J.

1. Originally, two other defendants were named and charged in the information: Hubert Varela and Ray Martinez. However, they both agreed to plea- bargained terms in exchange for their testimony against the remaining two defendants. Martinez-known as Payaso in the gang-received an 18- year sentence for the voluntary manslaughter of Robert while a gang member and having already been convicted of a serious felony, robbery. Varela-with the nickname of Lil Spike-received a five- year grant of probation after pleading guilty to voluntary manslaughter to benefit a criminal street gang. The trial court granted, in part, a motion for acquittal brought at the end of the prosecution's case. (See Pen. Code, § 1118.1.) The result was that the defendants no longer faced the conspiracy to commit murder count and any enhancements attached to it, and San Nicolas no longer faced the street terrorism charge. Ultimately, the jury rejected the street gang and firearm enhancements against him, acquitting him of those charges.

2. All further section references are to the Penal Code, unless otherwise stated.

3. Shakespeare, Romeo and Juliet, supra, act. 1, sc. 1, lines 51- 58.

4. Although Castaneda claimed she had no memory of the conversation at trial, she had told the police that when he called, Alvarado was crying and confided in her that he told them the truth.

5. Obviously, the jury rejected this specific conclusion as it acquitted San Nicolas of the gang enhancements attached to the murder charge. (See fn. 1, ante.)

6. Alvarado was 18 at the time of the murder; San Nicolas was 30 and had served two prior prison terms.

7. His numerous tattoos included "Toker Town" in large letters across his back.

8. Section 1111 provides that a "conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; . . . ."

9. We note that his motion for acquittal was successful, in part. The trial court dismissed the initial conspiracy to commit murder as to both defendants, and the street terrorism charge along with all enhancements as to San Nicolas. (See fn. 1, ante.) The defendants, of course, are attacking only the court's denial of the motion as to those counts not dismissed.

10. Montanez explained that it was highly disrespectful, if not stupid, for one man to challenge another man in the presence of women and children.

11. Barrera never voluntarily spoke with the officers that night. Her car was stopped after fleeing the area, and the police then questioned her concerning the events at Iris Court. Her taped statements to the officers during her detention that night were used to impeach her professed failure of memory at trial.

12. Barrera's pretrial statement to the police was admitted as a prior inconsistent statement via the testimony of Fullerton Police Department Detective Richard Bohling, who interrogated her and tape recorded her answers.

13. Section 192, subdivision (b) provides that manslaughter is the unlawful killing without malice, and defined as involuntary manslaughter when committed "in the commission of an unlawful act, not amounting to a felony . . . ."

14. CALJIC No. 8.45, as given in this case, provided that anyone "who unlawfully kills a human being, without malice aforethought, and without an intent to kill, and without conscious disregard for human life, is guilty of the crime of involuntary manslaughter in violation of . . . section 192, subdivision (b). [¶] There is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. [¶] A killing in conscious disregard for human life occurs when a killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life. [¶] A killing is unlawful within the meaning of this instruction if it occurred: [¶]1. During the commission of an unlawful act which is dangerous to human life under the circumstances of its commission; or 2. In the commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and circumspection. [¶] The commission of an unlawful act, without due caution and circumspection, would necessarily be an act that was dangerous to human life in its commission. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; and [¶] 2. The killing was unlawful." We also note the trial court informed the jury the involuntary manslaughter was a lesser included offense to the charge of second degree murder (of two different varieties) and

voluntary manslaughter, all charges which the court defined for the jurors. (See CALJIC Nos. 17.10, 8.30, 8.31, 8.37, 8.40, 8.45, as given.)

15. Section 1138 provides that after the jury retires for deliberation, "if there be any disagreement between them as to testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

16. The requested instruction read, "`If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense willful, deliberate or premeditated.'" (People v. Mincey, supra, 2 Cal.4th at p. 437, fn. 5.)

17. The full instruction read, "`Murder by means of torture under section 189 is murder committed with the willful, deliberate, and premeditated intent to inflict extreme and prolonged pain. In determining whether a murder was committed with that intent, the jury may of course consider all the circumstances surrounding the killing. Among those circumstances, in many cases, is the severity of the victim's wounds. You are admonished against giving undue weight to such evidence, however, as the wounds could in fact have been inflicted in the course of a killing in the heat of passion (or a misguided, irrational and totally unjustifiable attempt at discipline) rather than a calculated torture murder.' [Citation.]" (People v. Mincey, supra, 2 Cal.4th at p. 437, fn. 5.)

18. The prosecutor's verbatim statements in argument were as follows: (1) "The right of self- defense is available only to people who are innocently attacked. Not someone who goes out looking for a fight. You go out looking for a fight and you find a fight, you can't come to a court later and say, `But I acted in self defense.' [¶] . . . [¶] It is as if there is a whole hallway in front of you with a million[] turns and twists off of that. If you decide at the outset that they went out looking for a fight, you can close the door at the beginning of the hallway and not have to walk down that hall and take all the endless rabbit trails that these hundred pages of instructions are going to explain." (2) "As I have said, you are going to save yourself a whole lot of time by finding that the facts show that these individuals went out looking for a fight and/or went out and engaged in mutual combat and, therefore, are not entitled to claim self- defense. . . ." (3) "Remember, there are three main rules to apply in this case. If they went out looking for a fight, or if they went out and engaged in mutual combat, they are not entitled to claim self- defense."

