IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JUAN MANUEL LOPEZ,

Defendant and Appellant.

CAPITAL CASE

S073597

Los Angeles County Superior Court No. PA023649
The Honorable Meredith C. Taylor, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed on February 13, 1997, by the Los Angeles County District Attorney, appellant was charged with the murder of Melinda Carmody (Pen. Code,[1/] § 187, subd. (a); count 1), kidnapping (§ 207, subd. (a); count 2), assault by means of force likely to produce great bodily injury and/or with a deadly weapon (§ 245, subd. (a)(1); count 3), first degree residential burglary (§ 459; count 4), and second degree burglary of a vehicle (§ 459; count 5). It was alleged that Melinda Carmody was a witness to a crime and was intentionally killed because of that fact within the meaning of section 190.2, subdivision (a)(10). It was further alleged that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). (CT 699-702.)[2/]

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1. All further statutory references are to the Penal Code, unless otherwise specified.

2. The information also charged appellant's brother, Ricardo Lopez, with the murder of Melinda Carmody in count 1. Appellant and his brother were tried jointly, although the People did not seek the death penalty against Ricardo Lopez, who was 17 years old at the time of the murder. Ricardo Lopez was convicted of first degree murder and a section 190.2, subdivision (a)(10) special circumstance was found to be true. (RT 2760-2761.) He is not a party

Appellant pled not guilty and denied the special allegations. (CT 704.) Trial was by jury. (CT 903.) On July 2, 1998, the jury found appellant guilty of first degree murder and found true the special circumstance that Melinda Carmody was a witness to a crime and was intentionally killed due to that fact. The jury found the firearm allegation to be true. (CT 1072.) The jury also found appellant guilty of the crimes of kidnapping, assault by means of force likely to produce great bodily injury and/or with a deadly weapon, and second degree burglary of an automobile. (CT 1073-1075.)[3/]

The penalty phase of the trial began on July 7, 1998. (CT 1088.) On July 8, 1998, the jury found the appropriate penalty to be death. (CT 1090.) The trial court denied appellant's application for modification of the verdict of death pursuant to section 190.4, subdivision (e), and sentenced appellant to death. (CT 1138-1139.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. Guilt Phase Evidence

A. Prosecution Evidence

As set forth below in detail, appellant orchestrated the murder of his estranged 16-year-old girlfriend, Melinda Carmody (hereinafter "Melinda"). A few weeks after Melinda had ended their one-year dating relationship, appellant broke into Melinda's residence, cut her neck with a knife, and kidnapped her. Melinda reported the incident to the police. Despite appellant's

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to this appeal.

3. The jury was unable to reach a verdict on the charge of first degree residential burglary. A mistrial was declared and the count was dismissed in the furtherance of justice. (CT 1086-1087.)

attempts to dissuade Melinda from testifying against him, Melinda did indeed testify against him at a preliminary hearing on March 28, 1996. In the ensuing weeks, appellant, while in jail, made several telephone calls to Melinda's friends, arranging for them to take her to a specific location claimed by appellant's Parthenia Street gang, on the evening of April 12. After Melinda arrived at this location, she was shot several times at close range by appellant's 17-year-old brother, Ricardo Lopez, in front of numerous witnesses.

1. Appellant's Relationship With Melinda

On March 17, 1995, when Melinda was 14 years old, she joined the Parthenia Street Baby Locas ("the Baby Locas"), a female gang started by appellant to complement his own gang, Parthenia Street, otherwise known as the Parthenia Village Locos and Cyclonas. (RT 1147-1148, 1153.) Appellant was 21 years old at the time. (See RT 2126). Shortly after Melinda joined the gang, appellant and Melinda began a romantic relationship. (RT 1152-1153.) At some point in their relationship, Melinda moved in with appellant's family. (RT 1153, 1590.) After dating for almost a year, Melinda broke up with appellant on February 27, 1996. (RT 917.)

2. The Kidnapping, Assault, And Burglary Charges[4/]

On March 13, 1996,[5/] Melinda had moved back in with her mother and was living at 14315 Terra Bella in Los Angeles County. At 11:30 a.m., she was home alone when she received a telephone call from appellant. Appellant asked

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4. Melinda's testimony from the preliminary hearing in the kidnapping, assault, and burglary case was read to the jury. (RT 916-947.)

5. Melinda was 15 years old at the time. By the time she testified at the preliminary hearing, she had turned 16. (RT 919.)

if he could come over to pick up some paperwork, but Melinda said "no." Melinda feared appellant, because he had told her if she ever broke up with him, he would kill her. (RT 916-919.)

One hour after calling Melinda, appellant entered Melinda's home through her attached garage. He went to the living room and asked Melinda if she wanted to leave with him. When Melinda refused, appellant approached her with a knife in his hand. Appellant struck Melinda with the knife on the back of the neck, causing her to fall on a couch. Appellant got on top of Melinda and choked her with both hands. Melinda could not breathe. (RT 918-921.) Appellant told Melinda that if he "can't have" her, then "no one can." (RT 947.)

Appellant released Melinda after she fell off the couch. He dragged Melinda to her feet by pulling her hair and then dragged her to her upstairs bedroom by pulling her arm. Appellant forced Melinda into a walk-in closet, gave her a bag, and ordered her to put clothes in the bag. When Melinda finished packing, appellant took her bag and dragged her downstairs by pulling her arm. (RT 921-924.)

Appellant pushed Melinda into the back seat of a car. Melinda was frightened. The car was being driven by a man she did not know. They drove to appellant's home. Melinda stayed in the car with the driver while appellant went inside his home. A few moments later, appellant returned to the automobile carrying a small bag. (RT 924-927.)

Next, they drove to the Los Angeles home of appellant's aunt. Appellant took Melinda inside and then left. Melinda's neck was bleeding, and appellant's aunt helped Melinda clean the wound. Four hours later, appellant's aunt drove Melinda back to her home. (RT 927-933.)

At 5:00 p.m., Los Angeles Police Officer Robert Denton went to Melinda's home. (RT 948.) Melinda was very upset, nervous, and crying. He

subsequently brought Melinda to the Van Nuys police station and photographed the bruises and scratch marks on her neck. Blood still was oozing from the wounds on Melinda's neck. (RT 949-950, 952-953.)

On March 15, 1996, Zury-Kinshasa Terry lived in a condominium located at 14235 Terra Bella. In the early morning hours of March 15, she heard glass shattering in the street below her window. She looked out her window and saw someone moving inside her aunt's car which was parked on the street. When Terry opened the door to her condominium, the person, whom she identified in court as appellant, exited her aunt's car. Appellant walked towards Terry and said, "Bitch, if you don't get back in the house, I am going to kill you." Terry closed the door and told her aunt to call 911 because someone had broken into her car. (RT 981, 983-986.) Officers arrived moments later and apprehended appellant near the condominium, under a balcony. (RT 986-989.) Appellant told an officer he was there to see his girlfriend. (RT 1014.) He did not explain what he was doing under the balcony. He repeatedly said that he loved his girlfriend "too much." (RT 1020.)

On March 18, 1996, Detective Philip Morritt of the Los Angeles Police Department interviewed appellant regarding the kidnapping of Melinda. (RT 1040-1043.) Appellant said he took a bus to Melinda's home to get some tax papers from her. They argued while he was at her home, and he hit and choked her. Afterwards, they got on a bus and went to his house. A "friend" picked them up at his house and drove them to appellant's aunt's house in Los Angeles. Appellant claimed that Melinda went with him voluntarily. Appellant could not remember the name or telephone number of the "friend." (RT 1045-1047.)

3. The Murder Of Melinda

A couple of days before the preliminary hearing was to begin in appellant's kidnapping, assault, and burglary case (hereinafter, the "kidnapping case"), he called Sandra Ramirez (also known as "Shy Girl"), a member of Melinda's gang, the Baby Locas, from jail. (RT 1147-1148, 1157-1159, 1164.) Ramirez had been the first member of the Baby Locas and was Melinda's close friend. (RT 1147-1148, 1155.) She was dating a member of the Parthenia Street gang. (RT 1294.) Appellant told Ramirez about his problems with Melinda. Appellant admitted stabbing Melinda in the neck and trying to kidnap her. He said he wanted to take Melinda to Mexico so they could get married. Appellant asked Ramirez to tell Melinda not to testify at the preliminary hearing.[6/] The next day, appellant called Ramirez again and asked her to meet him at the courthouse so he could give her a letter for Melinda. Ramirez, however, did not go to court. (RT 1157-1162, 1396, 1999-2000, 2003.)

The preliminary hearing in the kidnapping case was held on March 28, 1996. (RT 1049.) According to Detective Morritt, who was present at the preliminary hearing, Melinda was "frightened, upset and sometimes crying" during her testimony. (RT 1051.) At one point during Melinda's testimony, the court took a recess for the noon lunch break, and appellant said, "I don't have to sit here and listen to this shit." (RT 1054-1055.)

Sometime during the first week of April 1996, appellant called his sister, Patricia Lopez, from jail and asked her to set up a three-way telephone call with his brother, Ricardo Lopez (also known as "Diablo"), and Jorge Uribe (also known as "Pelon"). Patricia set up the telephone call, but she did not listen to the conversation. (RT 1192, 1837, 1388, 1536, 1589-1590, 1597, 1825-1829, 2007-2009.)

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6. Ramirez subsequently relayed this message to Melinda. (RT 1162.)

On April 11, 1996, appellant made a three-way telephone call from jail to Ramirez and Alma Cruz (also known as "Silent"), another member of the Baby Locas. (RT 1163-1166, 1374-1377.) Appellant told them to attend a Parthenia Street gang meeting in the "alley"[7] on Friday, April 12. He said they had to pay dues to the Mexican Mafia. The Baby Locas had not previously paid dues to the Mexican Mafia. (RT 1166-1167.) Appellant also said Melinda had told him that one of her friends, "Happy," was to be "jumped" into the Baby Locas.[8] (RT 1172, 1175.) Ramirez and Melinda had initially planned for Happy's initiation to occur at a carnival at Humphrey Park that night. Appellant said if Happy was initiated at the park rather than the alley, she would not be "from the neighborhood." Ramirez had believed it did not matter where a new member was initiated as long as it was done by fellow gang members. She complied with appellant's instructions, because he had founded the Baby Locas. Appellant also told Ramirez to enforce his orders if the other members disobeyed. Ramirez was the leader of the Baby Locas and was responsible for enforcing orders. (RT 1176-1179.)

During this same conversation, appellant asked Cruz if she could kill a "homegirl," meaning a member of her gang. Cruz said it would depend on whether the person "did something" to her. Appellant said, "I already have someone doing it for me." (RT 1187, 1382.)[9]

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7. The "alley" referred to an alley off Schoenborn Street between Zelzah Avenue and Lindley Avenue. The Parthenia Street gang controlled the alley and the immediate surrounding area. (RT 1090, 1093-1094.)

8. A person joining the gang had to be "jumped in," in an initiation where three gang members fought the person joining the gang. (RT 1150.)

9. At the time, the "immediate group" of the Baby Locas, included Melinda, Ramirez, and Cruz. (RT 1188.) Another girl, Ophelia (also known as "Juera" or "Giggles") was also a member but did not hang out with the gang very often. (RT 1188, 1403.) Other members included "Baby" and "Casper." (RT 1403, 1433.) Angelica Maria Soto (also known as "Sad Girl") had

The following evening, April 12, Ramirez drove Melinda and several other girls[10] to the meeting in the alley. (RT 1179-1184.) Ricardo and Uribe were already there when the girls arrived. (RT 1192, 1837, 1388, 1536.) Upon seeing Ricardo and Uribe, Melinda appeared afraid and said she was worried. Ramirez told her not to worry and that nothing was going to happen. (RT 1195.)

After a while, Ramirez, Melinda, and some of the other girls went to a liquor store. (RT 1196, 1199.) Melinda attempted to call Happy. (RT 1197.) The girls then returned to the alley. (RT 1197.) When they returned, two other members of the Parthenia Street gang, Ramon Ramos (also known as "Oso") and "Terko" were there, along with two non-gang members. (RT 1196-1199, 1214, 2243.)

Thirty minutes later, Ramirez and Melinda drove to the liquor store again. They were accompanied by Ricardo and one of the other girls. Melinda sat with Ricardo in the back seat of the car, although they did not talk. When they arrived at the liquor store, Melinda went inside to make a telephone call. Ricardo went inside and had an adult buy him beer. The group then returned to the alley. (RT 1199-1202.)

Later, Melinda went to the liquor store for a third time. She went there with Ramos. After they returned, Ramirez spoke with Ricardo. (RT 1202-1203.) Ricardo asked Ramirez why she brought "them," apparently referring to the other girls. (RT 1205-1206.) Ricardo also told Ramirez that she knew what was going to happen. Ramirez, however, did not know what was going

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previously been a member but had since "walked out" of the gang. (RT 1169-1170, 1531.) Since the gang's inception, there had been a total of seven or eight members. (RT 1295.)

10. Those present included Liliana Delgado and her one-year old son, sisters Alma and Yesenia Cruz, and Angelica Maria Soto. (RT 1180-1182, 1384-1386.)

to happen. (RT 1206-1207.) Ricardo told Ramirez that if anything happened, she was to say "it was a drive-by." (RT 1207.) Ramirez still did not know what Ricardo was talking about. Ricardo pulled a gun from his waistband, pointed it at Ramirez, and said he was going to shoot her. Uribe, who had been standing nearby, said something to Ricardo, and told him to put the gun away. Ricardo next told Ramirez they were going to "jump" her boyfriend because he had not been paying his dues. Ramirez went to talk to Ramos about Ricardo's comments regarding her boyfriend. (RT 1207-1208, 1212-1213, 1215.)

Uribe told Melinda that Ricardo wanted to speak with her. Melinda looked as if she did not want to speak with Ricardo. While Ricardo was speaking with Melinda, he had a gun next to his leg pointing toward the ground. Melinda then screamed to Ramirez, "Let's get out of here." Melinda ran toward Ramirez, and Ricardo followed. Ricardo raised the gun, pointed it at Melinda's back, and fired several shots. Melinda fell sideways onto the street and looked at Ramirez. Ricardo walked up very close to Melinda, pointed the gun at her, and shot her in the head. He fired more than one shot. Melinda fell all the way to the pavement after being shot in the head. Ricardo said the word "brother" when he shot Melinda. Ramirez and some of the other girls went to Melinda, but Melinda appeared to be dead. Blood was coming from the wounds in her back and head. (RT 1215-1233, 1266, 1394-1399, 1472-1477, 1540-1546, 1549.)

Ricardo walked backwards away from Melinda and pointed the gun at his own head. Ramos went to Ricardo, who appeared to be angry. Ricardo ran away toward Lindley. The girls also fled because they were scared and did not want to falsely tell police it was a drive-by shooting. They went to a 7-Eleven store at Roscoe and Reseda and called 911. (RT 1267-1270, 1401-1402, 1442, 1545.)

Drew Oliphant, a firefighter-paramedic for the City of Los Angeles Fire Department and his partner were called to the scene and attempted to aid Melinda. After they transported Melinda to the hospital, Oliphant saw Melinda's pager. The pager had a message that read, "187." (RT 1511-1512, 1524-1525.)[11/] The hospital's chaplain, Josue Garcia Delgado, Jr., also saw Melinda's pager. On the pager was a series of 187's and the telephone number "891-1948." The chaplain subsequently learned the telephone number belonged to Melinda's mother. (RT 1896, 1906-1907.)

Melinda died from multiple gunshot wounds. She had two gunshot wounds to the back, and one to the rear of her head. (RT 1707-1726.)

On April 13, 1996, the day after the shooting, Ramirez received a three-way telephone call from appellant and his sister Patricia.[12/] Appellant asked Ramirez, "What happened?" Ramirez said Ricardo shot Melinda. Appellant asked if Ramirez knew where Ricardo was. Ramirez told appellant she did not know. Appellant then hung up. (RT 1273-1275, 1589-1590, 2012-2013, 2021-2022.)

Later that day, Ricardo called Ramirez. He asked her, "What happened?" Ramirez said, "You know what happened." Ricardo told Ramirez to say the incident was a drive-by shooting, and he told her to tell "the girls" the incident was a drive-by shooting. Appellant called Ramirez again after she had spoken with Ricardo. He asked if she had spoken to the police. She said she had not. Appellant told her, "Don't say anything." Ricardo then telephoned Ramirez a second time. He said to tell the "girls" to attend a meeting that night so they would know "what to say" about the incident. Ramirez said the girls

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11. Detective Michael Oppelt of the Los Angeles Police Department testified that "187" meant "murder." (RT 1661.)

12. Patricia testified at trial she did not remember making this telephone call. (RT 1598.)

could not go to a meeting. Ricardo said the "same thing" would happen to them if they did not go to the meeting. (RT 1279-1282, 2012-2014, 2021-2022.)

On Sunday, April 14, two days after the shooting, Ramirez spoke to Detective Oppelt. After speaking with the detective, Ramirez received another telephone call from appellant. Appellant asked if she had spoken with the police. She said she spoke with them, but did not tell them anything. (RT 1282-1284, 2014-2015, 2021-2022.)

While appellant was in custody, and after being advised of, and waiving, his constitutional rights, he told the police he did not know Melinda had been killed until a week after she died. He admitted he made a mistake in kidnapping Melinda. He also was mad that Melinda testified against him. (RT 1608-1613.) Appellant said he had not spoken to Ricardo since appellant had been arrested for kidnapping. He also said he had not spoken to Uribe. (RT 1635-1636, 1639.) He initially denied having talked to Ramirez, but he later acknowledged he had done so. (RT 1618-1619.)

In a police interview, Ricardo admitted shooting Melinda. He claimed that he was angry about what she had said about his brother in court. Ricardo acknowledged that two to three days before the shooting, he and Uribe had discussed shooting Melinda. Uribe obtained the gun for him. (RT 1831-1848.) Ricardo claimed that he only wanted to wound Melinda rather than kill her. (RT 1861, 1864.)[13/]

In January 1997, sometime before the preliminary hearing regarding the murder charges against appellant and Ricardo, Ramirez's boyfriend Aldo (also known as "Bago") received a letter from Ricardo. The return address on the letter was a jail facility. (RT 1281, 1284-1286, 1289-1291.) In the letter,

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13. The jury was instructed that Ricardo's statement to the police was admissible only against Ricardo. (RT 1831, 1840.)

Ricardo ordered Aldo to tell Ramirez "not to go to court or else" Ricardo would "have the homeboys take care of" her. (RT 1291.)

4. Telephone And Jail Records Of Appellant's Whereabouts

Christopher Larson, a paralegal in the Los Angeles County District Attorney's Office, examined records relating to appellant's whereabouts within the jail system in March and April of 1996. He cross-referenced these records with telephone records for appellant's residence, Ramirez's residence, and the county jail. (RT 1995-1996.)

On March 26, 1996, there was a six-minute call at 3:29 p.m. from a location where appellant was housed to Ramirez's residence. Another call was made on March 27, the day before appellant's preliminary hearing, to Ramirez's residence. On March 29, there was a 10-minute call from a location where appellant was housed to Ramirez's residence. (RT 1999-2006.)

On April 10, the following calls were made from the jail facility where appellant was housed to appellant's residence: a three-minute call at 9:36 a.m.; a 30-minute call at 1:17 p.m.; a 24-minute call at 1:56 p.m.; an eight-minute call at 3:28 p.m.; a 26-minute call at 4:49 p.m.; a six-minute call at 6:26 p.m.; a 13-minute call at 7:10 p.m.; and a 58-minute call at 11:59 p.m. (RT 2007-2009.)

On April 11, a date on which appellant had a court appearance in his kidnapping case, the following calls were made from locations in which appellant was housed to appellant's residence: a call at 8:30 a.m.; a 20-minute call at 11:15 a.m.; a 32-minute call at 2:38 p.m.; and a 33-minute call at 5:16 p.m. (RT 2010-2012.)

On April 12, the following calls were made from appellant's location in jail to his residence: a 29-minute call at 12:12 p.m.; a four-minute call at 5:12 p.m.; and a four-minute call at 8:51 p.m. (RT 2012-2013.)

On April 13, the following calls were made to appellant's residence from a location where he was housed: a 19-minute call at 9:45 a.m.; a three-minute call at 10:45 a.m.; a 28-minute call at 1:31 p.m.; and a 46-minute call at 5:01 p.m. (RT 2014-2015.)

B. Defense Evidence

On March 13, 1996, Melinda and appellant went to appellant's home and saw appellant's mother, Rosario Hernandez. Melinda did not appear frightened and did not have any injuries on her neck. (RT 2116-2119.) Melinda did not complain to Rosario about any injuries. (RT 2120.) Melinda and appellant said they were going to go to Mexico because appellant had a warrant and wanted to avoid the authorities. (RT 2129, 2134-2135.) They also were going so they could get married. (RT 2135-2136.)

After leaving Rosario's home, appellant and Melinda went to the home of appellant's aunt, Maria Hernandez. (RT 2143-2144, 2147, 2184-2185.) They stayed at Maria's home for approximately one to two hours. Melinda did not appear to be frightened. Melinda also did not have any noticeable injuries on her neck. Maria convinced appellant and Melinda to not go to Mexico. (RT 2148, 2150-2152.) James Murphy,[14/] Maria's husband, drove appellant and Melinda to a location near the intersection of Van Nuys Boulevard and Roscoe Boulevard. During the ride, Melinda did not appear to be frightened and did not appear to be injured. (RT 2183-2188.)

A portion of Ramon Ramos's preliminary hearing testimony was read to the jury. (RT 2232.) Ramos was a member of the Parthenia Street gang when Melinda was killed. He went with Melinda on her first trip to the liquor store after she arrived at the alley on the evening she was killed. Ricardo drank

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14. Murphy had prior convictions for grand theft auto in 1993, and attempted robbery and assault with a deadly weapon in 1980. (RT 2192.)

some of the beer that was purchased at the liquor store. Ramos said he and Melinda went to the liquor store for the second time approximately one hour later. (RT 2236-2240.)

Ramos saw Ricardo and Melinda speaking with each other for five to ten minutes with raised voices before the shooting. (RT 2243-2244.) After Ricardo shot Melinda, he put the gun to his head and clicked it. (RT 2245.) Appellant said, "It's for my carnal." (RT 2249.) "Carnal" is a Spanish slang term that means "brother." (RT 2250-2251.)

C. Rebuttal Evidence

Lawrence Torres was one of Melinda's school teachers. (RT 2252-2253.) Torres met with Melinda on March 15, 1996. (RT 2254.) Melinda told Torres that appellant had broken into her house and told her that if he could not have her nobody could. Melinda described how appellant had held a knife to her neck, dragged her out of her home, and drove her to his aunt's house. Melinda told Torres she had ended her relationship with appellant. She further stated that appellant had been calling her, but she was not returning the calls. (RT 2255.)

Susan Carmody, Melinda's mother, testified that Melinda ran away from home in March of 1995. Melinda went to live with appellant. Melinda returned home in September of 1995. (RT 2260-2263.) On March 13, 1996, Ms. Carmody received a telephone call from Melinda and went home. Melinda had injuries to her neck. The police arrived soon afterward. (RT 2264-2265.)

After Melinda's death, Ms. Carmody found Melinda's diary. (RT 2266.) On one page of the diary, Melinda wrote, "Bird broke in and stabbed me and

choked me and kidnapped [*sic*] me. Went to police station. Went to Grandma's." (RT 2268.)[15/]

II. Penalty Phase Evidence

A. Prosecution Evidence

1. Evidence Of Other Crimes

On July 11, 1997, appellant went to the infirmary at the North County Correctional Facility following an altercation with a fellow inmate. (RT 2786-2787, 2801-2802.) Despite signs on the wall stating "no talking," appellant was talking to another inmate. Los Angeles County Sheriff's Deputy Natalie Romo told appellant to stop talking. (RT 2788, 2802.) Los Angeles County Sheriff's Deputy Angela Perez got some handcuffs out in preparation for transporting appellant. Appellant stated, "Fuck you, I ain't going to the hole." (RT 2790-2791, 2802.) When Deputy Perez tried to handcuff appellant, appellant tried to elbow her in the face and then tried to punch her in the face. A struggle ensued, with appellant kicking Deputy Perez in the shin. Other deputies arrived, and appellant was eventually restrained, despite his continued efforts to resist the deputies' authority. Deputy Perez suffered swelling and a scratch to her leg, and bruising on her arm where appellant had struck her. (RT 2793-2796, 2803-2804.)

2. Victim Impact Evidence

a. Susan Carmody

Susan Carmody was Melinda's mother. They had a close relationship, despite some problems experienced in the past. Their relationship had become

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15. "Bird" was appellant's nickname. (RT 1149.)

strained while Melinda was not living at home, although they continued to see each other during that time period. Since Melinda had returned home, "things were going pretty good." They were going to group therapy for troubled girls and runaways. (RT 2820-2822.)

When Melinda died, Carmody's "whole world stopped." She no longer wanted to live in the condominium she had shared with Melinda. She had been going to weekly counseling sessions since Melinda's death. She did not feel that she could be "put back together again" and felt that "the void will always be there." (RT 2823-2825.) Every day was a struggle to stay alive. If not for her son, she would "already be gone to join [Melinda]." (RT 2825.)

b. Dee Carmody

Dee Carmody was Melinda's stepmother. Dee had a close relationship with Melinda and loved her very much. Dee had seven children in addition to Melinda and Melinda's brother. Melinda had a very close relationship with her siblings. Melinda's death devastated their family. (RT 2807-2808.)

Dee described holidays as "impossible" since Melinda used to be with them on holidays. They now go to the cemetery on holidays instead of trying to have fun. Melinda's death affected Dee's relationship with her other children because she is afraid to let them out of her sight. (RT 2811.)

Melinda had talked about working in the neonatal field because she loved babies. (RT 2812.) Melinda had a new baby sister who was seven months old when Melinda died. (RT 2808.) Dee had looked forward to Melinda growing up, going to school, and someday having her own children. (RT 2812.)

c. Edna Steffen

Edna Steffen was Melinda's maternal grandmother. They had a very close relationship before Melinda's death. Melinda had enjoyed baking cakes for Steffen's husband. Melinda and Steffen joked around and went shopping

together. Melinda came to Steffen with her problems and confided in her. Melinda had told Steffen about her plan to break up with appellant when the time was right. (RT 2814-2817.)

Melinda's death had destroyed Steffen's family. Steffen's daughter (Melinda's mother) was under a doctor's care. Steffen was unable to take away her daughter's pain. Steffen constantly thought about Melinda's death. She was obsessed with thoughts of revenge, which troubled her, because she was not a vengeful or violent person. Steffen occasionally required medication in order to sleep. (RT 2818-2819.)

B. Defense Evidence

Appellant did not present any evidence at the penalty phase. (See RT 2831.)

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN LIMITING VOIR DIRE OF PROSPECTIVE JURORS

Appellant contends the trial court improperly limited voir dire on the issue of racial prejudice, in violation of his state and federal constitutional rights to due process, to a fair and impartial jury, and to a reliable verdict in a capital case. (AOB 16-24.) Respondent submits the trial court properly conducted voir dire.

A. The Relevant Proceedings Below

The prospective jurors completed written questionnaires, which all counsel had participated in drafting. (See CT 1243-4955; RT 77-78, 92-93, 105-106.) Before voir dire began, the trial court explained to counsel that it would ask the majority of voir dire questions of the prospective jurors. The trial court stated that the questions would be based on answers given by the prospective jurors in their questionnaires. The trial court informed counsel that they could provide the court with additional questions to be asked, and that counsel may be allowed to ask a few questions on their own. The court stated that a portion of the voir dire would be conducted of the jurors on an individual basis. (RT 100.)

Regarding the issue of racial bias on the jury questionnaire, the following discussion occurred:

[APPELLANT'S COUNSEL]: Let's go back to the bias questions. I think - -

THE COURT: At what page are we now?

[APPELLANT'S COUNSEL]: Page 19, your Honor. Question 92.

THE COURT: Right.

[APPELLANT'S COUNSEL]: We felt that the question was important because we believe that the testimony will indicate that perhaps the motivation, some of the motivation or perhaps some of the testimony will reflect problems with racial discrimination amongst the various witnesses and sides here, and we thought it important to have some questions whether they have been exposed to such problems.

THE COURT: I would not have an objection to Question 92 as it stands if it does not have the various sections below for them to use. I would suggest that it be: If you believe that racial discrimination against Latino / Mexican-Americans in Southern California is a problem, please describe the problem as you see it.

[APPELLANT'S COUNSEL]: That would be agreeable, your Honor.

(RT 112.)[16/]

The jury questionnaire also included the following additional questions addressing the subject of race:

83. You must use the same standards (which will be given to you by the court) to judge all witnesses' credibility regardless of their occupation, lifestyle, race, ethnic background, language, sex, or sexual orientation. If you do not believe you can do this, or if you believe it would be difficult for you to do so, please set forth your thoughts about this.

. . . .

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16. In the questionnaire submitted to the jurors, this was Question 86. (See CT 868.)

87. Have you ever been afraid of another person because of their race? ___ Yes ___ No [¶] If yes, what was the circumstance?

88. Are you a member of any private club, civic, professional or fraternal organization which limits its membership on the basis of race, ethnic origin, sex or religious convictions?

___ Yes ___ No [¶] If yes, please identify the club(s) or organization(s)[.]

(CT 867-868.)

Before voir dire began, the trial court informed counsel that it did not intend to ask any follow-up questions to the "question about racial prejudice." Specifically, the trial court stated as follows:

> I noticed in reading the questionnaires, as I'm confident you did as well, that a number of people did not respond to the question about racial prejudice. I don't have any intention of following up on that question, ladies and gentlemen. I was pleased to have you ask it so that if somebody did respond, you would have the benefit of their responses. In some of those responses, some showed a great sensitivity to the question, others showed less than great sensitivity to the question. For other people it was apparently something they had a ready answer to, and that suggests perhaps something about them one way or the other as any person would choose to infer; but inasmuch as the non-Hispanic who is part of the information before the court goes, that is, the alleged victim, she is the only non-Hispanic, I believe, with respect to the charges themselves, and there does not seem to have been any kind of discriminatory prosecution here. I mean it's a simple and regular

charging; and so if those people did not answer that, I do not intend to go over that subject matter.

(RT 275-276.)

Ricardo's counsel objected on her client's behalf "both on his federal and state constitutional grounds." Appellant's counsel joined in the objection. (RT 276.)

B. Appellant's Claim Has Been Waived

In order to preserve a claim for purposes of appeal, a defendant must object in the trial court on the same grounds urged on appeal. (See *People v. Fierro* (1991) 1 Cal.4th 173, 209 [defense counsel's objection to prosecutor's voir dire question on grounds that he did not understand the question did not preserve appellate claim that the question asked the jurors to prejudge the defendant's guilt]; see also *People v. Heard* (2003) 31 Cal.4th 946, 972, fn. 12 [appellant's claim of violation of constitutional rights raised for first time on appeal not preserved for review]; *People v. Memro* (1995) 11 Cal.4th 786, 867 [same]).) In *People v. Staten* (2000) 24 Cal.4th 434, this Court found that where a defense attorney participated in drafting the jury questionnaire, which included questions on racial bias, the defendant waived any claim that there was an inadequate voir dire on racial prejudice. (*Id.* at p. 452.)

Here, appellant claims on appeal that the trial court's decision to exclude questions about racial prejudice violated his federal and state constitutional rights to due process, his right to a fair and impartial jury, and his right to a reliable verdict in a capital case. (AOB 16-17.) However, appellant did not object on these grounds in the trial court. Instead, he objected that the trial court's decision not to ask follow-up questions on one of the questions in the written questionnaire violated unspecified "federal and state constitutional grounds." (RT 276.) Because appellant did not specify in the trial court the

alleged constitutional violations which he now identifies for the first time on appeal, his claims have been waived. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 209.

C. The Voir Dire Was Proper

Even assuming appellant's claim has been properly preserved for appellate review, it lacks merit. The scope of the inquiry permitted during voir dire is committed to the discretion of the trial court. (*People v. Lucas* (1995) 12 Cal.4th 415, 479.) Appellate courts recognize the considerable discretion of the trial court to contain voir dire within reasonable limits. (*Id.* at p. 479.) A trial court's limitations are reviewed for an abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 539.) In a capital case, a defendant is entitled to voir dire on the subject of racial prejudice upon request. However, the trial court retains discretion as to the form and number of questions, and whether to question the prospective jurors collectively or individually. (*Turner v. Murray* (1986) 476 U.S. 28, 37 [106 S.Ct. 1683, 90 L.Ed.2d 27].)

In *People v. Roldan* (2005) 35 Cal.4th 646, the defendant in a capital case claimed on appeal that the trial court failed to adequately question the prospective jurors on whether racial prejudice might affect their impartiality. The jury questionnaire in *Roldan* included the following question: "'A part(ies), attorney(s) or witness(es) may come from a particular national, racial or religious group or has a life style different from your own. Would that fact affect your judgment or the weight and credibility you would give to his or her testimony.'" (*Id.* at p. 695.) In rejecting the claim of inadequate voir dire on appeal, this Court emphasized that the trial court retains discretion as to the form and manner of questioning on voir dire. (*Id.* at pp. 695-696, citing *Turner v. Murray*, *supra*, 476 U.S. at p. 37.) This Court concluded,

> Because defendant does not explain how the jury questionnaire was inadequate to reveal hidden racial discrimination among the jurors, and because it appears he had sufficient information to intelligently exercise his challenges, we find the trial court did not abuse its discretion by relying on the jury questionnaire to address the issue of possible racial bias among the prospective jurors.

(*People v. Roldan*, *supra*, 35 Cal.4th at pp. 695-696.)

In the instant case, the jury questionnaire included several questions aimed at exposing racial bias. For example, in Question 83, the prospective jurors were informed that they must use the same standards to judge all witnesses' credibility, regardless of their occupation, lifestyle, race, ethnic background, language, sex, or sexual orientation. The prospective jurors were then asked whether they believed they could not do this or whether it would be difficult to do so. (CT 867.) In Question 86, the prospective jurors were asked whether they believed there was racial discrimination against "Latino/Mexican-Americans in Southern California" and if "yes," to describe the problem as they saw it. (CT 868.) In Question 87, the prospective jurors were asked if they had ever been afraid of another person because of their race. (CT 868.) Finally, in Question 88, prospective jurors were asked whether they were members of any private organization which limited its membership on the basis of race, ethnic origin, sex, or religious convictions. (CT 868.) As in *Roldan*, appellant fails to explain why the jury questionnaire did not sufficiently explore the issue of racial prejudice. Nor does he suggest what follow-up questions should have been asked, or which prospective jurors should have been further questioned.[17/]

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17. Appellant identifies only potential Juror No. 7813, who wrote, "It appears that as a race they [Hispanics] are involved in more of the day to day crimes than other races," and "Mexicans and blacks appear to me to be more violent and threatening." (AOB 21, fn. 10; CT 3322.) Appellant notes that the trial court did not ask any follow-up questions on this subject. (AOB 21, fn. 10;

Because the jury questionnaire adequately addressed the subject of racial prejudice, appellant's claim should be rejected.

II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S *WHEELER* MOTION

Appellant, who is of Mexican descent, contends that the trial court prejudicially erred by denying his motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), which was made on the ground that the prosecution had exercised a peremptory challenge against prospective juror 9877, an African American woman. Specifically, appellant contends the trial court erred in finding there was no prima facie showing of group bias. Moreover, although the trial court found that appellant had not made a prima facie case but allowed the prosecutor to provide a justification for the challenge, appellant contends the prosecutor's stated reason for excusing prospective juror 9877 was not supported by the record. (AOB 25-33.) Appellant's contentions are meritless. The trial court properly denied appellant's *Wheeler* motion because appellant failed to establish a prima facie case of discrimination. Further, the prosecutor's stated reason for exercising the challenge was supported by the record.

A. The Relevant Proceedings Below

The prospective jurors completed written questionnaires, which all counsel had participated in drafting. (See CT 1243-4955; RT 77-78, 92-93, 105-106.) The trial court then conducted the majority of voir dire questioning,

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RT 470-475.) However, this potential juror was excused for cause upon the request of appellant and his co-defendant (see RT 470, 483), so it is unclear why further questioning was necessary.

based primarily on the answers given in the questionnaires. Counsel for each party was given the opportunity to submit additional questions to be asked by the court of the prospective jurors. The prosecutor used his fifth peremptory challenge to excuse prospective juror 9877. Appellant's counsel lodged a *Wheeler* objection. He stated that the prosecutor had used a peremptory challenge against an African-American male the previous day, and after using a peremptory challenge against prospective juror 9877, an African-American female, there were no remaining African Americans in the entire jury pool. Appellant's counsel observed that the prosecutor had not challenged either of the two African-American prospective jurors for cause. (RT 488-489.) He further noted with respect to prospective juror 9877,

> she seems otherwise qualified. She has prior jury experience, including sitting on a jury in a murder case, indicated in her questionnaire she could personally impose the death penalty if it was appropriate, and [appellant] therefore makes this *Wheeler* motion on the basis of discriminatory peremptory challenge.

(RT 489.)

The trial court responded as follows:

> Okay. I'm thinking, as I recollect her, that perhaps it is something other than direct answers to questions. I do note that she had a friend who was a victim of a 187 [murder]. She was a witness in that matter. I think she said a number of years ago, so that may have had something to do with it.
>
> I have noted about this particular person that she doesn't seem to be quite tuned in sometimes, and I'm understanding that might be because of some information that I have that counsel don't have because it's not on the record.

My clerk, Ms. Arredondo, told me that [prospective juror 9877] is coming to court in the daytime and working the shift - - the swing shift at night so that she's in court all day and working during the night. I noticed when she was sitting in the audience when we originally met her, she seemed to be behaving in a relatively unusual kind of way, leaning over her seat, not tuning in and paying attention to what we were doing. She had to leave once during the proceedings, as you may recall, and I can't say that that's what the exercise was based on, but it would certainly appear to me from what she said and from the information, that might explain her what I would call relatively noticeable conduct in court, that perhaps added together, that was sufficient. I would certainly accept it as so. And while I don't find a prima facie case shown, [prosecutor], for purpose of review of any court of appeal, should there ever be occasion for such a review, you may state your position for the record, please.

(RT 489-490.) The following exchange ensued:

[PROSECUTOR]: Your honor, I - - if the court has invited me to do so, I will just state - - I don't - - I personally - - I must say I personally find these motions offensive, but I just for - - whether they have to make a record or not, I don't know. However, I think there was quite enough evidence in the way - - in the uncandid manner she answered particularly on her jury experience to justify my exercise of a peremptory.

THE COURT: So it's basically on her remarks concerning that?

[PROSECUTOR]: Yes.

(RT 490-491.)

Codefendant Ricardo's counsel objected to the trial court "providing its own observations for [the prosecutor's] challenge for cause." The trial court

replied that it had followed the applicable law regarding *Wheeler* motions. Ricardo's counsel further stated,

> Your honor, I would also indicate to the court that I don't think, just in response to [the prosecutor's] statement, that because of the less than candid way she answered her question regarding her jury service - - I would disagree with that for the record.

(RT 491.)

The trial court responded, "If it might be for cause, I would certainly disagree as well, but it's not for cause. It's peremptory and it is sufficient reason." (RT 492.)

Regarding prior jury service, prospective juror 9877 wrote in her questionnaire that in 1985, she had served as a juror in a murder case. She indicated that a verdict had been reached. She answered that she voted with the minority. She also stated that as an alternate, she believed her decision would have been the same as the one reached by the majority. (CT 4484.) When the trial court questioned prospective juror 9877 individually, the court asked if there were any corrections that needed to be made to her questionnaire. Prospective juror 9877 responded that regarding prior jury experience on page eight, question 41, she had mistakenly written that a verdict had been reached, when in fact, there had been a hung jury. (RT 416.) The following exchange ensued:

> THE COURT: Okay. This was a case that took place about 1990?
>
> [PROSPECTIVE JUROR 9877]: Right.
>
> THE COURT: Okay. And you put - - you were with the majority, is that your recollection, as you look back in time?
>
> [PROSPECTIVE JUROR 9877]: No, the minority.
>
> THE COURT: You voted with the minority. Thank you for the correction. [¶] Anything further?

[PROSPECTIVE JUROR 9877]: No.

THE COURT: Is there anything further about you that I should know outside of what's been in the questionnaire that you think would be helpful? I can talk with you publicly or privately, if there is.

[PROSPECTIVE JUROR 9877]: No, your honor.

THE COURT: You served as a juror, perhaps as an alternate, I'm not sure, in 1985 on a homicide case?

[PROSPECTIVE JUROR 9877]: Alternate, yes.

THE COURT: You were the alternate?

[PROSPECTIVE JUROR 9877]: Yes.

THE COURT: Can you set aside whatever you might recall from that past experience and look at this case all on its own with what's presented here. [¶] In other words, you'll set that aside entirely; you won't discuss that matter with anyone else; you'll just look at this case?

[PROSPECTIVE JUROR 9877]: That is correct.

(RT 417-418.)

When the court later asked whether counsel had any additional areas of inquiry with respect to prospective juror 9877, the prosecutor asked, "[A]m I to understand there was only one prior jury experience?" (RT 422.) Prospective juror 9877 replied, "That's correct." The court then added, "And the jury did not return a verdict. It came back hung. She was with the minority; anything further?" (RT 423.)

B. The Trial Court Properly Determined That Appellant Had Failed To Show A Prima Facie Case Of Group Bias In The Use Of Peremptory Challenges

Exercising peremptory challenges because of group bias violates the California and the United States Constitutions. (*People v. Cornwell* (2005) 37

Cal.4th 50, 66.)[18] The United States Supreme Court has reiterated the applicable principles regarding the discriminatory use of peremptory challenges as follows:

> "First, the defendant must make out a prima facie case by 'showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]"

(*People v. Cornwell*, *supra*, 37 Cal.4th at pp. 66-67, quoting *Johnson v. California* (2005) ___ U.S. ___ [125 S.Ct. 2410, 2416, 162 L.Ed.2d 129].)

In determining whether a prima facie case is established, this Court previously held the applicable standard is whether there was a showing of a strong likelihood that the juror was challenged for group bias. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) However, under *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97, the applicable standard is whether the circumstances of the challenge raised an inference that the challenge was racially motivated. (See *Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 988.) This Court had previously held that both tests were consistent in that there must be a showing the challenge was "more likely than not" racially motivated. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1328.) Ultimately, on June 13,

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18. Although appellant did not specifically invoke *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] in his objection at trial, this Court has recognized that an objection under *Wheeler* preserves a federal constitutional objection because the legal principle that is applied is ultimately the same. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

2005, the United States Supreme Court resolved the issue by rejecting the "more likely than not" standard and deciding a prima facie case is established if the totality of the relevant facts give "rise to an inference of discriminatory purpose." (*Johnson v. California, supra*, 125 S.Ct. at p. 2417.) In determining whether there is a prima facie case of group bias, the reviewing court should consider the entire record of voir dire of the challenged jurors. (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

Here, defense counsel's *Wheeler* motion was based on the excusal of prospective juror 9877, the second of only two African Americans in the venire.[19] (RT 488-489.) The trial court did not indicate the standard used in determining that appellant's counsel had not stated a prima facie case of race-based discrimination. (RT 489-490.) Accordingly, this Court must review the record and apply the appropriate standard set forth in *Johnson v. California* to determine the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race. (See *People v. Cornwell, supra*, 37 Cal.4th at p. 73.) A review of the record in this case demonstrates that appellant's counsel did not make a sufficient showing to establish an inference[20] of a discriminatory purpose.

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19. Appellant's counsel did not object to the dismissal of prospective juror 6842, who was the first African-American prospective juror excused by the prosecutor via a peremptory challenge. (See RT 488; CT 2139-2168.) Prospective juror 6842 indicated in his questionnaire that he had been convicted of a firearm offense in 1996 and that his driver's license had been suspended. (CT 2149.) During the court's voir dire questioning, he added that he had also been convicted of a drug-related offense. (RT 386-391.)

20. In *Johnson*, the United States Supreme Court defined "inference" as a "conclusion reached by considering other facts and deducing a logical consequence for them." (*Johnson v. California, supra*, 125 S.Ct. at p. 2416, fn. 4.)

The record demonstrates that there were very obvious reasons to excuse both African American prospective jurors for reasons other than race. Prospective juror 9877 had previously served as an alternate juror in a murder case which resulted in a hung jury, and she indicated on her questionnaire that she would have voted with the minority. (CT 4484; see also RT 417.) This fact alone would have made her undesirable to any prosecutor and constituted a valid race-neutral basis for her excusal. (See, e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 266 [prosecutor properly exercised peremptory challenge against juror who had been a holdout for acquittal in a previous jury].) Furthermore, the trial court described prospective juror 9877's "unusual" and "very noticeable" behavior during voir dire proceedings. Specifically, the trial court remarked that during voir dire proceedings, prospective juror 9877 was "behaving in a relatively unusual kind of way, leaning over her seat, not tuning in and paying attention to what we were doing." The trial court also noted that prospective juror 9877 had to leave the courtroom at one point during the proceedings. (RT 490.) Thus, prospective juror 9877's noticeable inattentiveness provided an another race-neutral reason for excusing her. (See *United States v. Power* (9th Cir. 1989) 881 F.2d 733, 740.)