19. We note trial counsel could not have requested a modification based on the opinion in People v. Quach, supra, 116 Cal.App.4th 294 as that opinion was not filed until almost a year after the trial in this case.

20. The appellants direct us to CALJIC No. 5.54 as authority, but the instruction fails to stand up to such a challenge. It provides that the "right of self- defense is only available to a person who initiated an assault" if certain conditions are met. There is a great difference between initiating an assault and committing one. That distinction can be found in the two cases invoked by the appellants, People v. Gonzales (1887) 71 Cal. 569 and People v. Hecker (1895) 109 Cal. 451. Initially, we note the discussion of the right of self- defense in Hecker was abrogated by statute in 1984. (See People v. Hardin (2000) 85 Cal.App.4th 625, 632- 634.) In Gonzales, the defendant was charged with the murder of George Kirkham, the son of his girlfriend, Ms. Umphlet. Gonzales went to Umphlet's home at her invitation but after Kirkham heard of a

"supposed intimacy" between the couple and threatened Gonzales if he continued seeing Umphlet. Consulting with a police officer, Gonzales learned he did not have to leave town as Kirkham demanded. Fearing an attack by Kirkham, Gonzales obtained a gun and returned to Umphlet's place to play cards. Kirkham, armed with a gun and in company with another friend, arrived and demanded entry of his mother, immediately jumping on Gonzales. After a violent struggle in which Gonzales was dragged outside, he managed to escape his captors' clutches and retreat back inside Umphlet's door, only to have Kirkham confront him anew, at which time Gonzales shot him. Several issues were raised concerning various instructions, some of which were given incorrectly and some of which were properly refused. For instance, the defendant wanted an instruction informing the jury that he had the right to visit Umphlet irrespective of Kirkham's demand for him to leave. He feared that by going to the location, the jury might believe he invited the attack on himself, and was thereby precluded from resisting with force. The instruction was properly rejected because the appellate court could not "conceive how any man of ordinary intelligence could be otherwise led to such a belief . . . ." (Gonzales, supra, 71 Cal.App. at p. 576.) Another instruction, not related verbatim in the opinion, was given and found to be in error. It apparently stated that a man who expects to be attacked is "compelled to employ all the means in his power to avert the necessity of self- defense before he can exercise the right of self- defense." (Gonzales, supra, 71 Cal. at pp. 577- 578.) The court corrected this, holding that "one may know that if he travels along a certain highway he will be attacked by another with a deadly weapon, and be compelled in self- defense to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack." (Id. at p. 578.) In neither of these cases was there a statement that a direct assault must be completed before a person is an aggressor for self- defense purposes.

21. The proposed instruction read, "If the prosecution has it peculiarly within its power to produce a witness whose testimony would be material on any matter in issue, the fact that [he][she] does not[,] creates the presumption that the testimony, if produced, would be unfavorable to the prosecution."

22. Although a prosecutor may err by refusing immunity in an alleged effort "of distorting the judicial fact finding process" (United States v. Herman (3d Cir. 1978) 589 F.2d 1191, 1204, italics added) such has only been discussed in terms of the evenhanded granting of immunity. If the prosecutor grants immunity to three prosecution witnesses but then refuses immunity to a single defense witness and the refusal can be shown to be for the sole and specific purpose of assuring "the exclusion of [that witness's] testimony . . . as a partisan engaged in a legal game" (People v. Hunter (1989) 49 Cal.3d 957, 974- 975), then prosecutorial misconduct may have occurred. No such a showing has been made here.

23. The defendants rely on section 1044 as authority for any trial court to confer immunity as it codifies the judge's duty to control all trial proceedings, limiting "the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." However, that statutory duty confers the power to control but not produce evidence. (See e.g., People v. Santana (2000) 80 Cal.App.4th 1194, 1206- 1208 [court committed reversible error in questioning all defense witnesses as to discredit all of them].) "Within reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. [Citation.]" (Id. at p. 1206; italics added.) Section 1324 remains the exclusive vehicle by which immunized testimony is received in felony proceedings.

24. Evidence Code section 412 provides that if "weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with

distrust."

25. On direct examination, Martinez identified the document memorializing his plea agreement with the prosecution. In that agreement, he pleaded guilty to one count of voluntary manslaughter with an admission that he had a prior conviction for robbery and he would receive an 18- year term in prison, in exchange for which the prosecutor would ask the court to dismiss the murder charge. The agreement was conditioned on Martinez's promise to testify truthfully and completely as to all the events surrounding Robert's death. The written agreement was numbered for identification in court but never admitted into evidence.

26. The verbatim exchange was as follows: "Q: Mr. Martinez, in terms of your memory today of things that happened back on July 8th of 2000, how good would you say it is? [¶] A: Not good at all. [¶] Q: All right. Now, you have been in custody for almost three years. That's been very stressful on you, correct? [¶] A: Correct. [¶] Q: And that in itself causes you to have some problems with your memory, correct? [¶] A: Correct. [¶] Q: You suffer from depression, correct? [¶] Mr. Wagner: Objection. Relevance. [¶] The Court: Sustained."