Although appellant does not directly challenge the prosecutor's decision to use a peremptory challenge on prospective juror 6842, the first African-American prospective juror excused by the prosecutor, there were very clear reasons for his excusal as well. Prospective juror 6842 indicated in his questionnaire that he had been convicted of a firearm offense in 1996 and that he had spent time in jail or prison. He also indicated that his driver's license had been suspended. (CT 2149.) When questioned in private by the judge, he added that he had also been arrested in 1992 in a "sweep" or a "drug raid" for a cocaine-related charge. (RT 386-387.) He further explained that his firearm offense was possession of a loaded weapon. He stated that he had traded cars

with someone and did not know the firearm was present. Nevertheless, he entered into a plea disposition. (RT 390.) Due to prospective juror 6842's prior arrests, the prosecutor had a valid race-neutral reason for excusing him (see *People v. Panah* (2005) 35 Cal.4th 395, 442; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 277, fn. 18), and appellant does not attempt to argue otherwise.

Based on the very strong and obvious race-neutral reasons for excusing both African-American prospective jurors in this case, the record is insufficient to support an inference that the prosecutor excused any juror on the basis of race. (See *People v. Smith* (2005) 35 Cal.4th 334, 346-348 & fn. 3 [no inference of discrimination when one peremptory challenge was used against an African-American juror who acknowledged feeling sympathy for the defendant and another peremptory challenge was used against an African-American prospective juror who opposed the death penalty].) In this respect, the instant case is distinguishable from *Johnson v. California*. In *Johnson*, a jury found the defendant, an African-American male, guilty of second degree murder and assault in a California trial court. During jury selection, after several prospective jurors were removed for cause, forty-three eligible prospective jurors remained. Of the remaining prospective jurors, only three were African-American. The prosecutor used three of his twelve peremptory challenges to remove the African-American prospective jurors. The empaneled jurors and alternates for the trial all were white. (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2414.)

After the prosecutor had used a peremptory challenge as to the second of the three prospective African-American jurors in *Johnson*, the defense objected that the prosecutor was using race as a basis for the peremptory challenges in violation of the United States and California Constitutions. (*Johnson v. California*, *supra*, 125 S. Ct. at p. 2414.) Relying on *People v. Wheeler*, *supra*, 22 Cal.3d at p. 258, the trial court overruled the objection

without asking the prosecutor to explain the reason for his challenge, finding that there was no strong likelihood that the exercise of the peremptory challenges were based on race. The trial court warned the prosecutor that "we are very close." (*Johnson v. California*, *supra*, 125 S. Ct. at pp. 2414-2415.)

When the prosecutor exercised the peremptory challenge as to the remaining prospective African-American juror, the defense again objected. The trial court again overruled the objection without asking the prosecutor to explain the reason for the challenge. The trial court explained that its own examination of the record showed that the peremptory challenges could be justified by race-neutral reasons. The trial court also opined that the prospective African-American jurors offered equivocal or confused answers on the jury questionnaires. Therefore, the trial court found that no prima facie case of discrimination had been established. (*Johnson v. California*, *supra*, 125 S. Ct. at pp. 2414-2415.) Noting the trial court's comment that "we are very close," and this Court's acknowledgment that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury," the Supreme Court found the inferences that discrimination may have occurred were sufficient to establish a prima facie case of race-based discrimination. (*Johnson v. California*, *supra*, 125 S.Ct. at p. 2419.)

In contrast to *Johnson*, in the instant case, there were such obvious race-neutral reasons for any prosecutor to excuse both African-American prospective jurors that there was no reason to find the challenges to be a "close call" or "suspicious." Accordingly, *Johnson* is distinguishable and appellant's claim that the trial court erred in failing to find a prima facie case of discrimination should be rejected.

C. Even If The Trial Court Should Have Made A Finding Of A Prima Facie Showing, Appellant's Contention Fails Because Race-Neutral Reasons Supported The Exercise Of The Peremptory Challenge

In any event, appellant's contention fails even if this Court finds that appellant made a prima facie showing of group bias in the exercise of the prosecution's peremptory challenges. If the trial court has found a prima facie case of group bias, then the prosecutor must state adequate, race-neutral reasons for the peremptory challenges. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) These reasons must relate to the particular individual jurors and to the case at issue. (*Ibid.*) "'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, quoting *Batson, supra*, 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation omitted], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra*, 16 Cal.4th at p. 664.)

Appellant asserts that the trial court "disagreed" with the prosecutor's assessment of prospective juror 9877 not being candid about her answers concerning prior jury service. (AOB 30.) He is incorrect. The trial court observed that although the prosecutor's stated reason was insufficient to excuse the prospective juror for cause, it was a sufficient reason for exercising a peremptory challenge. (RT 492.) A trial court is not required to make detailed comments on the record in accepting the prosecutor's reasons as genuine. (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) A trial court's proper focus is on whether the prosecutor's stated reasons are genuine, not whether they are objectively reasonable. (*Id.* at p. 924, citing *Purkett v. Elem* (1995) 514 U.S. 765, 769 [115 S.Ct. 1769, 131 L.Ed.2d 834].) In concluding that the prosecutor's stated reason for excusing prospective juror 9877 was a "sufficient reason" for exercising a peremptory challenge, the trial court implicitly found

that the reason was genuine. (See *People v. Alvarez*, *supra*, 14 Cal.4th at pp. 197-198.)

Furthermore, there was substantial evidence supporting the trial court's finding that the prosecutor's stated reason was genuine. The prosecutor explained that the peremptory challenge of prospective juror 9877 was prompted by "the uncandid manner she answered particularly on her jury experience." (RT 490-491.) The answers given on prospective juror 9877's questionnaire regarding prior jury service were internally inconsistent. She listed only a 1985 murder case and wrote that a verdict had been reached. Yet, she also stated on the questionnaire that she had voted with the minority. She further indicated that as an alternate, she believed her decision would have been the same as that reached by the majority. (CT 4484.) When asked whether she had any corrections to the questionnaire, prospective juror 9877 informed the court that her answer to question 41 (the question on prior jury service) was incorrect. She stated that there was no verdict reached because there was a hung jury. (RT 416.) The court asked whether this was a case that took place "about 1990?" and prospective juror 9877 replied affirmatively. The court asked, "Okay. And you put - - you were with the majority, is that your recollection, as you look back in time?" Prospective juror 9877 replied, "No, the minority." The court stated, "You voted with the minority. Thank you for that correction."[21] (RT 416-417.)

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21. Although the trial court described voting with the minority as a "correction," prospective juror 9877's questionnaire actually reflected that she had voted with the minority rather than the majority (although she also stated that as an alternate, she believed her decision would have been the same as that reached by the majority). (CT 4484) It is possible that the trial court confused prospective juror 9877 with prospective juror 7228, as the two shared the same last name. (See RT 421; CT 3967, 4477.) Further evidence that the trial court may have confused the two prospective jurors sharing the same last name includes the fact that in prospective juror 7228's jury questionnaire, he listed the year he served on a criminal jury as "about 1990" (CT 3974) which was the

The court later asked prospective juror 9877, "You served as a juror, perhaps as an alternate, I'm not sure, in 1985 on a homicide case?" Prospective juror 9877 confirmed that she had served as an alternate in that case, but she did not explain that this was the same case she had been discussing before when the court had just asked about her service in a case in "about 1990." Seeking clarification, the prosecutor subsequently asked whether there had been only one prior jury service, and prospective juror replied, "That's correct." (RT 422-423.)

The above record supports the prosecutor's belief that prospective juror 9877 was being less than candid in her answers. There may have been some confusion on the trial court's behalf, as prospective juror 9877 was asked about prior jury service in "about 1990" as well as her service as an alternate in a homicide case in 1985. Nevertheless, prospective juror 9877 did nothing to affirmatively clarify that these two separate lines of inquiry posed by the court actually involved only one term of prior jury service. When the court stated its understanding that prospective juror 9877 had "voted" with the minority, this could not have been true, since an alternate never would have voted. Yet, prospective juror 9877 did not attempt to clarify this point.

Moreover, even appellant remains confused about the number of times prospective juror 9877 previously served on a jury. He asserts, "Indeed, the potential juror clarified her questionnaire to indicate that a verdict had not been reached when she served as a juror in a petty theft trial in 1985, but she had served as an alternate juror on a homicide case and agreed with the verdict that was reached." (AOB 30, citing RT 416, CT 4484.) Yet, when the prosecutor sought to clarify the issue, prospective juror 9877 agreed that there had only

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exact language used by the court when questioning prospective juror 9877 about her jury service (see RT 417), even though she had listed her prior jury service as occurring in 1985 (see CT 4484).

been one prior jury experience. The trial court then summarized, "And the jury did not return a verdict. It came back hung. She was with the majority . . . ." (RT 422-423.) Thus, even appellant's present understanding of prospective juror 9877's prior jury experience is at odds with the answers provided on voir dire and with the trial court's understanding of those answers.

At the very least, prospective juror 9877 gave confusing responses to the questions about prior jury experience. Additional questioning failed to fully clarify the issue. When the trial court asked prospective juror 9877 about her jury experience as an alternate in a 1985 homicide, after the court had just asked her about jury service in a case in "about 1990," it would have been an appropriate time for her to explain that there had only been a single prior jury experience. Yet, prospective juror 9877 failed to provide this clarification. Accordingly, the trial court's implicit finding that the prosecutor's stated reason for excusing prospective juror 9877 was genuine was supported by the record. (See *People v. Alvarez*, *supra*, 14 Cal.4th at pp. 197-198.) Appellant is not entitled to reversal.

III.

APPELLANT WAS NOT DENIED HIS RIGHT TO BE PRESENT

Appellant argues his absence from certain chambers conferences during voir dire deprived him of meaningful participation during the jury selection process and thereby a reliable determination of guilt, death eligibility, and penalty. Accordingly, appellant maintains his absence from the chambers conferences: (1) denied him of his statutory right under section 977 to be present at all proceedings; and (2) denied him of his state and federal constitutional rights to due process and a trial by jury (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 16). Appellant maintains he need not

demonstrate prejudice since his absence from the chambers conferences affected the integrity of the trial and requires an automatic reversal. In the alternative, he argues any error was not harmless beyond a reasonable doubt under the *Chapman*[22] standard. (AOB 34-40.) Respondent submits appellant's contentions are foreclosed by the express holdings to the contrary in *People v. Ochoa* (2001) 26 Cal.4th 398, 433-436 and *People v. Holt* (1997) 15 Cal.4th 619, 706-708. In *Holt*, this Court held that the type of challenged proceedings in this case are not the type of proceedings in which a defendant's presence is required since those type of proceedings "do not bear a reasonably substantial relation to the opportunity to defend." Moreover, any error was harmless, as appellant has failed to show how his absence from the chambers proceedings prejudiced his ability to defend his case.

A. The Relevant Proceedings Below

Before voir dire proceedings commenced, the trial court asked counsel for appellant and co-defendant Ricardo whether their clients would be inclined to waive the right to be present during discussions of a procedural nature, such as discussions relating to the jury questionnaires. (RT 88.) After conferring with appellant, appellant's counsel indicated that appellant was willing to waive his right to be present during such discussions. However, Ricardo indicated that he was unwilling to waive his right to be present. (RT 89.)

During voir dire, the following proceedings occurred:

THE COURT: I have a number of people I need to talk with privately, and that presents a bit of a problem. I'm going to talk with counsel briefly, and if it's with their consent and their clients, off the

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22. *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

record. To just determine how we're going to determine this, could I see counsel for just a moment, if that's agreeable with you?

(The following proceedings were held in chambers:)

THE COURT: I have a few people, one or more, that I need to talk with privately; and if I do it in front of your clients, I have to get rid of everybody else. I'm happy to do it out there, but we'll have everybody milling around in the hall. If your clients are willing, and if you are willing, I'll bring them in here one at a time, we'll do it on the record, and you can talk to your clients about anything you want to talk about with them in between, or whatever. So we'll go back out there, and I'll list who it is I want to talk with privately, and then I'll ask you if we can come back here of if we'll do it in the courtroom.

[RICARDO'S COUNSEL]: Fine.

[APPELLANT'S COUNSEL]: Very good.

(RT 609-610.)

Back in open court, the trial court stated that it wanted to speak privately with prospective juror 0903, to be followed by prospective juror 0886. (RT 610-611, 617.) The court asked counsel whether these discussions could take place in chambers and all counsel agreed. (RT 611.) Prospective juror 0903 was subsequently questioned about whether he could follow the law as given by the judge regardless of whether he agreed with the law. He confirmed that he could. He was also questioned about whether he could vote to impose the death penalty, and he stated that although he would be reluctant to do so, he would be able to consider the death penalty as an option. (RT 612-615.) Based on the prospective juror's reluctance regarding the death penalty and his demeanor in answering questions, the prosecutor moved to excuse him for cause. The trial court denied this request. (RT 619-621.) The prosecutor later used a peremptory challenge against prospective juror 0903. (RT 623.)

Prospective juror 0886 was also questioned in chambers. He stated that he was confident that he could not vote for the death penalty. Over appellant's counsel's objection, the trial court granted the prosecutor's request to excuse prospective juror 0886 for cause. (RT 617-619.)

The following day, the trial court again questioned some prospective jurors in chambers. The court questioned prospective juror 3193 about his wife's pregnancy. Prospective juror 3193 stated that the baby was due in December. His wife had previously had a miscarriage in March when she was five months pregnant. Although the current pregnancy appeared to be going well, he was worried about being away from his wife and did not believe he would be able to concentrate on the case if seated as a juror. (RT 715.) All counsel stipulated that he could be excused. (RT 716.)

Prospective juror 4156 was also questioned in chambers. The court asked him about being charged with contributing to the delinquency of a minor in 1963. Prospective juror 4156 explained that he had allowed a minor who had escaped from some kind of facility to stay with him, upon his roommate's request. He believed he had been treated fairly by the criminal justice system. He was not challenged for cause. (RT 716-720.) Appellant's trial counsel later used a peremptory challenge against him. (RT 723.)

After all parties had accepted the panel as constituted, the court asked whether any of the prospective jurors had any reason to believe they could not be fair and impartial. Prospective juror 2393, who later served as Juror No. 1, asked to speak to the court. In chambers, a health issue was discussed, and it was determined that the juror would advise the court if he needed any breaks during the proceedings. (RT 722-723, 728-730.) In addition, prospective juror 3689, who served on the jury as Juror No. 3, went into chambers to discuss a health issue, and it was decided that the court would accommodate the juror's scheduled medical appointments. (RT 724-728.)

Some of the prospective alternate jurors were also questioned in chambers outside appellant's presence. Prospective juror 5421 stated that he did not believe he could be fair and impartial. All counsel stipulated that he could be excused. (RT 751.) Prospective juror 7011 stated that he was unemployed, although he did not believe it would interfere with serving on the jury. He stated that he could impose the death penalty. He described a prior conviction for trespass, which resulted from him confusing a little girl for someone he knew. He stated that he had been diagnosed with schizophrenia. (RT 752-757.) The trial court denied appellant's counsel's challenge of this prospective juror for cause. (RT 760.) The prosecutor later exercised a peremptory challenge against this prospective juror. (RT 762.) After questioning prospective juror 8921 in chambers, the court excused her on its own motion due to concerns about her comprehension of the English language and her ability to be fair and impartial (she had indicated it would be difficult to vote not guilty if there was any possibility the defendant could be guilty). (RT 788-789.)

Finally, the trial court ruled on additional challenges for cause of prospective alternate jurors while in chambers. The trial court denied appellant's counsel's challenges to prospective jurors 3045 and 4320. (RT 759.) Ricardo's counsel subsequently exercised a peremptory challenge against prospective juror 3045. (RT 761.) The prosecutor subsequently exercised a peremptory challenge against prospective juror 4320. (RT 762.) The trial court also advised counsel in chambers that it planned to excuse prospective juror 8026 due to problems understanding English. (RT 782.)

B. There Was No Denial Of Appellant's Right To Be Present At Proceedings Bearing No Relation To His Opportunity To Defend The Charges

A criminal defendant's right to be personally present is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution, as well as by article I, section 15 of the California Constitution and sections 977[23] and 1043.[24] (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) A defendant, however, does not have a right to be present at every hearing in the course of a trial. (*People v. Hines* (1997) 15 Cal.4th 997, 1039.) This Court has repeatedly held that a defendant is not entitled to be personally present at proceedings which bear no relation to his or her opportunity to defend against the charge. (*Ibid.*, accord, *People v. Welch* (1999) 20 Cal.4th 701, 774; *People v. Holt, supra*, 15 Cal.4th at p. 706; *In re Lessard* (1965) 62 Cal.2d 497, 506.) Moreover, sections 977 and 1043 do not demand that a defendant be personally present or execute a written waiver if the proceeding does not bear any relation to his or her opportunity to defend. (*People v. Bradford, supra*, 15 Cal.4th at p. 1357; *People v. Holt, supra*, 15 Cal.4th at p. 706; *People v. Horton* (1995) 11 Cal.4th 1068, 1120-1121.)

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23. At the time of trial, section 977, subdivision (b), stated in relevant part:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, approved by his counsel, which waiver must then be filed with the court . . . .

24. Section 1043 states in relevant part: "Except as provided in this section, the defendant in a felony case shall be personally present at the trial."

Significantly, in *People v. Ochoa*, *supra*, this Court rejected the defendant's claim that he was denied his statutory and constitutional right to be present at trial since during voir dire, 12 jurors were questioned about "confidential" matters at sidebar conferences outside of the defendant's presence. This Court found that the defendant had "not indicated any way in which his presence at the sidebar conferences bore a reasonably substantial relation to his opportunity to defend himself." (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 433.) Thus, there was no due process violation. (*Ibid.*) Furthermore, this Court found no statutory violation in *Ochoa.* This Court explained that where the proceeding bears no reasonable relation to the defendant's ability to defend against the charges, sections 977 and 1043 do not require the defendant's presence. (*Id.* at p. 434.)

Similarly, in *People v. Holt*, *supra*, this Court rejected the defendant's claim that he was denied his statutory and constitutional right to be present at trial since he was absent during "a variety of proceedings." This Court held that, "none of the proceedings [the defendant] identifies in support of his claim is shown to be one that bore any relationship to defendant's opportunity to defend." (*People v. Holt*, *supra*, 15 Cal.4th at p. 706.) Two of the proceedings Holt challenged were (1) sidebar discussions of a challenge for cause; and, (2) an in-chambers discussion of a sitting juror. (*Id.* at p. 706, fn. 26.) If sidebar discussions of a challenge for cause and in-chambers discussion of a sitting juror do not require the defendant's presence, since those type of proceedings do not bear a reasonably substantial relation to the defendant's opportunity to defend, then it logically follows, that appellant's presence was not mandated in the chambers conferences involved here where jurors were asked during voir dire about certain answers they provided on the jury questionnaire forms. There is simply no functional difference in the type of proceedings challenged in *Holt* and the one challenged here. Appellant's contention must be rejected under this

Court's decision in *Holt*. (See also *United States v. Gagnon* (1985) 470 U.S. 522, 526-527 [105 S.Ct. 1482, 84 L.Ed.2d 486] [no constitutional violation when defendant was absent from judge's discussion with sitting juror]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1357 [citing *Gagnon* with approval]; *In re Lessard*, *supra*, 62 Cal.2d at p. 506 [defendant had no right to attend private conference with sitting juror who was asking to be excused]; *People v. Abbott* (1956) 47 Cal.2d 362, 372 [defendant had no right to attend hearing determining juror's qualifications].)

Due process does not entitle the defendant to appear at every encounter between judge and jurors. Instead, the central inquiry in such situations is whether the defendant's presence at the hearing reasonably could have assisted his defense of the charges against him. (*United States v. Gagnon*, *supra*, 470 U.S. at pp. 525-527; accord, *People v. Johnson* (1993) 6 Cal.4th 1, 19; *United States v. Olano* (9th Cir. 1995) 62 F.3d 1180, 1190-1191 [no federal constitutional violation where defendant not present at ex-parte meeting with judge and juror]; *United States v. McClendon* (9th Cir. 1986) 782 F.2d 785, 788-789 [defendant's presence not warranted at in-chambers voir dire of prospective jurors].)

Moreover, even assuming there was error, appellant has not carried his burden of proving prejudice under either the reasonable-probability harmless-error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or the more stringent beyond-a-reasonable-doubt-harmless error standard of *Chapman v. California, supra*, 386 U.S. at p. 24. No substantive rulings were made at any of the chambers conferences other than when the trial court ruled on challenges for cause. Appellant was present for the majority of voir dire with the exception of the limited chambers proceedings when jurors were questioned individually about private matters. Appellant fails to explain how he could have assisted in his defense by being present during these proceedings. (*People*

v. Mayfield (1997) 14 Cal.4th 668, 732-737 [although defendant's absence from jury view violated section 977, it was harmless as it was not reasonably probable defendant would have received a more favorable verdict absent the error]; *People v. Hardy* (1992) 2 Cal.4th 86, 177-178 [defendant's absence from portion of preliminary voir dire non prejudicial].) Appellant's claim should be rejected.

IV.

EVIDENCE OF A THREE-WAY TELEPHONE CALL BETWEEN APPELLANT, CODEFENDANT RICARDO LOPEZ, AND JORGE URIBE WAS PROPERLY ADMITTED

Appellant contends that the trial court improperly allowed appellant's sister, Patricia Lopez, to testify about the existence of a three-way telephone call between appellant, codefendant Ricardo Lopez, and Jorge Uribe. Appellant claims that the admission of this evidence violated a stipulation entered into by the parties, which was designed to protect appellant's Sixth Amendment right to confrontation, and thereby violated appellant's due process right to enforcement of the stipulation. Appellant further argues that the admission of the evidence was more prejudicial than probative under Evidence Code section 352. (AOB 41-53.) Respondent disagrees, as appellant's sister's testimony about setting up the three-way telephone call did not violate the stipulation. When viewed in the proper context, it is apparent that the stipulation was intended to preclude any mention of codefendant Ricardo's statements to the police about a three-way telephone call. The stipulation did not, however, preclude other witnesses from testifying about the existence of a three-way telephone call. Furthermore, appellant's claim that the evidence should have been excluded pursuant to Evidence Code section 352 should be rejected, as the

probative value of the evidence was not substantially outweighed by the danger of undue prejudice. Finally, any error in admitting the evidence was harmless.

A. The Relevant Proceedings Below

On March 3, 1998, before trial began, appellant filed a motion for severance in light of co-defendant Ricardo Lopez's extrajudicial statements to the police implicating appellant. (CT 784-792.) In the motion, appellant relied on the authority of *Bruton v. United States* (1968) 391 U.S. 123, 129-130 [88 S. Ct. 1620, 20 L.Ed.2d 476] and *People v. Aranda* (1965) 63 Cal.2d 518, 530-531. (CT 787-789.) As one of four possible alternatives, the motion proposed "[e]dit[ing] the extrajudicial statement so as to delete any portion which implicates the nondeclarant-defendant, if the editing can be done without changing the statement so as to prejudice the declarant." (CT 787, citing *Richardson v. Marsh* (1987) 481 U.S. 200, 208-209 [107 S.Ct. 1702, 95 L.Ed.2d 176].)

At a pretrial conference on March 9, 1998, the trial court noted that the severance motion was pending. The prosecutor stated that he was not prepared to respond at that time, as he had been engaged in another trial. The court agreed to provide the prosecutor with additional time in which to respond to the motion. The prosecutor informed the court that he would discuss the matter with appellant's counsel in an effort to reach a resolution. The prosecutor explained, "The issue circles around whether or not there could be an effective redaction of Mr. Ricardo's statement, Ricardo Lopez's statement, and I'm going to work on that. I'm going to get together with [appellant's counsel]. We might be able to come to some type of agreement." (RT 68.)

At the next pretrial conference on March 30, 1998, appellant's counsel informed the court that he and the prosecutor had been working on a redaction of Ricardo's statement, which would render his severance motion moot. (RT

71.) At the following pretrial conference on April 17, 1998, the subject of appellant's severance motion was addressed as follows:

> [APPELLANT'S COUNSEL]: Yes. The other thing is, as the court is aware, I did file a motion for severance or for separate juries or some other alternatives. We've had some lengthy discussions, and my understanding at this point is that the People do not intend to use any portion *of Ricardo Lopez's statements* that refer to or indicate any phone conversations between Ricardo and my client [appellant] Juan Lopez. If that's the understanding, then it appears to me that in all likelihood my request for severance is moot unless between now and the time we return to court some other reason for the request appears. But that's - - if my understanding's correct, that's the position of the People, then I think we can lay that motion to rest for the moment.
>
> [THE PROSECUTOR]: If I may, your Honor. [¶] I asked [appellant's counsel] to state what our understanding is, and that is what our understanding is. Just so the court's aware, that *there is a statement* that I - - for the most part refers to Mr. Ricardo Lopez's own deeds regarding the homicide. There are references to phone conversations *within that statement* involving him and his brother having to do with request for the murder. However, those conversations - - there's three-way conversations. Among them was [Uribe]. I intend to redact any conversation, even if it's a reference to a phone conversation, so that it only refers to the two parties of [Uribe] and Ricardo Lopez, with no reference whatsoever to [appellant].
>
> THE COURT: Is that your understanding, [appellant's counsel]?
>
> [APPELLANT'S COUNSEL]: That's correct.

(RT 81-82, emphasis added.)

On June 3, 1998, during a break in voir dire proceedings, the trial court asked the parties whether there were any outstanding issues that would need to be resolved with an Evidence Code section 402 hearing. (RT 694.) Appellant's counsel asked for verification that the prosecutor did "not intend to use *the statements of the co-defendant* that refer to [appellant]." (RT 695-696, emphasis added.) The prosecutor acknowledged that the agreement remained intact. He offered to state the agreement clearly for the record, although it was his understanding that they had already done so. The court replied, "We'll do that with a little more specificity, but I'm understanding the agreement holds." (RT 696.)

On June 8, 1998, before trial began, there was a discussion about Ricardo's statement to the police, which had been redacted by the prosecutor and appellant's trial counsel. The court acknowledged that it had received a copy of the redacted transcript. (RT 825-826; see Supp. CT 594-724.) Appellant's trial counsel made the following statement:

> [APPELLANT'S COUNSEL]: Your honor, [the prosecutor] and I did spend several hours Thursday afternoon with the redacted transcript. So I think at this point I'm satisfied that my item two on the [Evidence Code section] 402 motion[25] . . . . has been properly dealt with by a stipulation of counsel, and I'm satisfied that we have eliminated any concerns that I have *with regard to the use of Mr. Ricardo Lopez's statements* used in some way.

(RT 826-827, emphasis and footnote added.)

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25. Appellant's counsel had filed a written motion entitled "Notice of Motion and Motion for Determination of Foundational and Other Preliminary Facts; Points and Authorities [Evidence Code § 402]." (CT 887-894.) The second item listed in that motion was "Admissibility of Statement by Co-Defendant Concerning Substance of Conversation Allegedly Had With the Defendant." (CT 891.)

The following discussion of the stipulation ensued:

[THE PROSECUTOR]: Counsel and I have proposed the following stipulation: that the *redaction of the transcript* that the court - - has been provided to the court *of Mr. Ricardo Lopez's statement*, which has interlineated through it all conversations where [appellant] was involved with Mr. Ricardo Lopez, any references to that. So our agreement is that any reference to [appellant], anything that he said, the fact that he was involved in any conversations with Mr. Ricardo Lopez, the fact that there were even three-way conversations, which would indicate that this was a missing third party there those *will be deleted*. Our agreement is, however, that any references to those conversations, since they were three-party conversations, will only include reference to the fact that this was a conversation between Ricardo Lopez and this person George Uribe, also known as Pelon, during which the murder of Miss Carmody was discussed, but there will not be any reference to the fact that this was a three-way conversation or that [appellant] was involved in such conversations. [¶] *I believe we've looked this over. We've looked together*. We're aware of what the prevailing case law is in this area, and we believe that this is in conformance with *Richardson vs. Marsh*. I can provide the citation to the court at a later time. It's a U.S. Supreme Court case.

[APPELLANT'S COUNSEL]: So stipulated, with the further proviso, so I understand that counsel will instruct his investigating officers, *if they testify to any portion of Ricardo Lopez's statement*, that they will not inadvertently, or otherwise, refer to those passages that have been redacted.

THE COURT: And you will so instruct your officers.

[THE PROSECUTOR]: Yes.

THE COURT: The stipulation is accepted by the court.

(RT 833-834, emphasis added.)

During his opening statement, the prosecutor made the following comments regarding Ricardo's statement to the police and the expected testimony of appellant's sister:

> Now, Ricardo Lopez was subsequently arrested, I think, about the 16th, April 16th, and the officers spoke to him. He said that he had conversations between him him [sic] and George Uribe Pelon during the week that proceeded [sic] her murder about killing her.
>
> We will also establish, as I mentioned, through the records that there's a lot of phone activity from the jail, from [appellant] to his residence, Sandra Ramirez's residence.
>
> I anticipate that Patty Lopez, [appellant's] sister, she was subsequently interviewed. She stated that she set up - - that [appellant] had called during the previous week asking for Ricardo; that Ricardo wasn't there, and she was asked to set up a three-way conversation and forward the call to Mr. Uribe, which she did. She didn't know what the conversation was about.
>
> I expect that she'll also testify that subsequent to that that she also set up a three-way conversation when her brother called. [Appellant] called from jail. It was a three-way conversation between Ricardo, [appellant], and George Uribe.

(RT 901-902.)

Appellant's counsel asked to approach the bench, although the court declined the request and allowed the prosecutor to conclude his opening statement. (RT 902-903.) After the prosecutor finished his opening statement, appellant's counsel argued outside the jury's presence that the prosecutor's

mentioning of a three-way telephone call between appellant, Ricardo, and Uribe violated their stipulation. (RT 904-905.) Appellant's counsel argued:

> The agreement was not only that the content of the conversation not be admissible, not be presented to the jury, but the very fact of a three-way conversation likewise being totally off limits. [¶] I'm shocked that [the prosecutor] said it; I ask the court because of that, because of the inference and implication that gives rise to - - in any reasonable person's mind, the court declare a mistrial at this time.

(RT 905.)

The prosecutor responded as follows:

> [Appellant's counsel] and my agreement pertained to the statement of Mr. Ricardo Lopez. Mr. Ricardo Lopez's statement said he had a conversation, a three-way conversation with his brother [appellant] and George Uribe alone, during which they discussed the killing of Mindy Carmody.
>
> He also stated that he had conversations with [Uribe] regarding this. It appears at other times, he also says that he has individual conversations with his brother at other times.
>
> It's my statement to the proposed redaction and the statement that I made to the jury about his statement was only referring to the conversation that he had with Mr. George Uribe. I made no reference in that statement when I said that Mr. Ricardo Lopez said that he had a conversation. He had a conversation with George Uribe and that was it. And I'm very careful not to refer to anything else there.
>
> Now, the fact that we're going to have his own sister who will testify that on - - during the weeks and days preceding that she did set up such conversations does not have anything to do with the actual statement of Mr. Ricardo Lopez which was redacted to take out any reference to that.

So that's - - the question now is that was our agreement - - I'm not sure what's going on here for one extent because I even spoke to [appellant's counsel] about calling Patty Lopez and he assured me that I probably would have no trouble getting her in at all, and I said I didn't - - I wanted to know if she was going to be in the courtroom when certain statements were being made because she was one of the potential witnesses. She has been here on other occasions.

So as far as our agreement goes and as far as the redaction, I believe that I don't see where the misunderstanding is.

(RT 906-907.)

Appellant's counsel replied that the "agreement that there be no content of the three-way conversation is somewhat empty without also eliminating reference to a three-way conversation between those three individuals, [Ricardo], appellant, and [Uribe]." (RT 909.) Appellant's counsel further argued that the inference a reasonable juror would draw from the prosecutor's comments was that the three-way conversation, of which they would never hear about the content, was indeed about a plan to kill the victim. (RT 909.)

The trial court remarked that the prosecutor's comments appeared to have violated the spirit, if not the absolute language of the stipulation. The court reserved ruling on the motion for mistrial. The prosecutor reiterated his position that the stipulation went only to the redaction of Ricardo's statement for purposes of complying with *Richardson v. Marsh*.[26] (RT 910.) The trial court responded that appellant's counsel's motion for mistrial was based on the inference that could be drawn from the prosecutor's comments. (RT 911.)[27]

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26. See *Richardson v. Marsh*, *supra*, 481 U.S. at pp. 208-211.

27. The trial then proceeded with the prosecution calling witnesses. At the end of the day, there was another brief discussion of the issue. The trial court reiterated that it would rule on the motion for mistrial the following day.

The next day, the trial court initially stated that although the prosecutor had erred in referencing the three-way conversation during his opening statement, appellant's motion for mistrial was denied. (RT 966-967.) The court explained:

> I have in front of me the stipulation, as I've said. That stipulation was introduced yesterday morning. I asked counsel if they had it in writing. They said no. I didn't want [the prosecutor] to just free-wheel something onto the record without knowing for sure that it represented exactly what counsel had in mind, and so I told the attorneys to take some time to get the stipulation together. [Appellant's counsel] and [the prosecutor] spoke together, and then [the prosecutor] put a stipulation on the record, part of which reads as follows:
>
> > So our agreement is that any reference to [appellant], anything that he said, the fact that he was involved in any conversations with Mr. Ricardo Lopez, the fact that there were even three-way conversations, which would indicate that this was a missing third party there, those will be deleted. Our agreement is that any references to those conversations, since they were three-party conversations, will only include reference to the fact that this was a conversation between Ricardo Lopez and this person George Uribe, also known as Pelon,
>
> and it goes on further. But it's clear, [prosecutor], that the stipulation included mention of a three-way conversation. I will hold you bound to your stipulation, [prosecutor], so please do remember it through the remainder of the trial.

(RT 967-968.)

(RT 961-964.)

The prosecutor asked the court to reconsider its ruling in light of the context in which the stipulation was made. The prosecutor explained that the stipulation was only designed to address the second item in appellant's Evidence Code section 402 motion, and that the stipulation only pertained to Ricardo's statement. The prosecutor asserted that he "would in no way enter into any agreement limiting my ability to present other evidence in this case. And I did not do that, and it was never my intention to do that." (RT 968.) The prosecutor further indicated that he did not complete his opening statement as planned after appellant's counsel asked to approach the bench and the court asked whether the prosecutor was near the completion of his opening statement. The prosecutor explained that he had not even gotten to the case against appellant in his opening statement. He had planned to discuss the statement appellant had given to the police in which he denied having spoken to Ricardo or Uribe, which would be contradicted by testimony from appellant's sister, i.e., that she had set up a three-way telephone conversation between appellant, Ricardo, and Uribe. (RT 969.)

The prosecutor acknowledged that because of the way his opening statement "was broken up there at the time of [appellant's counsel's] objection," it left the impression that the prosecutor was trying to get the jury to draw an improper inference about the three-way conversation, i.e., that the three-way conversation set up by Patricia Lopez was one and the same as the conversation Ricardo had mentioned having with Uribe in Ricardo's statement to the police. (RT 970.) However, the prosecutor noted that the transcript of Ricardo's statement to the police contained references to separate conversations with Uribe and with appellant. Thus, the prosecutor explained, he did not intend in his opening statement for the jury to draw the inference that Ricardo's statement to the police regarding a conversation with Uribe was the same conversation as a three-way telephone conversation set up by appellant's sister. (RT 970.)

The prosecutor agreed that Ricardo's statement to the police was hearsay with respect to the case against appellant, and that it would be improper to ask the jury to infer that Ricardo's admitted conversation with Uribe somehow involved appellant. The prosecutor explained, however, that it had been his intent to separately discuss the case against appellant during his opening statement, although he only got so far as discussing the case against Ricardo. The evidence against appellant would include the fact that Uribe was at the scene of the crime and was the one who called the victim over to speak to Ricardo. In addition, there was evidence that appellant's sister set up a three-way conversation prior to the murder between the two people involved at the scene of the crime (Ricardo and Uribe), and appellant. The prosecutor argued that this evidence incriminated appellant, and was completely separate from Ricardo's admission to the police that he had planned the shooting in a conversation with Uribe. (RT 971-972.)

The prosecutor asked the court to advise the jury that the statements each defendant gave to the police could only be used against that defendant. The prosecutor also urged the court to understand that the stipulation went only to Ricardo's statement and not to the other evidence in the prosecution's case. (RT 973-974.) The prosecutor again asked the court to reconsider its ruling in light of the context in which the stipulation was made, and to find that the stipulation was limited to Ricardo's statement to the police. (RT 974-975.)

The trial court stated that it was clear that there was no "meeting of the minds" with respect to the stipulation. The court declined to declare a mistrial, noting that the jurors had been instructed that opening statements are not evidence. With respect to a curative instruction, the court advised counsel it would consider giving an instruction if counsel proposed such an instruction during trial, preferably in writing. (RT 975.) The court then changed its ruling on the stipulation, and agreed to enforce the stipulation "as limited as set forth

by [the prosecutor]." Appellant's counsel announced that when the prosecution sought to introduce evidence that a three-way telephone call existed, he would object on relevance grounds. (RT 976.)

B. The Trial Court Did Not Abuse Its Discretion In Enforcing The Stipulation In Accordance With The Prosecutor's Interpretation

The trial court's ultimate ruling that the stipulation would be enforced in accordance with the prosecutor's interpretation was proper. "'A party seeking relief from the burdensome effects of a stipulation may, in some cases, be fully protected by *interpretation*, i.e., by enforcement of the stipulation in a reasonable and nonburdensome way.'" (*People v. Dyer* (1988) 45 Cal.3d 26, 57, quoting 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 223, p. 252, and cases cited, italics in Witkin.)

In *Dyer*, the prosecution and defense stipulated that the prosecutor would not impeach the defendant with his prior convictions during the guilt phase of a capital murder trial. Defense counsel inquired whether the stipulation extended to any character witnesses that may be presented by the defense and whether the prosecutor agreed not to ask about their knowledge of the defendant's prior felony convictions. The prosecutor replied that the witnesses could be advised not to volunteer information about prior convictions and further agreed "not to bring out in any way before this jury in this phase of the trial any evidence of any nature concerning any prior convictions . . . ." (*People v. Dyer*, *supra*, 45 Cal.3d at pp. 54-55.) The defendant testified and was not impeached with his prior convictions. A defense expert likewise was not questioned about the defendant's prior convictions. Defense counsel then questioned the defendant's former co-worker about the defendant's reputation. At that point, the court called the parties into chambers to clarify the extent of the prosecutor's stipulation. Defense counsel asserted that the agreement

precluded any mention of appellant's criminal conduct as it applied to character evidence. The court replied, "'I'm not indicating that he [the prosecutor] didn't say it, but it's not in my mind that that's what would be in the record, that he would waive it as far as any character testimony is concerned, or reputation testimony, if you wish to call it that . . . .'" (*Id.* at p. 55.) The prosecutor then stated,

> "Never has it been stated or made clear or asked me can we ask reputation information and will you forego that relevant information on his reputation, because then it would be basically asking me if I would let the jury hear false information about the defendant. And I would never accede to those kinds of points. So it was never clearly stated to me that there was an attempt to get me to be silent when the jury gets this false notion that this defendant has been nonviolent in his past. And I would not have acceded to those things, and I don't think the Court would require me to do that."

(*Ibid.*)

The trial court in *Dyer* ruled that although both counsel had acted in good faith, there was no meeting of the minds as to the meaning of the stipulation. (*People v. Dyer*, *supra*, 45 Cal.3d at p. 56.) The trial court concluded that the agreement was not intended to allow the defense to introduce character evidence without the prosecutor being allowed to impeach those witnesses using the defendant's prior convictions. The trial court did acknowledge that this was what defense counsel likely intended when he inquired of the prosecutor regarding character witnesses, although the court determined that because of the context in which the question arose, the prosecutor likely intended that he would not on his own introduce the matter or cross-examine defense witnesses testifying about other matters by inquiring about the prior convictions. (*Ibid.*) On appeal, this Court found that the trial

court's ruling was proper, explaining that "it did not purport to release the prosecutor from his stipulation, but merely interpreted it to reflect the probable intention of the parties." (*Id.* at p. 57.)

To the extent the trial court in the instant case ultimately agreed to enforce the stipulation as limited to Ricardo's police statement, it acted properly in accordance with *Dyer*. As in *Dyer*, the trial court here did not release the prosecutor from his stipulation, but rather interpreted the stipulation to reflect the probable intention of the parties. (*Ibid.*)

Appellant's trial counsel and the prosecutor disagreed about the meaning of the stipulation. Appellant's counsel argued that the stipulation precluded any witness from mentioning the existence of a three-way telephone conversation between appellant, Ricardo, and Uribe. On the other hand, the prosecutor maintained that the stipulation was limited to omitting any references made by Ricardo in his statement to the police about a three-way telephone conversation. When the stipulation is viewed in context, the prosecutor's interpretation of the stipulation is reasonable.

First, the prosecutor agreed to work with appellant's counsel in reaching a stipulation because of concerns initially raised in appellant's motion for severance, brought on *Aranda/Bruton* grounds, and also in response to appellant's Evidence Code section 402 motion, which argued that Ricardo's statement was "only admissible if the court excises any and all references to the other defendant, and instructs the jury that it may consider the confession only against the confessing defendant." (CT 891-892; see also CT 787-789; RT 81-82694-696.) Both the motion for severance and the Evidence Code section 402 motion suggested that Ricardo's statement would be admissible if all references to appellant contained therein were deleted from the statement. (CT 787, citing *Richardson v. Marsh*, *supra*, 481 U.S. at pp. 208-209; CT 892 citing *Richardson v. Marsh*.) In light of the high court's holding in *Richardson v.*

Marsh, it is reasonable to conclude that the parties' stipulation was limited to Ricardo's statement.

In *Richardson v. Marsh*, the United States Supreme Court concluded that the rule announced in *Bruton*[28] (that a defendant is deprived of his rights under the Confrontation Clause when a nontestifying codefendant's statement naming him as a participant in a crime is introduced at a joint trial, even if the jury is instructed to consider the confession only against the codefendant), did not extend to a situation where the codefendant's confession is redacted to omit any reference to the defendant, even when the defendant was nonetheless linked to the confession by other evidence admitted at trial. (*Richardson v. Marsh*, *supra*, 481 U.S. at pp. 208-211.) The High Court explained that unlike a confession that implicates the other defendant on its face, "Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." (*Id.* at p. 208.) Thus, when the codefendant's statement is redacted to omit all references to the other defendant, there is no violation of the Confrontation Clause, even if other properly admitted evidence links the defendant to the codefendant's statement, provided that the jury is instructed that the statement of the codefendant cannot be used against the defendant. (*Id.* at pp. 210-211.)

Here, appellant's written motions referenced *Richardson*, and the prosecutor repeatedly stated that their stipulation complied with the holding of *Richardson*. The prosecutor also indicated that Ricardo's statement had been redacted to omit all references to appellant. When the prosecutor further indicated that any references to a three-party conversation would be "deleted," because otherwise the jury would be left with the impression that there was a missing third party, this was in accordance with *Richardson*, i.e., to ensure that there was nothing in Ricardo's statement that facially incriminated appellant.

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28. *Bruton v. United States*, *supra*, 391 U.S. at pp. 135-136.

When the prosecutor added, "Our agreement is that any references to those conversations, since they were three-party conversations, will only include reference to the fact that this was a conversation between Ricardo Lopez, and this person George Uribe," when read in context, was limited to Ricardo's statement and was clearly for the purpose of complying with *Richardson*. However, since *Richardson* held that there was no Confrontation Clause violation when other evidence linked the defendant to the codefendant's statement, there was no reason for the prosecutor in this case to stipulate that there would be no mention of a three-way conversation by any other witnesses.

Furthermore, when discussing the proposed stipulation, both counsel referred to Ricardo's statement and the manner in which it should be redacted. (RT 826-827.) Even when the prosecutor read the proposed stipulation into the record, he referred to the redactions that had been agreed to by both counsel as represented by interlineations in the transcript of Ricardo's police interview. (RT 833-834.) Finally, as the prosecutor explained in urging the trial court to reconsider its ruling and construe the stipulation as limited only to Ricardo's statement (see RT 968), there was no reason for the prosecutor to agree to limit any references by other witnesses to the existence of a three-way telephone conversation between appellant, Ricardo, and Uribe.

Separate from Ricardo's admission that he and Uribe had discussed the shooting in advance and that Uribe had provided the gun, other evidence established that Ricardo and Uribe were both involved in the shooting. Uribe was the one who called Melinda over to talk to Ricardo right before Ricardo shot her. (RT 1395.) Uribe was also present when Ricardo asked Ramirez why she had brought the other girls and that she knew what was going to happen. Uribe was also present when Ricardo told Ramirez that if anything happened, to say it was a driveby shooting. (RT 1208-1209.) In his police interview, appellant denied speaking to Ricardo or Uribe in the days preceding the

shooting. (RT 1634-1636.) However, appellant's sister testified that she had set up a three-way telephone call between appellant, Ricardo, and Uribe. (RT 1594, 1597.) Appellant's denial of the fact that he had spoken with the two individuals involved in the shooting was strong evidence of consciousness of guilt. Because this evidence was not implicated by *Aranda/Bruton* concerns, there was simply no reason for the prosecutor to agree to limit this evidence.

Furthermore, appellant has not established any prejudice resulting from the trial court's failure to enforce the stipulation as interpreted by appellant. Appellant claims he reasonably relied on the stipulation in withdrawing his motion for severance. (AOB 45, 47-48.) This assertion, however, falls short of demonstrating prejudice. As previously discussed, interpreting the stipulation in the manner advanced by the prosecutor effectively removed any facially incriminating references to appellant from Ricardo's statement. It was not necessary for the prosecutor to agree to prohibit any other witnesses from testifying about the existence of a three-way telephone call between appellant, Ricardo, and Uribe. (*Richardson v. Marsh*, *supra*, 481 U.S. at pp. 210-211.)

Thus, even if it is true that appellant's counsel withdrew his severance motion in reliance on his own interpretation of the stipulation, this is of no consequence. Regardless of whether the stipulation was interpreted in the manner advocated by appellant's counsel or the prosecutor, appellant had no valid basis for a severance motion, as long as Ricardo's redacted statement contained nothing on its face to incriminate appellant. Furthermore, had appellant perceived Ricardo's statement to be facially incriminating, he could have moved to exclude the statement on *Aranda/Bruton* grounds. Thus, he could not have suffered any prejudice from detrimentally relying on the stipulation.

C. The Trial Court Properly Admitted Evidence Of The Three-Way Conversation Over Appellant's Evidence Code Section 352 Objection

Appellant further contends that the admission of Patricia Lopez's testimony that she had set up a three-way telephone call between appellant, Ricardo, and Uribe should have been excluded as irrelevant and pursuant to Evidence Code section 352, as he claims the probative value of the evidence was outweighed by the potential for prejudice. (AOB 48-51.) This contention should be rejected, as the trial court properly admitted the evidence.

Just before the prosecution called appellant's sister, Patricia Lopez, to testify, appellant's counsel objected to any testimony about her setting up a three-way telephone conversation between appellant, Ricardo, and Uribe. Appellant's counsel argued that such evidence would be irrelevant in light of the stipulation precluding any reference to the content of the conversation. He further argued that allowing Patricia to testify about setting up the telephone conversation would invite the jury to speculate about the content of the conversation. He also claimed that the evidence should be excluded as more prejudicial than probative. (RT 1577-1578.)

The prosecutor stated that he intended to elicit testimony from Patricia that when appellant called asking for his brother, who was not home at the time, he then asked her to forward the call to Uribe. He also stated that Patricia would testify that a week before Melinda's death, she had set up a three-way telephone conversation between appellant, Ricardo, and Uribe. (RT 1578-1579.) The prosecutor argued that the evidence was relevant because appellant told the police he had not talked to Ricardo or Uribe, despite the evidence demonstrating that Ricardo and Uribe were both involved in the shooting. The prosecutor also discussed the evidence that the night before the murder, appellant had asked Alma Cruz if she could kill a homegirl, and when she said it depends, appellant told her not to worry about it because he already had

somebody doing it. The prosecutor argued that considering this evidence together, Patricia's testimony that she put appellant in touch with Ricardo and Uribe was relevant. (RT 1579-1580.)

The trial court asked the prosecutor whether he would introduce appellant's statement to the police, and the prosecutor responded affirmatively. The trial court then referred to the stipulation and asked the prosecutor to restate his understanding of its scope. The prosecutor reiterated his position that the stipulation was limited to the redaction of Ricardo's statement to the police. The trial court stated that the stipulation was not as clear as the prosecutor asserted it was and advised that any further stipulations would be in writing. The trial court then ruled that Patricia's testimony about setting up a call was admissible. (RT 1580-1582.)

Appellant's counsel stated that he understood the prosecutor's argument as representing that the evidence was admissible because appellant had denied talking to anyone from jail. The court replied, "I think it's also the fact that the act themselves have some relevance." (RT 1583.) Appellant's counsel replied that to the extent the evidence was offered as impeachment, appellant's statement to the police was somewhat ambiguous regarding whether he had denied talking to Ricardo and Uribe from jail. (RT 1583-1587.) The court declined to alter its ruling. (RT 1587.)

Patricia testified at trial and acknowledged telling the police that a week before Melinda was killed, appellant had called her and asked her to set up a three-way call between appellant, Ricardo, and Uribe. She further testified that she did not listen to the content of the telephone call. (RT 1597.) Patricia claimed no recollection of telling the police that during the first week of April, appellant had called home and asked to speak to Ricardo, and when told he was not home, asked her to forward the call to Uribe. (RT 1594-1595.) Detective

Bruce Oakley testified that Patricia had indeed made such a statement to him. (RT 1828-1830.)

Detective Oppelt testified that he interviewed appellant on April 24, 1996. Appellant stated that he had learned about Melinda's death one week after it had happened when his attorney told him about it. (RT 1611.) Appellant denied talking to Ricardo since appellant had been incarcerated. Appellant also denied talking to Uribe. (RT 1635-1636.)

Under Evidence Code section 352, a trial court in its discretion 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." A trial court's decision to admit evidence over an Evidence Code section 352 objection is reviewed under the abuse of discretion standard. The ruling will not be reversed on appeal unless the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Here, the trial court properly admitted the testimony about Ms. Lopez setting up a three-way call for appellant, Ricardo, and Uribe, and about Ms. Lopez forwarding appellant's call to Uribe, upon appellant's request, after appellant was told that Ricardo was not home.

The probative value of the evidence was highly significant. The prosecution's theory was that a conspiracy existed between appellant, Ricardo, and Uribe to murder Melinda. (See RT 2573-2580.) This theory was based on evidence that was independent of Ricardo's statement to the police. Both Ricardo and Uribe were involved at the murder scene. Uribe was the one who told Melinda that Ricardo wanted to speak to her. (RT 1395, 1540.) Once Melinda walked over to speak to Melinda, Ricardo shot her multiple times. (RT 1397-1398, 1542-1544.)

There was also considerable evidence establishing appellant's involvement in the crime. Appellant was instrumental in assuring that the female gang members would bring Melinda to the location where she was ultimately gunned down. (RT 1166, 1176-1177, 1381, 1616-1617.) He had a motive for killing Melinda, since she had recently testified against him at the preliminary hearing in the kidnapping case (see RT 916-947), and he could anticipate her testifying against him again at trial. Furthermore, when Alma Cruz equivocated upon appellant asking whether she could kill a homegirl, appellant told her he already had someone doing it for him. (RT 1382.) Finally, appellant denied to the police that he had been in telephone contact with Ricardo and Uribe while appellant was incarcerated. (RT 1634-1636.) Based on all of these factors, it was highly relevant that Patricia had put appellant in contact with Uribe and Ricardo. (See, e.g., *People v. Sorrentino* (1956) 146 Cal.App.2d 149, 160 [telephone contact between coconspirators relevant in establishing conspiracy].) Indeed, had there been no evidence of telephone contact between appellant and Ricardo or Uribe, appellant's counsel would have inevitably exploited this fact as a weakness in the prosecution's case.

In allowing the evidence to be admitted, the trial court properly balanced the probative value of the challenged evidence against the potential for undue prejudice and found the former substantially outweighed the latter. Based on the record, respondent submits it simply cannot be said that the court, as a matter of law, exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

Finally, assuming error, appellant cannot demonstrate he was prejudiced by the trial court's ruling. An appellant seeking relief due to the erroneous admission of evidence in violation of Evidence Code section 352 must

demonstrate that it is "reasonably probable that a result more favorable to [him] would have been reached in the absence of the error." (*People v. Earp* (1999) 20 Cal.4th 826, 878, quoting *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Here, appellant was not prejudiced. Aside from the evidence of the telephone calls, there was compelling evidence establishing appellant's guilt. Appellant had a motive to kill Melinda, as his efforts to prevent her from testifying were not working. He arranged for Melinda to be in the location where she was ultimately killed. He asked Alma Cruz if she could kill a "homegirl," and then said he already had someone doing it for him. Even though Ramirez told appellant about the shooting the day after it had happened, appellant told the police he had not heard about Melinda's death until his lawyer told him a week later. In light of this other evidence, it is not reasonably probable that a result more favorable to appellant would have been reached if the challenged evidence had been excluded. Appellant's claim should be rejected.

V.

THE TRIAL COURT PROPERLY ALLOWED EVIDENCE OF RICARDO'S STATEMENT MADE AT THE SCENE OF THE SHOOTING; FURTHERMORE, THE TRIAL COURT HAD NO SUA SPONTE DUTY TO GIVE A LIMITING INSTRUCTION REGARDING THE EVIDENCE

Appellant contends the trial court improperly allowed a statement attributed to Ricardo, i.e., that after shooting Melinda, Ricardo pointed the gun to his head and said, "For my carnal,"[29] to be used against appellant. (AOB 54-60.) Respondent submits the evidence was properly admitted, as it was relevant to the cases against both Ricardo and appellant. Furthermore, even if the

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29. The word "carnal" is slang for "brother." (See RT 2251.)

evidence was admissible only against Ricardo, the trial court had no sua sponte duty to give a limiting instruction, in the absence of such a request. Finally, any possible error was harmless.

A. The Relevant Proceedings Below

Ricardo's counsel wanted to call Ramon Ramos to testify as a defense witness. As an offer of proof, Ricardo's counsel proffered that Ramos would testify as follows: he was a member of the Parthenia Street gang, which met on a weekly basis; Ramos went to the meeting on the night of Melinda's death; Ricardo was drinking beer that night; before the shooting, Ricardo and Melinda were arguing with each other in raised voices; as soon as Melinda walked away, shots were fired; after the shooting, Ricardo put the gun to his head and pulled the trigger; just before Melinda was shot, Ramos had a conversation with Ramirez, who did not mention that Ricardo had accused her boyfriend of failing to pay dues; and Ramos had told Melinda on one of the trips to the store not to worry about Ricardo because Ricardo was nonviolent. (RT 2072-2073.)

Ramos's appointed counsel informed the court that Ramos would refuse to testify out of fear for his own life and that of his family. (RT 2066.) An Evidence Code section 402 hearing was held, at which time Ramos confirmed that he would refuse to testify. (RT 2077-2078.) Ricardo's counsel asked that the court impose sanctions on Ramos, arguing that Ramos's testimony would support the defense of heat of passion manslaughter, and would also negate the evidence of premeditation and deliberation, as well as the special circumstance. Ricardo's counsel explained her position that she felt compelled to ask for sanctions in order "to preserve [her] client's records." (RT 2080.) Appellant's counsel joined in the request for sanctions, stating, "Your honor, I would join in that because obviously the testimony, although it directly reflects on Mr. Ricardo Lopez's actions or mental state, has an impact on my client's status

also." (RT 2080-2081.) The trial court declined to impose sanctions on Ramos for his refusal to testify. (RT 2083.)

Ricardo's counsel asked that Ramos be declared "unavailable" as a witness and that a portion of testimony from the preliminary hearing be entered into evidence. (RT 2086.) The testimony subsequently read into evidence included the following information: Ramos was a member of the Parthenia Street gang at the time of the shooting; Ramos arrived in the alley on the night of the shooting around 8:00 p.m.; at 8:30 p.m., he went to the store with Melinda and bought five forty-ounce beers, which he shared with people in the alley; an hour later, he went to the store again; Ricardo and Uribe were already in the alley when Ramos first arrived; Ricardo was drinking beer that night; before the shooting, Ricardo and Melinda spoke to each other in raised voices; and after the shooting, after Ricardo put the gun to his head and pulled the trigger, Ramos tried to take the gun away from him but was unable to do so. (RT 2236-2246.)

At the prosecutor's request, and over appellant's objection,[30] a portion of Ramos's direct testimony from the preliminary hearing was also read into evidence. According to this testimony, when Ramos went to take the gun away from Ricardo, Ricardo pointed the gun at his head and pulled the trigger, but there were no bullets left. While doing so, Ricardo said, "It's for my carnal." Ramos explained that the word "carnal" meant "brother." (RT 2249-2251.)

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30. Appellant's trial counsel objected that the evidence was hearsay, improper rebuttal, and called for a conclusion. (RT 2218, 2250.) The prosecutor argued that the testimony placed Ramos's cross-examination, which had been read to the jury, in context. He further argued that the evidence was not hearsay because it was not being offered for the truth of the matter that Ricardo had committed the shooting at the behest of appellant. (RT 2220.) The trial court overruled the objection. (RT 2222, 2250.)

B. Appellant Has Waived His Constitutional Challenge

For the first time on appeal, appellant contends the admission of the evidence violated his Sixth Amendment right to confront witnesses against him. (AOB 54-57.) Because appellant did not object on this ground in the trial court, the claim has not been preserved for purposes of this appeal. In order to properly preserve an issue on appeal, the defendant must make a timely and specific objection in the trial court on the same ground urged on appeal. (*People v. Raley* (1992) 2 Cal.4th 870, 892.) An objection on hearsay grounds is insufficient to preserve an alleged violation of the right to confront witnesses. (*People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Raley*, *supra*, 2 Cal.4th at p. 892.) Requiring a specific objection enables the trial court to make an informed ruling and allows the party proffering the evidence to cure any defect. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) In the instant case, because appellant did not object on the ground that the challenged evidence violated his federal constitutional right to confront witnesses against him, this claim has been waived.

C. The Trial Court Did Not Abuse Its Discretion In Admitting The Evidence

The evidence was properly admitted and did not constitute hearsay or improper rebuttal. Hearsay is defined as "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 stated." (Evid. Code, § 1200, subd. (a); *People v. Alvarez*, *supra*, 14 Cal.4th at p. 185.) An out-of-court statement not offered for its truth does not constitute hearsay, but still must pass the test of relevancy. (*People v. Jaspal* (1991) 234 Cal.App.3d 1446, 1462.)

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in

reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

(Evid. Code, § 210.)

On appeal, a trial court's decision to admit evidence is reviewed for abuse of discretion. (*People v. Alvarez, supra*, 14 Cal.4th at p. 201; accord *People v. Williams* (1997) 16 Cal.4th 153, 213.) Furthermore,

> [n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission . . . of evidence unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI , § 13; see also Evid. Code, §§ 353, 354.)

A miscarriage of justice occurs only when an examination of the entire record, including the alleged improper evidence, indicates a reasonable probability a more favorable result to the appealing party would have been reached in the absence of the error. (*People v. Breverman* (1998) 19 Cal.4th 142, 173-174; *People v. Cahill* (1993) 5 Cal.4th 478, 501; *People v. Watson, supra*, 46 Cal.2d at p. 836.) Appellant's claim establishes neither an abuse of discretion on behalf of the trial court nor a miscarriage of justice.

Appellant claims the challenged statement should have been excluded because the asserted nonhearsay purpose, i.e., Ricardo's state of mind, was not relevant to the case against appellant. (AOB 55-57.) Appellant is mistaken. The portion of Ramos's preliminary hearing testimony introduced by Ricardo's counsel included Ramos's account of Ricardo and Melinda talking to each other in raised voices prior to the shooting. Ramos also described arriving at the alley after Ricardo and Uribe, more than one trip to the store, and Ricardo drinking beer while at the alley. (RT 2236-2244, 2247-2248.) In addition, Ramos testified that after the shooting, once Ricardo put the gun to his head and

clicked it, Ramos tried to take the gun away from Ricardo, but was unable to do so. (RT 2245-2246.) Ricardo's purpose in introducing this testimony was to negate the prosecution's theory that the killing was deliberate and premeditated, as the evidence might suggest that Ricardo was distraught over the shooting and had not premeditated his actions. (See RT 2080, 2542-2548.) Accordingly, the prosecution was entitled to introduce additional portions of Ramos's preliminary hearing testimony to rebut this inference. Specifically, the fact that Ricardo stated "It's for my carnal" when he pointed the unloaded gun at his head and pulled the trigger placed Ramos's previous testimony in context. Further, it supported the prosecution's theory that Ricardo's actions were planned as opposed to a spontaneous reaction to an argument with Melinda at the scene.

Moreover, Ricardo's state of mind was relevant to the case against appellant. To the extent the jury believed Ricardo's defense, i.e., that he did not premeditate or deliberate, appellant would also benefit. The prosecution's theory was that Ricardo killed Melinda at appellant's request, as a result of planning and deliberation. If the jury believed that Ricardo acted in the heat of passion, it would undermine the case of first degree murder against appellant. Even appellant's trial counsel implicitly acknowledged that Ricardo's state of mind was relevant to the case against appellant when he joined in Ricardo's counsel's request for sanctions against Ramos when Ramos refused to testify and asserted that Ramos's proposed testimony would have "an impact" on appellant's "status." (See RT 2080-2081.)

Although the trial court did not instruct the jury that the evidence was limited to establishing Ricardo's state of mind and was not offered for the truth of the matter, no such instruction was requested. In the absence of such a request for a limiting instruction, the trial court had no sua sponte duty to provide one. (Evid. Code, § 355; *People v. Coleman* (1989) 48 Cal.3d 112,

151; *People v. Collie* (1981) 30 Cal.3d 43, 63-64.) Likewise, even assuming the evidence was only admissible against Ricardo, appellant's trial counsel did not request an instruction so informing the jury. In the absence of a request, the trial court had no sua sponte duty to provide a limiting instruction. (Evid. Code, § 355; see *People v. Coleman*, *supra*, 48 Cal.3d at p. 151; *People v. Collie*, *supra*, 30 Cal.3d at pp. 63-64.)

Finally, any error was harmless, as it is not reasonably probable a more favorable result would have occurred in the absence of the challenged evidence. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 173-174.) The statement was ambiguous and did not necessarily imply that Ricardo was acting at the behest of his brother. Moreover, the jury had already learned that Ricardo said something about his brother at the time he was shooting Melinda. (RT 1549.) Furthermore, the other evidence against appellant was strong, including that he arranged for Ramirez to take Melinda to the alley on the night of the shooting, he was in telephone contact with Ricardo and Uribe before the shooting, he admitted to Alma Cruz that he had someone who had agreed to kill one of Cruz's fellow gang members, and after the shooting, appellant denied to the police that he had spoken to Ricardo or Uribe. Finally, the morning after the shooting, appellant called Ramirez and asked what had happened, indicating he knew something would happen. This was not a close case. Any error in the admission of Ricardo's statement did not result in a miscarriage of justice. Appellant's claim should be rejected.

VI.

THE TRIAL COURT PROPERLY ALLOWED EVIDENCE THAT THE NUMBER "187" APPEARED ON MELINDA'S PAGER

Appellant contends the trial court erred in admitting evidence that Melinda's pager showed the message "187" shortly after the crime was committed because there was no evidence that the message was linked to appellant. He claims the trial court should have sustained appellant's objections that the evidence was speculative and unduly prejudicial under Evidence Code section 352. He further claims that the use of this testimony violated his federal rights to due process and to a reliable penalty verdict. (AOB 61-66.) Respondent submits the trial court properly admitted the evidence. Finally, any error was harmless.

A. The Relevant Proceedings Below

The prosecutor sought to introduce evidence that paramedic Drew Oliphant observed the numbers "187"[31] on Melinda's pager. Appellant's counsel initially objected on grounds that there had been late discovery. The prosecutor responded that a police officer's report, which had been provided in discovery, mentioned the pager message. Appellant's counsel subsequently objected that the proffered evidence was speculative and should be excluded pursuant to Evidence Code section 352. (RT 1488-1490.) The trial court ruled that the evidence was admissible, stating as follows:

> If two people saw it, it seems that it's not speculation. The number was there. How it got there and why it got there may be nothing more than serendipity. None of us may know that, what little's before the court

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31. The number "187" corresponds to the California Penal Code for murder.

now, unless we have something further that suggests that there is some known reason why it's there, but it's part of what they saw. I will permit it to come in. . . . Under [Evidence Code section] 352 it does have some prejudicial impact, but it's part of what was observed so it's part of the whole event that happened that night, and I will permit it to come in.

(RT 1490-1491.)

Oliphant, the paramedic, subsequently testified that after Melinda was taken to the hospital, he saw her pager with the numbers "187" displayed on it. He did not know how long the numbers had been on the pager. (RT 1525-1526.) Over appellant's objection on grounds of hearsay and Evidence Code section 352 (see RT 1893-1894), hospital chaplain Josue Garcia Delgado also testified that he saw the numbers "187" on Melinda's pager when he was looking at her pager in an attempt to find a number for contacting Melinda's family. There was an indication on the pager that the page was made at 8:42 p.m. (RT 1893-1896, 1901, 1904-1905.)

Detective Oppelt testified that when he interviewed appellant, appellant brought up the subject of Melinda receiving "187" pages on her pager. Appellant explained that Melinda had been in trouble with some girls. Appellant stated that Melinda had thought his family was responsible for the pages, but appellant denied that his family was responsible. He volunteered that his family members did not have Melinda's pager number. (RT 1659-1661, 1672-1675.)

B. The Evidence Was Properly Admitted

The trial court did not abuse its discretion in admitting the evidence over appellant's objection. "Only relevant evidence is admissible [citations] and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute." (*People v. Scheid* (1997) 16 Cal.4th 1, 13, citing

Evid. Code, §§ 350, 351; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau* (1993) 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Evidence Code section 210 provides:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive. (*People v. Scheid*, *supra*, 16 Cal.4th at pp. 13-14, citing *People v. Garceau*, *supra*, 6 Cal.4th at p. 177.) Evidence leading only to speculative inferences is irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035, citing *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244.) The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Scheid*, *supra*, 16 Cal.4th at p. 14.)

Evidence Code section 352 provides:

> The court in its discretion 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.

A finding as to the admissibility of evidence is left to the sound discretion of the trial court and will not be disturbed unless it constitutes a manifest abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371; *People v. Mickey* (1991) 54 Cal.3d 612, 655; *People v. Karis* (1988) 46 Cal.3d 612, 637; *People v. Siripongs* (1988) 45 Cal.3d 548, 574; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65 [discretion is abused only if court exceeds bounds of reason].) Appellate courts rarely find an abuse of discretion under Evidence Code section 352. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22,

reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171].)

Here, the evidence was relevant and was not unduly speculative. It was undisputed that Ricardo shot Melinda. The chaplain testified that the pager indicated that the page was received at 8:42 p.m., which was around the time the shooting occurred. (RT 1906.)[32] There was strong evidence that Ricardo shot Melinda pursuant to a conspiracy. Although the identity of the person sending the page was unclear, based on the timing of the page, there was a sufficient showing that the person sending the page was a part of the conspiracy, and was making a statement in furtherance of the conspiracy. (See Evid. Code, § 1223.) The fact that the declarant's identity was unknown did not preclude the admission of the statement. (See *People v. Von Villas* (1992) 11 Cal.App.4th 175, 231.)

Appellant's reliance on *People v. Weiss* (1958) 50 Cal.2d 535, 552-553, *People v. Hannon* (1977) 19 Cal.3d 588, 599-600, and *People v. Pitts* (1990) 223 Cal.App.3d 606, 781 (see AOB 63), is misplaced. Those cases involved intimidation of a witness and efforts to suppress evidence. However, none of them involved a conspiracy, such as the instant case, where one person's statement made in furtherance of the conspiracy is attributed to all other members of the conspiracy. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 182, citing 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 93, pp. 310-311.) Accordingly, the cases appellant relies upon are inapposite.

Moreover, the trial court properly weighed the potential for undue prejudice against probative value determining that the evidence was admissible. (See RT 1491.) The prosecution's theory was that there was a conspiracy

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32. Leticia Corona discovered Melinda in the middle of the street when she drove by around 9:00 p.m. (RT 1495.) Melinda was moaning and moving around. (RT 1501-1502.) According to the coroner, Melinda would have died within minutes of being shot absent medical assistance. (RT 1753-1754.)

between appellant, Ricardo, and Uribe to kill Melinda. (See RT 2573-2580.) Ricardo's defense was that the killing was not intentional, premeditated, or deliberate, but instead occurred in the heat of passion following an argument. (See RT 2080, 2542-2548.) To the extent the jury believed this defense, it would have to reject the prosecution's conspiracy theory. Thus, the fact that someone sent a "187" page to Melinda just before the shooting was circumstantial evidence that there had indeed been a plan to kill Melinda and that the shooting was intentional. Although the sender of the message was unknown, the timing of the page made it very likely that it was either one of the conspirators or someone acting on their behalf. Accordingly, respondent submits it simply cannot be said that the court, as a matter of law, exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

In any event, any error was harmless, as it is not reasonably probable the jury would have reached a different result absent the alleged error. (See *People v. Breverman*, *supra*, 19 Cal.4th at pp. 173-174.) The pager message was an extremely minor part of the prosecution's case. An abundance of other evidence affirmatively established appellant's guilt. Appellant had a motive to kill Melinda to prevent her from testifying against him. (See RT 1161-1162.) He arranged for Ramirez to bring Melinda to the alley on the night of the shooting. (RT 1176-1178, 1375-1379.) He was in telephone contact with Ricardo and Uribe the week of the shooting (RT 1597), although he denied this fact to the police (RT 1635-1639). The night before the shooting he admitted to Alma Cruz that he already had someone who had agreed to kill one of her "homegirls." (RT 1382.) Finally, the morning after the shooting, appellant called Ramirez and asked what had happened, indicating he knew something would happen. (RT 1275.) In light of the above evidence, any possible error

in admitting the pager evidence was harmless. Moreover, because any error was harmless, appellant's federal constitutional claims must fail. Accordingly, appellant's claim should be rejected.

VII.

THE TRIAL COURT PROPERLY LIMITED CROSS-EXAMINATION OF THE VICTIM'S MOTHER

Appellant contends the trial court improperly restricted his cross-examination of Melinda's mother, Susan Carmody. He argues that the trial court's rulings violated his statutory right to cross-examine a witness on matters within the scope of direct examination under Evidence Code section 761. He further argues that his state and federal constitutional rights to present a defense, to confront the evidence against him, to due process, and for a reliable penalty verdict were violated. (AOB 67-72.) Respondent submits there was no error, because the trial court properly sustained the prosecutor's objections to appellant's cross-examination of Carmody. Furthermore, any error was harmless.

A. The Relevant Proceedings Below

The People called Melinda's mother, Susan Carmody, as a witness in their rebuttal case. Carmody testified on direct examination that in March 1996, Melinda was living at home with Carmody. Around March 1995, Melinda had run away from home. Two to three weeks later, Carmody learned that Melinda was staying at appellant's house. Carmody had been trying to locate Melinda. Upon learning that Melinda was staying with appellant, she did not try to get Melinda to come home. Carmody explained that at least she knew where

Melinda was and Melinda continued to go to school. Carmody also testified that Melinda had previously run away from home. (RT 2261-2262.)

Carmody further testified on direct examination that on March 13, 1996, she was at work when she received a telephone call from Melinda. Carmody left work and went home to Melinda. When Carmody arrived home, Melinda was upset and had injuries on her neck. Later that evening, the police came to their home. (RT 2263-2265.)

Carmody also testified that Melinda used to write in her diary on a daily basis. Carmody identified the diary and identified Melinda's handwriting in the diary. In a diary entry dated March 13, 1996, the following words had been written: "Bird [appellant] broke in and stabbed me and choked me and kidnapped me. Went to police station, went to Grandma's." (RT 2266-2268.)

On cross-examination, appellant's counsel asked Carmody how many times Melinda had run away from home before Carmody found out that Melinda was living with appellant. The trial court sustained the prosecutor's objection based on grounds of relevance. (RT 2268-2269.)

Appellant's counsel also asked Carmody whether Melinda returned home in September 1995 "essentially on her own?" Carmody replied, "Yes." Appellant's counsel then asked, "That wasn't because some police officers scared her into doing so?" Carmody responded, "That's possible." (RT 2269.) Appellant's counsel later asked Carmody about her statements to a police officer on the morning of Melinda's death. The following exchange ensued:

Q. Did you, in fact, tell the officer that [Melinda] stayed with [appellant] from March 1995 until September 1995?

A. Yes.

Q. At that time, she ran into the police and they scared her into coming back home?

[Prosecutor]: Your honor, this is improper impeachment.

The Court: That is sustained.

(RT 2270.)

Carmody acknowledged on cross-examination that it upset her that Melinda chose to live with appellant rather than at home. She also acknowledged that it upset her that Melinda had a personal relationship with appellant. (RT 2271.) Carmody denied that the reason she was upset about the relationship was because appellant was Hispanic. (RT 2274.) Appellant's counsel then asked whether Carmody had ever told anybody that when Melinda was with her, she dressed "like a white girl, but when she wasn't with [Carmody], she dressed like a Chola?" The prosecutor objected that the question called for hearsay and was irrelevant. The trial court sustained the objection, and denied appellant's counsel's request to approach the bench. (RT 2274.)

B. Cross-Examination Of Susan Carmody Was Properly Limited

The trial court did not abuse its discretion and no constitutional violation occurred. Evidence Code section 761 defines cross-examination as "the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness." In general, the trial court is vested with wide discretion in determining the admissibility of evidence, and its rulings will not be overturned on appeal absent an abuse of discretion. (*People v. Cooper* (1991) 53 Cal.3d 771, 816.) The trial court may impose reasonable limits on cross-examination that do not violate the Confrontation Clause of the United States Constitution based on concerns "'about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" (*Id.* at p. 817, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679 [106 S.Ct. 1431, 89 L.Ed.2d 674].)

As previously stated, the test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive. (*People v. Scheid*, *supra*, 16 Cal.4th at pp. 13-14, citing *People v. Garceau*, *supra*, 6 Cal.4th at p. 177.) Evidence leading only to speculative inferences is irrelevant. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.) The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Scheid*, *supra*, 16 Cal.4th at p. 14.) A trial court also has wide discretion in determining whether to exclude evidence pursuant to Evidence Code section 352, and a ruling will not be disturbed unless the court acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

"As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) Due process violations occur only when the excluded evidence is highly probative of the defendant's innocence. (*People v. Smithey* (1999) 20 Cal.4th 936, 996, citing *Green v. Georgia* (1979) 442 U.S. 95, 97 [99 S.Ct. 2150, 60 L.Ed.2d 738] and *Chambers v. Mississippi* (1973) 410 U.S. 284, 289-303 [93 S.Ct 1038, 35 L.Ed.2d 297].) "[I]f the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law." (*Id.* at p. 996.)

Here, Carmody testified on direct examination that Melinda had run away from home prior to moving in with appellant's family. The number of times Melinda had previously run away was of such marginal relevance that it was properly excluded by the trial court. Appellant argues that the jury may have considered him as the person responsible for Melinda's problems with her family, or as a person who contributed to the problems. He further asserts that

"cross-examination on this subject could have placed this in its full context, allowing the jury to determine why Melinda ended up living with appellant's family." (AOB 68.) Appellant's argument is flawed. Simply allowing Carmody to testify about the number of times Melinda had previously run away from home would not have shed any light on the reason Melinda chose to live with appellant's family. Furthermore, the fact that Carmody acknowledged that Melinda had run away prior to living with appellant's family made it unlikely that the jury would find appellant to be the sole cause of Melinda's decision to run away from home and live with appellant's family. The trial court did not abuse its discretion in limiting the cross-examination on this topic.

The trial court also acted within its discretion in sustaining the prosecutor's objection regarding the circumstances under which Melinda returned home after living with appellant's family. Unless Carmody observed someone physically force Melinda to return home from appellant's house, and there is no indication that this happened, Carmody lacked personal knowledge of the reason Melinda chose to return home after living with appellant. Any opinion on this subject would have necessarily been based on hearsay or speculation. Thus, there was no reason to believe Carmody was being evasive when she agreed that it was possible that police officers had scared Melinda into returning home. (See RT 2269.) Accordingly, when appellant's counsel attempted to impeach Carmody by asking her, "at that time, [Melinda] ran into the police and they scared her into coming back home?" the prosecutor properly objected on grounds of improper impeachment.

Appellant's counsel had asked Carmody whether Melinda had run into the police and they scared her into returning home; he did not ask whether Carmody had ever made such a statement to the police. Furthermore, even if defense counsel's question is construed as asking Carmody about a statement she had purportedly made to the police, it still constituted improper

impeachment since any opinion held by Carmody regarding the reason Melinda returned home would have been based on hearsay and/or speculation. Therefore, the trial court properly sustained the prosecutor's objection.

Finally, the trial court properly sustained the prosecutor's objection to the question regarding whether Carmody had ever told anyone that Melinda dressed like a "white girl" when they were together but like a "Chola" when not together. (See RT 2274.) Even assuming the statement was not offered for the truth of the matter, as appellant suggests for the first time on appeal, the alleged statement was neutral in tone and was not addressed toward appellant. Thus, even if Carmody had made such a statement, there was nothing linking it to a bias against appellant. Accordingly, whether Carmody had made the statement was irrelevant and was properly excluded.

In sum, the challenged rulings all pertained to matters of marginal, if any, relevance. Appellant was able to explore Carmody's alleged bias against him by eliciting her admission that she did not approve of Melinda's relationship with appellant and that she was upset when Melinda chose to live with appellant rather than at home. Thus, the trial court did not abuse its discretion in limiting the cross-examination of Carmody. Nor did the limits on cross-examination deprive appellant of the rights to due process, to confront witnesses against him, to present a defense, or to a reliable penalty verdict. Appellant's claim should be rejected.

Finally, any possible error was harmless. As discussed above, no error of constitutional dimension occurred. Error in determining whether evidence is admissible as relevant evidence is subject to harmless error analysis of whether it is reasonably probable the jury would have reached a different result absent the error. (Evid. Code, § 354; *People v. Scheid*, *supra*, 16 Cal.4th at p. 21, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The number of times Melinda had run away from home was highly unlikely to influence the jury in

any way. Furthermore, Carmody's opinion of whether Melinda returned home from appellant's house on her own accord or because the police had scared her into doing so was not pertinent to any issue to be resolved by the jury. In fact, had the jurors believed that the police had scared Melinda into returning home, it may have caused them to speculate that the police had provided unfavorable information to Melinda about appellant. Thus, this line of cross-examination would not have assisted appellant, and, in fact, could have been to his detriment. Appellant had the opportunity to establish Carmody's possible bias against him. Carmody acknowledged that she did not approve of Melinda's relationship with appellant. Whether she told anyone that Melinda dressed like a "white girl" around Carmody but a "Chola" when not with Carmody was marginally relevant, if at all, and in any event cumulative. Reversal is not warranted. Finally, because any error was harmless, appellant's federal constitutional claims should be rejected.

VIII.

THE TRIAL COURT PROPERLY ALLOWED DETECTIVE MORRITT TO TESTIFY ABOUT MELINDA'S DEMEANOR AT THE PRELIMINARY HEARING

Appellant contends the trial court erred in allowing Detective Morritt, the investigating officer in the kidnapping case, to testify about Melinda's demeanor as she testified at the preliminary hearing in that case. (AOB 73-78.) This claim lacks merit and should be rejected.

A. The Relevant Proceedings Below

Melinda's testimony from the preliminary hearing in the previous kidnapping case was read into evidence at appellant's trial. (RT 916-947.) The

prosecutor subsequently called Detective Morritt, the investigating officer in the kidnapping case, to testify at the trial in the instant case. (RT 1040, 1050.) Detective Morritt testified that he was present while Melinda testified at the preliminary hearing in the kidnapping case. The prosecutor then asked Detective Morritt whether he observed Melinda's demeanor as she testified. Detective Morritt replied affirmatively. (RT 1050.) The following proceedings ensued:

Q [BY THE PROSECUTOR]: Can you describe to us what her emotional state appeared to be as she was talking?

[APPELLANT'S COUNSEL]: Objection, relevance, calls for a conclusion, speculation on his part.

THE COURT: He may describe his observations. Overruled.

[DETECTIVE MORRITT]: I would describe her as frightened, upset and sometimes crying.

Q [BY THE PROSECUTOR]: Now, her crying, did it ever get to the point that there needed to be a pause in the proceedings?

A Yes.

Q Did the judge or anybody do anything while - - at this time?

A Yes.

Q What was that?

A The judge in the proceeding stopped the testimony, Melinda's testimony, offered her some tissues and said to her, "Would you like to go on?"

Q Sir - - [¶] [PROSECUTOR]: I'm going to refer court and counsel to page 38 of those proceedings.

THE COURT: May I have the transcript, [court clerk]. [¶] You may go forward, counsel.

[PROSECUTOR]: Thank you. It would be lines 17 to 19.

Q Just let me ask you if you recall this exchange between the court and the witness.

THE COURT: Okay. You want some Kleenex? You okay to go on? Try to finish. [¶] Okay. Go ahead, [Deputy District Attorney Baird].

[Q] Do you remember that exchange?

A Yes, I do.

Q And is that the time you're talking about when the judge gave Ms. Carmody some Kleenex?

A Yes.

(RT 1051-1052.)

B. Evidence Of Melinda's Demeanor While Testifying At The Preliminary Hearing Was Relevant And Was Properly Admitted At Trial

Appellant asserts that Detective Morritt's impression of Melinda's demeanor was too speculative to be relevant. (AOB 73.) He further argues that to be relevant, the demeanor of a witness is something the trier of fact must observe. (AOB 74.) These arguments are unpersuasive.

First, the Evidence Code expressly states that a witness's demeanor is something to be considered in determining his or her credibility. Evidence Code section 780, states in pertinent part as follows:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
>
> (a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

. . . .

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(Evid. Code, § 780; see also *People v. Lewis* (2001) 26 Cal.4th 334, 361 [a witness's demeanor while testifying and the manner in which she testifies may be relevant to her credibility], citing Evid. Code, § 780, subd. (a).) A witness's fear of testifying is relevant because it bears on the witness's credibility. (*People v. Warren* (1988) 45 Cal.3d 471, 481.)

While the trier of fact is ordinarily able to observe the witness's demeanor firsthand, this is not possible when the witness is unavailable and her prior testimony is admitted pursuant to Evidence Code section 1291. Nevertheless, nothing in the language of Evidence Code section 780 limits the jury's consideration of demeanor evidence to firsthand observation. Nor do any of the cases relied upon by appellant stand for the proposition that the jury may only consider the demeanor of a witness if there was firsthand observation. Rather, in the cases cited by appellant, unlike the instant case, there simply was no demeanor evidence introduced. However, none of the cases cited by appellant hold that it would be improper to allow testimony regarding a witness's demeanor at a prior proceeding. (See AOB 74, citing *California v. Green* (1970) 399 U.S. 149, 198 [90 S.Ct. 1930, 26 L.Ed.2d 489]; *People v. Adams* (1993) 19 Cal.App.4th 412, 438; *People v. Manson* (1976) 61 Cal.App.3d 102, 224 (conc. and dis. opn. of Wood, P.J.); *People v. Williams* (1968) 265 Cal.App.2d 888, 896.)

To the extent that appellant claims Detective Morritt's impression of Melinda's demeanor was too speculative to be deemed relevant (AOB 73-74), this argument is unavailing, as this Court has long held that a witness may testify as to his opinion of another person's appearance or demeanor. (See, e.g.,

People v. Wong Loung (1911) 159 Cal. 520, 533-534; *People v. Sanford* (1872) 43 Cal. 29, 33.) Appellant provides no logical basis upon which to draw a distinction for testimony regarding a witness's demeanor at a prior proceeding. (Cf. *People v. Downs* (1952) 114 Cal.App.2d 758, 761 ["Any person who has heard or given testimony is competent to testify to the testimony that was there given"].)

Appellant suggests there may have been numerous causes of Melinda's demeanor while testifying at the preliminary hearing, and he complains that Detective Morritt did not identify any questions or answers that might have caused Melinda to be upset. (AOB 75.) These were subjects that appellant's counsel could have explored on cross-examination of Detective Morritt. Furthermore, appellant's concerns go to the weight to be given the evidence, not its admissibility.

In any event, any error was harmless, as it was not reasonably probable the jury would have reached a different verdict in the absence of the testimony about Melinda's demeanor. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant argues that the testimony was prejudicial because it allowed the jury to speculate that appellant frightened the victim. (AOB 76-78.) Yet, the jury had already heard Melinda's testimony from the preliminary hearing that she was frightened by appellant. (See RT 918, 926.) Thus, it is highly unlikely that the detective's testimony about Melinda's demeanor caused any prejudice. Furthermore, Melinda's testimony at the preliminary hearing went to the charges of kidnapping, assault with a deadly weapon or by means of force likely to produce great bodily injury, and residential burglary. The jury only returned guilty verdicts on the kidnapping and assault charges, demonstrating that the testimony did not unfairly prejudice appellant.

Moreover, the evidence of the kidnapping and assault charges was very strong. Appellant admitted to Ramirez that he had tried to kidnap Melinda and

that he had stabbed her in the neck. (RT 1160.) After the kidnapping, Melinda reported the incident to the police that evening and was still bleeding from her neck wounds when the police arrived at her home. She also had bruises on her neck. (RT 949-955.) Although appellant initially told the police that Melinda had accompanied him voluntarily, this was not credible in light of his admission to the police that he had hit and choked her that day. (See RT 1045-1046.) In any event, he later acknowledged to the police that he had made a mistake regarding the kidnapping case. (RT 1612.) Accordingly, any error in admitting testimony about Melinda's demeanor at the preliminary hearing was harmless, and appellant's claim should be rejected. Moreover, because any error was harmless, appellant's federal constitutional claims must fail.

IX.

SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S FIRST DEGREE MURDER CONVICTION

Appellant contends the evidence was insufficient to support his first degree murder conviction. (AOB 79-87.) Respondent disagrees, as ample evidence supports the conviction.

The standard applicable to a claim of insufficient evidence is settled. The relevant inquiry is whether any reasonable trier of fact, resolving conflicts in favor of the prosecution, could find guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578; *People v. Wharton* (1991) 53 Cal.3d 522, 546.) On appeal, this Court must view the evidence in the light most favorable to the prosecution, and must presume the existence of every fact that the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Johnson*, *supra*, at p. 576; see also *People v. Jones* (1990) 51 Cal.3d 294, 314.) The same standard applies to the review of circumstantial

evidence. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Bean* (1988) 46 Cal.3d 919, 932; *People v. Contreras* (1994) 26 Cal.App.4th 944, 956.)

Federal due process likewise requires that a criminal conviction be supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The relevant inquiry is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at p. 319.) This standard is "to the same effect" as the state standard. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Here, the prosecution proceeded on two theories of guilt, aiding and abetting and conspiracy. (See RT 2435, 2557; CT 991-996.) Substantial evidence supports the jury's finding of guilt on either of these two theories. With respect to aiding and abetting, section 31 provides in pertinent part as follows:

> All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed.

(§ 31; see *People v. McCoy* (2004) 25 Cal.4th 1111, 1116-1117.)

Although an aider and abettor must know the perpetrator's criminal purpose and he must intend to facilitate the offense (*People v. Beeman* (1984) 35 Cal.3d 547, 560), he need not be prepared to commit the offense by his own act. If a defendant's liability is predicated on a theory of aiding and abetting the perpetrator, the defendant's intent to encourage or facilitate the perpetrator must be formed before or during the commission of the offense. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039; *People v. Cooper* (1991) 53 Cal.3d 1158, 1164; *People v. Beeman*, *supra*, 35 Cal.3d at pp. 556-558.)

> [P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus - - a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea - - knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus - - conduct by the aider and abettor that in fact assists the achievement of the crime.

(*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)[33/]

The aider and abettor's liability extends to the natural consequences of the acts he knowingly and intentionally aids. (*People v. Croy* (1985) 41 Cal.3d 1, 12; *People v. Hammond* (1986) 181 Cal.App.3d 463, 467-468.) An aider and abettor "is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets." (*People v. Croy*, *supra*, 41 Cal.3d at p. 12, fn. 5.)

Here, the jury could reasonably infer that appellant aided and abetted the first degree murder of Melinda. First, appellant had a motive to kill Melinda to prevent her from testifying against him at the kidnapping trial, and to retaliate for her testifying at the preliminary hearing. At appellant's request, Sandra Ramirez had told Melinda not to go to court on the day of the preliminary

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33. The jury in the instant case was instructed on the principles of aiding and abetting as follows:

> A person aids and abets the commission of a crime when he
>
> One. With knowledge of the unlawful purpose of the perpetrator, and
>
> Two. With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> Three. By act or advice, aids, promotes, encourages or instigates the commission of a crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.

(RT 2659; CT 991; CALJIC No. 3.01.)

hearing. Appellant also tried to get Ramirez to pick up a letter and deliver it to Melinda. (RT 1161-1162.) When these efforts to discourage Melinda from testifying were unsuccessful, appellant became upset at the preliminary hearing. At one point in the proceedings, appellant leaned forward in his chair and stated, "I don't have to sit here and listen to this shit." (RT 1055.) From this evidence, the jury could reasonably infer that appellant had a motive to kill Melinda, to prevent her from testifying against him at the kidnapping trial.

There was also ample evidence that appellant aided, promoted, encouraged, or instigated the commission of the murder. Appellant insisted to Ramirez and Alma Cruz that prospective gang member "Happy" had to be "jumped in" in the alley rather than at a park where the girls had originally planned to do it. It was also agreed that Happy should be jumped in on April 12, the night of the meeting in the alley. Ramirez complied because appellant had started the girls gang and therefore had the authority to tell her what to do. (RT 1176-1178, 1375-1379.) Thus, appellant aided in the killing of Melinda by arranging for her to be brought to the scene of the murder.

Furthermore, the day before the murder, appellant asked Cruz if she could would kill one of her "homegirls." When Cruz replied that it depended on whether the person had done something to her, appellant said, "I already have someone doing it for me." (RT 1382.) Because this statement occurred the day before the murder, and because of the small number of girls in Cruz's gang, the most logical inference was that appellant was referring to Melinda when he said he already had someone to kill one of Cruz's fellow gang members. Thus, the jury could reasonably construe appellant's statement as an admission that he had planned the murder and convinced someone to commit the act of killing Melinda. In addition, the fact that appellant had recently spoken to Ricardo, the shooter, and Uribe, who was present with Ricardo at the scene of the shooting and assisted Ricardo by calling Melinda over to speak to

Ricardo just prior to the shooting, corroborated appellant's statement that he had someone working on killing Melinda.

Moreover, Ricardo's actions at the scene of the crime supported an inference that appellant had aided, promoted, encouraged, or instigated the commission of the murder. Ricardo was upset when he saw that Ramirez had brought other females to the alley with her in addition to Melinda. He asked Ramirez why she had brought "them" with her when Ramirez knew what was going to happen. Ricardo also told Ramirez that if anything happened, to say it was a drive-by. (RT 1205-1207.) Since Ramirez did not know what Ricardo was talking about, it appears that Ricardo mistakenly assumed that Ramirez had learned of the plan from someone else, such as appellant, since Ramirez was the one responsible for bringing Melinda to the alley.

Finally, appellant's actions after the murder displayed a consciousness of guilt. He called Ramirez the next morning and his first words were "What happened?" (RT 1275.) This question demonstrated appellant's knowledge that something was supposed to have happened. He also denied to the police that he had spoken to Ricardo and Uribe, the two participants in the murder who were present at the crime scene. Appellant also initially denied that he had spoken to Ramirez, the person he had enlisted to make sure Melinda arrived in the alley on the night of the murder. Appellant also claimed that he had not learned of Melinda's death until his lawyer told him about it.

All of the above evidence supporting a guilty verdict on an aiding abetting theory also supported a guilty verdict on a conspiracy theory. A conspiracy exists if two or more people agree to commit any crime and there is an overt act in furtherance of the agreement. (§§ 182, subd. (a)(1), 184; *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) Since, in most cases, direct evidence of the parties' agreement is not available, the existence and nature of the agreement, and thus of the objectives of the conspiracy, are commonly

inferred from circumstantial evidence of conduct, relationship, interests and activities of the alleged conspirators before and during the alleged conspiracy. (*People v. Towery* (1985) 174 Cal.App.3d 1114, 1130; *People v. Martin* (1983) 150 Cal.App.3d 148, 163; *People v. Manson* (1976) 61 Cal.App.3d 102, 126.) Each member of a conspiracy is liable for acts committed by every other member of the conspiracy if that act is in furtherance of the object of the conspiracy. (*People v. Flores*, *supra*, 129 Cal.App.4th at p. 182, citing 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 93, pp. 310-311.)

Based on appellant's admission to Alma Cruz that he already had someone to kill one of her "homegirls," which was corroborated by Patricia Lopez's testimony that appellant had been in contact with both Ricardo and Uribe, and Ricardo's ultimate killing of Melinda, the jury could logically infer that an agreement had been formed to kill Melinda. Because Ricardo pulled out a gun and shot Melinda in furtherance of that conspiracy, appellant was liable for that act as a conspirator.

Appellant acknowledges much of the evidence discussed above and argues that there are innocent explanations for his actions. (AOB 79-86.) Appellant is essentially asking this Court to draw different inferences from those drawn by the jury and reweigh the evidence. This is impermissible. Accordingly, appellant's sufficiency claim must be rejected.

To the extent appellant argues there was no independent evidence of his guilt apart from his own admissions, in violation of the "corpus delicti" rule (see AOB 86-87), this contention should be rejected, as appellant's argument is premised on a misunderstanding of the corpus delicti rule. The corpus delicti rule serves the purpose of assuring against the accused admitting to a crime which never occurred. (*People v. Jones* (1998) 17 Cal.4th 279, 301.) Given this purpose, the prosecution must establish corpus delicti independently from

a defendant's extrajudicial statements or admissions, but such independent proof may consist of circumstantial evidence and need not establish the crime beyond a reasonable doubt. (*Ibid.*) The elements of corpus delicti include the fact of the injury or loss or harm and the existence of a criminal agency as its cause. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1127; *People v. Zapien* (1993) 4 Cal.4th 929, 985-986.) The core of the corpus delicti of murder is a killing. (*People v. Swain* (1996) 12 Cal.4th 593, 603.) There need be no independent evidence that the defendant was the perpetrator. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1128.) Furthermore, this Court has explained:

> More specifically, it has been held that in a case tried on an aiding and abetting theory, the requisite knowledge and intent required for aider-abettor liability are not elements of the corpus delicti that must be proved independently of any extrajudicial admissions for purposes of establishing the corpus delicti. (*People v. Ott* (1978) 84 Cal.App.3d 118, 131, 148 Cal.Rptr. 479 ["the corpus delicti must be established with respect to the underlying criminal offense, rather than the theory of aiding and abetting which, in the absence of the commission of the main crime, would not be punishable at all"], disapproved on other grounds in *People v. Beeman* (1984) 35 Cal.3d 547, 556-559, 199 Cal.Rptr. 60, 674 P.2d 1318.)

(*People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1128-1129.)

In the instant case, ample evidence established the corpus delicti of the crime independent of appellant's statements. Witnesses at the scene observed Ricardo shoot Melinda multiple times. (RT 1220, 1265, 1397-1399, 1541-1544.) According to the coroner, the cause of Melinda's death was multiple gunshot wounds. (RT 1726.) Thus, the killing was established independently of appellant's statements. It was not necessary for the prosecution to present independent evidence of appellant's guilt as an aider and abettor. (*Ibid.*)

Therefore, appellant's claim the prosecution failed to establish corpus delicti lacks merit.

X.

THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO INTRODUCE MELINDA'S DIARY ENTRY AND HER STATEMENTS TO HER TEACHER AS PRIOR CONSISTENT STATEMENTS

Appellant contends the trial court erred in allowing the prosecutor to introduce Melinda's diary entry as rebuttal evidence. He further argues that the trial court erred in allowing Melinda's teacher to testify about statements she had made to him. Appellant claims that the admission of the evidence violated his constitutional rights to due process and a fair trial, to confrontation of witnesses, and to a reliable capital trial. (AOB 88-94.) These claims are meritless.

A. The Relevant Proceedings Below

Melinda's testimony from the preliminary hearing in the kidnapping case was read into evidence at appellant's trial in the instant case. (RT 916.) Melinda testified that on March 13, 1996, about two weeks after she had broken up with appellant, he came over to her apartment against her wishes and tried to convince her to leave with him. When she declined, appellant came after her with a knife, hit her in the back of the neck, and choked her. He forced her to pack a bag and to go outside with him, where his friend was waiting in a car. Appellant pushed Melinda into the car, and they drove to appellant's house. Appellant told Melinda to stay in the car while he went inside and retrieved a bag. They next went to appellant's aunt's house. Melinda went inside and stayed with appellant's aunt, and appellant left with his friend. Appellant's aunt

helped Melinda clean the injury in the back of her neck. About four hours later, appellant's aunt drove Melinda home. Melinda reported the incident to the police that night. (RT 917-933.)

At trial, appellant called his mother, his aunt, and his uncle to testify about the events of March 13, 1996. According to appellant's mother, Melinda and appellant were at her home between 11:00 a.m. and noon. Melinda did not appear scared or frightened; rather, she was cheerful. Melinda did not complain of any injuries, and appellant's mother did not see any. Appellant and Melinda left together. (RT 2118-2120, 2131.)

Appellant's aunt, Maria Hernandez, testified that appellant and Melinda came to her house around 1:00 or 2:00 p.m. They stayed for one to two hours and said that they were planning to go to Mexico. Hernandez tried to talk them out of it. Melinda did not look scared or frightened. Melinda did not complain of any injuries, and Hernandez did not notice any. Hernandez succeeded in talking appellant and Melinda out of going to Mexico. Her husband later drove them somewhere. (RT 2144-2152.)

Hernandez's husband and appellant's uncle, James Murphy, also testified that appellant and Melinda came over to his house on the afternoon of March 13. Melinda did not appear scared or frightened. She did not say anything about being there against her will, and Murphy did not observe any injuries on her neck. Appellant and Melinda stayed for about three hours before Murphy drove them to a location near Parthenia and Van Nuys Boulevard. (RT 2184-2189.)

In light of the testimony of appellant's mother, aunt, and uncle, the prosecutor sought to admit rebuttal evidence, in the form of Melinda's diary entry for March 13 (stating that appellant had broken into her home, stabbed her, choked her, and kidnapped her) and statements she had made to a teacher on March 15 (that appellant had broken into her home, threatened her with a

knife, and forcibly took her to his aunt's house) as prior consistent statements under Evidence Code sections 791 and 1236. With respect to the diary entry, appellant's counsel objected on grounds of hearsay and lack of foundation as to when the entries were made. (RT 2211.) Appellant's counsel also objected that the evidence was improper rebuttal, as it could have been, but was not, introduced in the case-in-chief. (RT 2224.)

The trial court ruled that the diary entry was admissible, provided that an adequate foundation could be made. The court also ruled that Melinda's statements to her teacher were admissible under the prior consistent statement exception to the hearsay rule. (RT 2224-2228.)

At trial, Melinda's mother, Susan Carmody, testified that Melinda wrote in a diary on a daily basis. (RT 2261, 2266.) After Melinda's death, Carmody read the diary. (RT 2266.) An entry dated March 13, 1996, in Melinda's handwriting, stated, "Bird [appellant] broke in and stabbed me and choked me and kidnapped me. Went to police station, went to Grandma's." (RT 2268.)

Melinda's teacher, Frank Torres, testified about his conversation with Melinda on March 15, 1996. Melinda told Torres that she had broken up with her boyfriend. Melinda further stated that this ex-boyfriend continued to call her, although she did not return his phone calls. She described that her ex-boyfriend had recently broken into her house and threatened her that if he could not have her, no one else could have her. At that time, he held a knife to her neck and dragged her out of the house into a car and drove her to his aunt's house. (RT 2254-2256.)

B. Appellant Has Forfeited His Confrontation Clause Claim

To the extent appellant argues that the admission of Melinda's diary entry and the statements she made to her teacher violated his right to confrontation under the Sixth Amendment (see AOB 91-92), this claim has

been forfeited due to appellant's failure to object on this ground, and because appellant's own wrongdoing led to Melinda's absence at trial.

1. The Failure To Object On Constitutional Grounds Forfeits Appellant's Claim

A claim based on a purported violation of the Confrontation Clause must be timely asserted at trial or it is waived on appeal. (Evid. Code 353; *People v. Rodrigues*, 8 Cal.4th 1060, 1118 (1994); see also *People v. Alvarez*, *supra*, 14 Cal.4th at p. 186 (Confrontation Clause issue waived where no timely and specific objection made on that ground). An objection based on hearsay grounds is insufficient to preserve a claim premised on the violation of the Confrontation Clause. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869.) Here, appellant objected to the challenged evidence solely on grounds of hearsay. There was no assertion that the admission of the statements violated appellant's right to confront witnesses under the Sixth Amendment. Accordingly, appellant's constitutional claim has been waived.

2. Appellant Cannot Complain About His Right To Confrontation When The Witness Is Unavailable Because Of His Own Wrongdoing

Melinda was unavailable at trial because appellant arranged for his brother to kill her. Appellant cannot legitimately complain that he could not confront Melinda when it was his own wrongdoing that prevented the confrontation. The United States Supreme Court recognized this exception in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].) *Crawford* criticized the test in *Ohio v. Roberts*[34] as allowing a jury "to

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34. *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597].)

hear evidence, untested, by the adversary process, based on a mere judicial determination of reliability" thus replacing "the constitutionally prescribed method of assessing reliability with a wholly foreign one." (*Crawford*, *supra*, 541 U.S. at p. 62.) However, the Court emphasized:

> In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. *For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.*

(*Ibid.*, citing *Reynolds v. United States* (1879) 98 U.S. 145, 158-159 [25 L.Ed. 244], emphasis added.)

In *Reynolds*, the Supreme Court asserted:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful act. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

(*Reynolds*, *supra*, 95 U.S. at p. 158.) "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony." (*Id.* at p.

159; see also *United States v. Cherry* (10th Cir. 2000) 217 F.3d 811, 819-820 [a defendant may be deemed to have waived his or her Confrontation Clause rights if a preponderance of the evidence establishes, among other things, that he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing].)

Appellant orchestrated Melinda's murder to ensure she could not testify against him at trial in the kidnapping case. Appellant is estopped by his own wrongdoing from asserting that he was deprived of an opportunity to confront Melinda when he made her unavailable by having his brother kill her to prevent her from testifying against him. *Crawford* does not bar admission of Melinda's diary entry or her statements to her teacher.[35/]

C. The Trial Court Properly Admitted The Evidence

The admission of prior consistent statements is governed by Evidence Code sections 791 and 1236. 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 [Evidence Code] [s]ection 791.

(Evid. Code, § 1236.)

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

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35. The issue of forfeiture by wrongdoing is currently pending before the Court in *People v. Giles*, review granted Dec. 22, 2004, S129852.

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.

(Evid. Code, § 791.)

Here, Melinda's March 13, 1996 diary entry and the statements she made to teacher Frank Torres on March 15, 1996 were properly admitted as prior consistent statements pursuant to Evidence Code sections 1236 and 791. Appellant complains that the statements were not admissible under Evidence Code section 791 because they were not made before any other inconsistent statements within the meaning of subdivision (a), and they were not made before Melinda had a motive to fabricate appellant's guilt within the meaning of subdivision (b). (AOB 90-91.) Appellant's argument is unavailing, as both the diary entry and Melinda's statements to her teacher were admissible under Evidence Code section 791, subdivision (b).

Appellate courts have recognized an exception to the timing requirements of Evidence Code section 791, subdivision (b), when a charge of recent fabrication is made by negative evidence that the witness did not speak of a certain matter when it would have been natural to do so. (See *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012; *People v. Gentry* (1969) 270 Cal.App.2d 462, 473.) In *Gentry*, the Court of Appeal explained the reasoning behind subdivision (b)'s requirement that a prior consistent statement be made before the improper motive is alleged to have arisen as follows:

The reason for this limitation is that when there is a contradiction between the testimony of two witnesses it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has

asserted the same thing previously. "If that were the argument, then the witness who had repeated his story to the greatest number of people would be the most credible."

(*People v. Gentry*, *supra*, 270 Cal.App.2d at p. 473, quoting 4 Wigmore, Evidence (3d ed.) § 1127, p. 202.) The court then explained the reasoning behind the exception to this rule as follows:

> 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. His silence then is urged as inconsistent with his utterances at the trial. The evidence of consistent statements at that point 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."

(*People v. Gentry*, *supra*, 270 Cal.App.2d at p. 473, quoting 4 Wigmore, Evidence (3d ed.) § 1127, p. 205.)

In the instant case, by calling appellant's mother, aunt, and uncle to testify that on March 13, 1996, Melinda said nothing to indicate that she was with appellant against her will or that she was injured, the defense implied that Melinda's testimony to the contrary at the preliminary hearing was recently fabricated. Thus, the exception outlined in *Williams* and *Gentry* applied in the instant case, because the prior consistent statements were introduced to refute the defense position that Melinda's silence at a time when it would have been natural for her to speak was inconsistent with her testimony at the preliminary hearing. Accordingly, Melinda's diary entry and statements to her teacher were properly admitted under Evidence Code section 791, subdivision (b). (*People v. Gentry*, *supra*, 270 Cal.App.2d at p. 473; *People v. Williams*, *supra*, 102 Cal.App.4th at pp. 1011-1012.)

D. The Diary Entry And Statements To Melinda's Teacher Were Not Testimonial In Nature, And Therefore The Introduction Of This Evidence Did Not Violate The Confrontation Clause Under *Crawford*

To the extent appellant claims the introduction of the challenged evidence violated *Crawford* (AOB 91), this contention is meritless. The United States Supreme Court explained in *Crawford* that the core concern of the Confrontation Clause is testimonial hearsay, which includes statements made during police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at trial. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 50-53, 68.) The Court held that such statements are inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. (*Id.* at p. 68.) The Court, however, left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" because the out-of-court statements at issue were made during a police interrogation and would be "'testimonial' under even a narrow standard." (*Ibid.*)

In the instant case, neither the diary entry or the statements Melinda made to her teacher were testimonial, as they were not made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use later at trial. (*Id.* at pp. 51-52, ["[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"]; see also *Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030, 1037 (statements contained in diary constituted nontestimonial hearsay); see also *People v. Corella* (2004) 122 Cal.App.4th. 461, 467-468 [statements to 911 operator were not "testimonial"].) Accordingly, *Crawford* is inapplicable.

E. Any Error Was Harmless

In any event, any error was harmless, as it is not reasonably probable appellant would have obtained a more favorable result in the absence of the alleged error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Furthermore, any error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra,* 386 U.S. at p. 24.) The challenged statements went solely to the kidnapping and assault charges, where the evidence of appellant's guilt was truly overwhelming. Appellant *admitted* to Ramirez that he had tried to kidnap Melinda and that he had stabbed her in the neck. (RT 1160.) After the kidnapping, Melinda reported the incident to the police that evening and was still bleeding from her neck wounds when the police arrived at her home. She also had bruises on her neck. (RT 949-955.) Although appellant initially told the police that Melinda had accompanied him voluntarily, this was not credible in light of his admission to the police that he had hit and choked her that day. (See RT 1045-1046.) In any event, he later acknowledged to the police that he had made a mistake regarding the kidnapping case. (RT 1612.) In light of this evidence, any error in the admission of the diary entry and Melinda's statement to her teacher was clearly harmless.

XI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 2.51

Appellant contends that CALJIC No 2.51, as given, improperly allowed the jury to determine guilt based on motive alone and shifted the burden of proof, implying that appellant had to show an absence of motive. (AOB 95-101.) This claim lacks merit and should be rejected.

The trial court instructed the jury pursuant to CALJIC No. 2.51 as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish a defendant is guilty. Absence of motive may tend to show that a defendant is not guilty.

(RT 2654; CT 981.)

This Court has previously rejected the argument that CALJIC No. 2.51 implies that motive alone may establish guilt. (*People v. Snow* (2003) 30 Cal.4th 43, 97-98.) This Court has also rejected the argument that CALJIC No. 2.51 improperly shifts the burden of proof. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 750.) To the contrary, the instruction merely informs the jury that it may consider the presence or absence of motive. (*Ibid.*; see also *People v. Estep* (1996) 42 Cal.App.4th 733, 738.)

Furthermore, to the extent appellant claims that CALJIC No. 2.51 stood out from other standard evidentiary instructions, i.e., CALJIC Nos. 2.03 (Consciousness Of Guilt - - Falsehood) and 2.06 (Efforts To Suppress Evidence), because it did not contain a cautionary admonition that motive alone was insufficient to establish guilt, this claim has been waived due to appellant's failure to request clarification of the instruction. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 750.) In *Cleveland*, this Court found that such a challenge merely went to the clarity of the instruction, and therefore it was not cognizable on appeal absent a request for clarification in the trial court. (*Ibid.*) In any event, this Court rejected the argument on the merits in the alternative. (*Ibid.*) Appellant's claim should likewise be rejected. As in *Cleveland*, the trial court in the instant case fully instructed the jury on the reasonable doubt standard. (RT 1700-2701; CT 1046.) Thus, there is no reasonable likelihood the jury

would infer from CALJIC No. 2.51 that motive alone could establish guilt. Appellant's claim must fail.

XII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSCIOUSNESS OF GUILT PURSUANT TO CALJIC NOS. 2.03 AND 2.06

Appellant contends the trial court erred in instructing the jury on consciousness of guilt pursuant to CALJIC No. 2.03 (Willfully False Or Misleading Statements) and CALJIC No. 2.06 (Attempt To Suppress Evidence). Appellant claims these instructions were impermissibly argumentative and allowed the jury to make irrational inferences, and that they violated his right to due process because they permitted inferences based on evidence that was not necessarily linked to the underlying crime. (AOB 102-109.) As will be discussed, these contentions are meritless.

A. The Relevant Proceedings Below

The prosecutor requested that the jury be instructed pursuant to CALJIC No. 2.03 that if it found that appellant made a willfully false or deliberately misleading statement about the crimes, this evidence could be considered as tending to show a consciousness of guilt. The prosecutor argued that the instruction applied to statements appellant made to Detective Oppelt denying contact with Ricardo prior to the murder, despite the fact that his sister had testified that she had put appellant and Ricardo in contact with each other. Appellant's counsel objected, stating, "I don't believe that's the kind of comment or statement that is addressed by this particular instruction." He further argued that appellant's statements to Detective Oppelt went to collateral

matters. (RT 2303-2304.) The trial court concluded that the instruction was appropriate and instructed the jury pursuant to CALJIC No. 2.03 as follows:

> If you find that before this trial a defendant made a willfully false or deliberately misleading statement concerning the crime or crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(RT 2656; CT 985.)

The prosecutor also requested that the trial court instruct the jury pursuant to CALJIC No. 2.06 on efforts to suppress evidence. The prosecutor argued that the instruction applied to appellant telling Ramirez to tell Melinda not to go to court, and after the murder, appellant telling Ramirez not to say anything to the police. The prosecutor further argued that Ricardo had made efforts to conceal evidence by hiding the murder weapon in a wall heater. (RT 2304-2306.) Appellant's counsel objected to the instruction, arguing that appellant's statements did not amount to intimidation of a witness and that appellant had not concealed evidence. (RT 2307.) The trial court concluded the instruction was appropriate, and instructed the jury pursuant to CALJIC No. 2.06 as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness and/or by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(RT 2656-2657; CT 986.)

B. The Instructions Were Properly Given

Appellant does not contend the evidence was insufficient to support the giving of CALJIC Nos. 2.03 and 2.06. Rather, he claims the instructions were impermissibly argumentative and that they allowed the jury to make irrational inferences. (AOB 102-109.) These contentions lack merit.

This Court has repeatedly rejected the instant challenges to CALJIC Nos. 2.03 and 2.06. (See *People v. Stitely* (2005) 35 Cal.4th 514, 555 [CALJIC No. 2.03 is not improperly argumentative and does not generate irrational inference of consciousness of guilt]; *People v. Benevides* (2005) 35 Cal.4th 69, 100 [same]; *People v. Holloway* (2004) 33 Cal.4th 96, 142 [rejecting claim that CALJIC Nos. 2.03 and 2.06 are argumentative and fundamentally unfair]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [rejecting claim that CALJIC No. 2.03 is impermissibly argumentative and allowed irrational inferences]; *People v. Cash* (2003) 28 Cal.4th 703, 740 [rejecting argument that CALJIC No. 2.06 is improperly argumentative].)

As this Court has explained, the cautionary language of CALJIC Nos. 2.03 and 2.06 helps a defendant by admonishing the jury to use circumspection with respect to evidence that might otherwise be considered decisively inculpatory. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; accord *People v. Holloway*, *supra*, 33 Cal.4th at p. 142.) Moreover, as this Court has previously stated, "The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 142.) Appellant has provided no compelling reason why his case calls for a different result. Here, it would not have been irrational for the jury to infer appellant's consciousness of guilt from his false statement to the police that he had not been in contact with Ricardo or Uribe. Likewise, it would not have been irrational for the jury

to infer consciousness of guilt based on his efforts to prevent Melinda and Ramirez from testifying. Accordingly, appellant's claim should be rejected.

XIII.

APPELLANT'S CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT DURING HIS GUILT PHASE CLOSING ARGUMENT HAS BEEN WAIVED; IN ANY EVENT, THERE WAS NO MISCONDUCT

Appellant contends the prosecutor committed misconduct during his guilt phase closing argument by attacking the honesty of appellant's counsel and by improperly implying that there were facts not in evidence linking appellant to a plan to kill Melinda that involved both Ricardo and Uribe. (AOB 110-115.) These claims have been waived, due to appellant's failure to object on grounds of prosecutorial misconduct with respect to some of the instances of alleged misconduct and his failure to request that the jury be admonished with respect to each instance of alleged misconduct. In any event, these claims also fail on the merits.

A. The Alleged Denigration Of Appellant's Trial Counsel

A recurring theme in appellant's counsel's closing argument in the guilt phase was that the jury should resist the prosecutor's alleged attempts to invite the jury to engage in speculation. For example, he claimed that the prosecutor had asked the jury to speculate that appellant was the person who broke into Margarita Pile's car. (RT 2494-2496.)[36/] Appellant's counsel also argued that

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36. Appellant's trial counsel seemingly acknowledged that the elements of automobile burglary had been established (RT 2493-2494), although he challenged the evidence establishing appellant as the perpetrator:

> So this person, whoever it is, broke the window and then tried to pry out the radio, leaving pry marks. [¶] My client was arrested right there under the balcony. What did he break the

the prosecutor had encouraged the jury to speculate that appellant intended to kidnap Melinda when he entered her residence. (RT 2498.) Appellant's counsel further asserted that the prosecutor had asked the jury to speculate that Uribe actually answered the telephone when appellant's calls were forwarded to Uribe and also to speculate about the content of the telephone calls. (RT 2509-2510.) At other points, appellant's counsel argued that the prosecutor had encouraged unspecified speculation. (RT 2505, 2510, 2523-2524.)

In his rebuttal argument, the prosecutor denied appellant's counsel's allegations that he had asked the jury to speculate and draw inferences in the absence of any supporting evidence. (RT 2600.) The prosecutor explained that rather than asking the jury to speculate, he had asked the jury to:

> look at all the evidence, look at it carefully, and you pull it together. You'll see it in perspective to one another, and you'll see one thing

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> windows with? Any evidence there was a rock inside the car? Or a hammer found on his person or under the balcony where he was found by the officer?
>
> What did he use to try to pry out the radio, leaving pry marks on the face of it? [¶] Any evidence of a screwdriver is found in the car or on his person or under the balcony? No. [¶] So just because a witness has testified to a series of events doesn't mean the prosecution has given you all the information you need to make a decision.
>
> We know from all the other testimony that my client is a gang member. He's a gang kid. We know from the testimony of Detective Oppelt that gang kids aren't real comfortable around police officers. There is not a great relationship. They don't sit down and have chitchats all the time voluntarily.
>
> So [the prosecutor] has asked you to speculate that maybe my client broke into this car because he was cold or because he wanted an opportunity to steal a radio. But that's pure speculation because what did he break into the car with? And what did he use to try to pry out the radio[?]

(RT 2495-2496.)

naturally leads to another conclusion. It's not speculation. That's just your job. You're supposed to draw legitimate inferences from the evidence that's presented to you.

(RT 2600-2601.)

The prosecutor continued his argument as follows:

[PROSECUTOR]: But who wants you to speculate? [¶] I want you to think about what the - - counsel has looked you in the eye unblinkingly and just said straight out, butter wouldn't melt in their mouth, and I want you to think about - -

[RICARDO'S COUNSEL]: Objection, your honor.

THE COURT: As to the use of the phrase with reference to counsel, sustained. Please go forward.

[PROSECUTOR]: Forgive me. [¶] I want you to think about the defendant's position that was presented to you. If you look at what was presented to you, [appellant] didn't do anything.

(RT 2601.)

The prosecutor subsequently addressed appellant's counsel's argument that the prosecutor had asked the jury to speculate about appellant being inside Margarita Pile's car:

How do we know [appellant] was in the car? [¶] Now, this is what I'm talking about. I thought [appellant's counsel] had been in the courtroom during the testimony - -

[APPELLANT'S COUNSEL]: I object to disparaging remarks about counsel.

THE COURT: Sustained.

. . . .

[THE PROSECUTOR]: I thought we all heard the same testimony, and presented to you was this, how do we know he was even the one that was in the car?

I mean, you know, we heard that gang members don't like to be around police. How do we know that [appellant] just didn't go hide underneath the balcony and the real burglars ran off and the police find him under there? Okay. And [appellant's counsel] says it's bald speculation.

Forgive me, but I thought I heard Zury Terry say, "I watched him get out of the car, walk up to the front of my porch." I thought I heard her testify that she saw him in court today, or the day that she testified. I thought I heard her say that on the night that it happened, she saw him and identified him at that time as the person, that area was lit, the porch light was lit. We even heard the officer say, "Yes, we showed her, too." She said, "That's him."

Is that speculation? I mean, how does that work? I mean, she tells you this is what happened. That's not speculation. . . .

(RT 2604-2605; see also RT 985, 989-990 [Terry testifying that she saw appellant inside the car, identifying appellant as the person she had seen in the car].)

1. Appellant Has Waived His Claim Concerning "Disparaging" Comments

In general, a defendant may not raise an issue of prosecutorial misconduct on appeal unless a timely objection was raised on the same ground in the trial court and a request for a curative admonition was made. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Exceptions to this rule include where an objection or request for

admonition would be futile, where an admonition would not cure the misconduct, and where the court immediately overrules an objection and does not give counsel an opportunity to seek an admonition. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.) Finally, even if the reviewing court determines an admonition would not have sufficed, reversal is warranted only if, "on the whole record the harm resulted in a miscarriage of justice[.]" (*People v. Bell* (1989) 49 Cal.3d 502, 535; see also *People v. Bolton* (1979) 23 Cal.3d 208, 214.)

In the instant case, appellant's counsel never objected to the first alleged disparaging remark. Although counsel for co-defendant Ricardo lodged an objection, appellant's counsel did not join in the objection (RT 2601), and therefore the issue has not been preserved for appellate review. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048 [the failure to join in a co-defendant's motion or objection waives the issue on appeal].) Furthermore, appellant's counsel never asked that the jury be admonished after either of the alleged disparaging remarks. (RT 2601, 2604.) Moreover, any assumed harm from these "disparaging" comments could have been cured by an admonition, and appellant does not contend otherwise. (See. e.g., *People v. Gionis* (1995) 9 Cal.4th 1196, 1216-1217 [admonition cured a prosecutor's statement, "You're an attorney. It's your duty to lie, conceal and distort everything and slander everybody"]; *People v. Price* (1991) 1 Cal.4th 324, 454-455 [admonition cured prosecutor's remark about defense counsel's "sleazy" action]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 [admonition could have cured prosecutor's characterizations of defendant as a "contract killer," a "snake in the jungle," "slick," "tricky," a "pathological liar," and "one of the greatest liars in the history of Fresno County"].) The prosecutor's statements here were far less "disparaging" than the above examples. Because an admonition would have cured any assumed harm, and because appellant's trial counsel failed to object

in one instance and did not seek an admonition in either instance, his claim of misconduct has been waived. (See *People v. Welch, supra,* 20 Cal.4th at p. 701, 753; *People v. Hill, supra*, 17 Cal.4th at p. 820; *People v. Arias* (1996) 13 Cal.4th 92, 159.)

2. There Was No Misconduct and Appellant Suffered no Prejudice

Assuming arguendo that the claim is not waived, it is without merit. Under state law, prosecutorial misconduct only occurs when the prosecutor engages in "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, quoting *People v. Strickland* (1974) 11 Cal.3d 946, 955; see also *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) A prosecutor's statements are misconduct only if there is a "reasonable likelihood" the jury will improperly misconstrue or misapply the statements. (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Sanders, supra*, 11 Cal.4th at p. 526.) Federal due process is not violated unless the offending remarks are so egregious as to "infect" the entire trial with unfairness. (*Frye, supra*, 18 Cal.4th at p. 969.)

Appellant argues the prosecutor's comments denigrated and attacked the integrity of his trial counsel. (AOB 111-112.) Appellant is mistaken. While it is improper for a prosecutor to denigrate a defense attorney (because it directs a jury's attention away from the evidence adduced at trial), the prosecutor's comments must be viewed in relation to the defense attorney's remarks in order to determine whether the former constituted a fair response to the latter. (See *People v. Young* (2005) 34 Cal.4th 1149, 1189; *People v. Frye, supra*, 18 Cal.4th at p. 978.)

In the instant case, there is no reasonable likelihood that the jury construed the prosecutor's remarks as an attack on defense counsel's integrity.

(See *People v. Young*, *supra*, 34 Cal.4th at p. 1189.) Rather, viewed in the context of defense counsel's argument and the prosecutor's response, the prosecutor was merely highlighting the fallibility of defense counsel's assertion that the prosecutor had asked the jury to speculate that appellant had been inside the burglarized car. Defense counsel had argued that the jury would have to speculate in order to place appellant in the car. (RT 2495-2496.) Replying to this argument, the prosecutor merely pointed out that there had been direct testimony of appellant's presence in the car. Thus, it was highly unlikely that the jury would construe the prosecutor's comments as a personal attack on defense counsel's integrity as opposed to a criticism of the position he espoused. Appellant has failed to demonstrate any misconduct occurred.

Moreover, any possible misconduct was plainly harmless. This Court has held that:

> Prosecutorial misconduct is cause for a reversal only when it is "reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant."

(*People v. Milner* (1988) 45 Cal.3d 227, 245, quoting *People v. Beivelman* (1968) 70 Cal.2d 60, 75.)

The prosecutor's remarks directed at appellant's trial counsel were brief and isolated. The trial court sustained an objection made by co-defendant's counsel to the first challenged comment and sustained an objection made by appellant's counsel to the second challenged comment. Following each sustained objection, the prosecutor's ensuing argument made it clear that he was rebutting the position advanced by appellant's counsel rather than attacking counsel personally. Accordingly, any possible misconduct was harmless.

B. The Alleged Arguing Of Facts Not In Evidence

During closing argument, appellant's counsel argued that Alma Cruz and Sandra Ramirez were untruthful when they testified that appellant asked Cruz whether she would kill a "homegirl." Appellant's counsel further argued that Cruz "embellished" when she testified that appellant also told her he already had someone working on it. (RT 2516-2522.) In the prosecutor's rebuttal, he responded to appellant's counsel's argument as follows:

> [THE PROSECUTOR]: What I'm saying is that if the girls were going to say something that was to implicate [appellant] in this, why don't they just come straight out and say it? If they really wanted to get this guy, for God knows what reason, why didn't they say [appellant] said, hey, I've got Ricardo and [Uribe] working on this?

(RT 2625.)

Appellant's counsel objected, asserting that the prosecutor was arguing facts not in evidence. The trial court overruled the objection. (RT 2625.)

1. Appellant's Claim Has Been Waived

At the outset, appellant's claim of misconduct has been waived due to trial counsel's failure to make a timely and specific objection on grounds of prosecutorial misconduct and his failure to request an admonition. (See *People v. Gionis*, *supra*, 9 Cal.4th at pp. 1216-1217 [to preserve claim of alleged prosecutorial misconduct for appellate review, the defendant must assign misconduct and request a curative admonition].) Here, appellant's counsel objected on grounds of arguing facts not in evidence. (RT 2625.) However, he did not object on grounds of prosecutorial misconduct and did not request an admonition. Because an admonition could have cured any harm, appellant's claim has been waived. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

2. There Was No Misconduct; Nor Was There Any Possible Prejudice

Even if appellant preserved this claim, it must be rejected. While it is misconduct for a prosecutor to argue facts not admitted into evidence (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026), it is permissible to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. (*People v. Morales* (2001) 5 Cal.4th 34, 44.) "The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill*, *supra*, 17 Cal.4th at p. 819, internal quotation marks omitted.)

Here, the prosecutor's argument was a fair response to defense counsel's claim that Cruz and Ramirez had fabricated the highly incriminating statements attributed to appellant. In rebutting this assertion, the prosecutor logically argued that had the two girls wanted to falsely implicate appellant, they would have made up testimony that more directly incriminated appellant. Furthermore, contrary to appellant's assertion, the prosecutor did not link appellant to evidence admitted only against Ricardo.

While Ricardo's statement to the police (acknowledging his own and Uribe's involvement in the crime), was admitted solely against Ricardo, there was ample independent evidence establishing Ricardo's and Uribe's involvement. It is undisputed that Ricardo was the shooter, as several eyewitnesses saw him fire several times at Melinda. In addition, several eyewitnesses provided testimony demonstrating Uribe's involvement in the shooting. Ricardo chastised Ramirez in Uribe's presence for bringing too many people with her when she "knew" what was going to happen. Uribe was also present when Ricardo told Ramirez to say it was a driveby if anything happened. Had Uribe not been involved in the plan, it is unlikely Ricardo would have made these comments in Uribe's presence. And lastly, Uribe was

the one who summoned Melinda to talk to Ricardo just before the fatal shooting. Thus, aside from Ricardo's statement to the police implicating himself and Uribe, the independent evidence supported a theory that both Ricardo and Uribe were involved in the murder. Accordingly, when the prosecutor suggested that if Cruz and Ramirez really wanted to implicate appellant they would have testified that appellant claimed he had Ricardo and Uribe working on killing a "homegirl," he did not link appellant to evidence admitted solely against Ricardo. It is perfectly permissible to argue inferences drawn from the evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 169; *People v. Cunningham* (2001) 25 Cal.4th 926, 1026; *People v. Mitcham, supra*, 1 Cal.4th at p. 1052; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1380.) The record in this case clearly refutes appellant's claim. Appellant's claim of misconduct should be rejected.

In any event, even if the prosecutor's comments amounted to arguing facts not in evidence and therefore constituted misconduct, there was no prejudice. The evidence against appellant was compelling. The night before Melinda's death, appellant essentially admitted to Ramirez and Cruz that he had someone working on killing one of their "homegirls." Appellant had a strong motive to kill Melinda, to prevent her from testifying against him at the kidnapping trial. Appellant was adamant that Ramirez bring Melinda to the alley on the night of the shooting. After the shooting, appellant lied to the police about having been in contact with his brother and Uribe. He also initially attempted to deny any contact with Ramirez. Any brief reference to facts not in evidence did not prejudice appellant.

XIV.

APPELLANT'S CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT DURING HIS PENALTY PHASE ARGUMENT HAS BEEN WAIVED; IN ANY EVENT, THERE WAS NO MISCONDUCT

Appellant contends the prosecutor committed misconduct during his penalty phase argument by arguing that the death penalty was required to protect the witnesses in this case, by arguing that the rule of law depended on the imposition of the death penalty, and by contrasting life in prison with the victim's family visiting the victim's grave site. (AOB 116-127.) These claims have been waived, due to appellant's failure to object on grounds of prosecutorial misconduct and his failure to request that the jury be admonished. In any event, these claims also fail on the merits.

A. The Relevant Proceedings Below

At the outset of the prosecutor's penalty phase argument, he informed the jurors that they would receive a very specific instruction, CALJIC No. 8.85, regarding the factors to be considered in determining the appropriate penalty. The prosecutor stated that the jurors were to consider the aggravating and mitigating factors, although there was no mathematical formula for determining the penalty. (RT 2847-2848.) The prosecutor emphasized factor (a), the nature and circumstances of the crimes for which appellant had been convicted in this case. (RT 2848-2849.) The prosecutor also noted that the jurors could consider under factor (b) the presence or absence of criminal activity by appellant other than the crimes for which he was tried in the instant case, and that the incident with the jail deputies fell within this category. (RT 2851.) The prosecutor reiterated that the aggravating and mitigating factors set forth in CALJIC No. 8.85 would guide the jury in their decision. (RT 2852.)

The prosecutor argued that the purpose of introducing evidence of the jail incident was to demonstrate appellant's true demeanor, as opposed to the demeanor he demonstrated in the courtroom. (RT 2852-2853.) The prosecutor further added that they jurors should consider appellant as the person who attacked Melinda with a knife and told her to "quit crying" as he took her away from her home. The prosecutor also stated that appellant should be considered as the person who was caught breaking into a car and when confronted by Zury Terry said, "Get back in the house, bitch, or I'll hurt you." The prosecutor added that appellant had stood up during the preliminary hearing in the kidnapping case and said, "I'm not going to take this." (RT 2853-2854.)

The prosecutor then argued as follows:

> Now, I want to talk about the crime itself, and I want to talk about some things that you might consider and some of this is revisiting, and I'm going to go through it quickly. But we just talked about him breaking into the house and taking [Melinda], telling her to quit crying.
>
> We talked about him going to the - - we talked about him going through Sandra Ramirez to tell [Melinda] not to testify. And when she does testify, what happens? He has her killed.
>
> That in a nutshell is what he has done. But I want to look at the circumstances surrounding this and what he has left in his wake. [¶] Who did he get to do this? His own younger brother.
>
> Now, I'm certainly not asking you to feel sorry for Ricardo Lopez. Ricardo Lopez made his own decision. But if you recall, she did nothing to him. The only reason that he killed her was because he asked him to. [Appellant] wanted this girl dead and he didn't care that he even used his own brother to do it. His own brother's future was expendable to him. Not to mention [Melinda's] life. Or the futures and the lives of those that loved and cared about her.

You look at the victim here. And I want you, as a circumstance to this crime, this is a girl that was one week past her 16th birthday. She just turned 16.

Now, as a mitigating factor you might be asked to consider the age of [appellant]. What was he, 22, 23 at the time of this crime? That he had - - is that mitigating? He's not my age. But I'll tell you what, he's no 18-year-old, no 19-year-old, not even a 20-year-old. He's a 22-year-old man that takes a 14 year-old-girl as his girlfriend and has her through her 15th year basically and wants to marry her.

Do you realize that when he kidnapped her and wanted to go to Mexico, she was only 15 at that point?

And then, because, as young girls do, they get older, they move on, they mature, some people actually grow out of these idiotic endeavors that they are in when they're kids and younger and they actually do have a future.

Who else did he leave in his wake here? Look at the witnesses in this case. [¶] Look at Sandra Ramirez and Alma Cruz. Look at what position they were put in.

[APPELLANT'S COUNSEL]: Objection. Improper argument.

THE COURT: You may continue. Overruled.

[THE PROSECUTOR]: The circumstances surrounding this offense, he arranged through them, using them to get someone that was their friend in a position to be killed. And during that conversation what is he talking about? He's talking about the Mexican Mafia. He's talking about dues. He's talking about killing homegirls. And then afterwards they're told not to say anything. They still had enough courage to do the right thing, but it took a lot of courage.

So when does their nightmare end? When do they stop looking over their shoulders?

(RT 2854-2856.)

The prosecutor then discussed the victim impact testimony. He explained that the testimony from the victim's family was necessary for the jury to "understand what has been left behind" and "what the circumstances of this crime truly are." The prosecutor stated that his purpose in showing photographs of the victim with her family was "certainly not to whip up you emotions" but rather "to show you that these are memories that these people have and these are the faces for what they saw as a future for their daughter, their granddaughter, their grandchildren." (RT 2857.) The prosecutor discussed the impact that Melinda's death had on her grandmother, who testified that she was obsessed with revenge and thought about the murder on a daily basis. The prosecutor also discussed the impact Melinda's death had on her mother. (RT 2858-2859.)

The prosecutor continued his argument as follows:

Now, I was just talking about like these feelings of vengeance and necessity for revenge, or whatever, on the part of the family. How can they not have those feelings and how do they deal with them? Or what do we do in this society?

We do not say, okay, we take care of business. We do not allow that because we are a society of laws.

We have a social compact, a contract, if you will, where we say because we are a society of laws, because we do not allow you to go out there and get your eye for an eye, tooth for a tooth, limb for a limb, we do not allow that because we as a society would fall into chaos. We would have vendettas. We would have people being killed on half truths and not on complete information and out of emotion.

And that is why you, as a jury, has been selected here. And what we do is we sit there and say, no, we will determine justice here. And the way we will do that is that we look at all of these circumstances, we will look at this crime, and we will not out of emotion, we will look at this crime and we will see objectively what it is that has been done here and what is the appropriate penalty, and we will look at everything around the crime.

We will look at the nature of this crime. We will look at the defendant. We will look at mitigating evidence, and we will seek justice. And we will come back with a just verdict.

So we say to these families, we say to them, trust us. Just be patient. (RT 2859-2860.)

After a break, the prosecutor resumed his argument by discussing the role of a jury trial in the criminal justice system, noting that a jury takes the place of individuals engaging in "self help." He observed that mercy is a part of the system but argued that it was not warranted in this case. The prosecutor argued that the crime was "horrible" and went to the heart of the criminal justice system, as appellant reached out from behind the walls of a custodial facility to kill a witness, who was just a child. (RT 2861-2862.)

After another break, the prosecutor discussed the option of sentencing appellant to life in prison without the possibility of parole. The prosecutor argued that if appellant received such a sentence, he would still be able to read, watch television, exercise, and maintain relationships with friends and family, while the victim's family would no longer be able to have any contact with her, other than visiting her grave site. (RT 2865-2866.)

At that point, appellant's counsel objected on the ground that the prosecutor was asking the jury to base its decision on emotion only. The trial

court noted the objection, but made no ruling. (RT 2866.) The prosecutor proceeded with his argument as follows:

> [PROSECUTOR]: Make no mistake about it. You are asked to evaluate this in a detached objective, let's say, manner. What I'm talking to you about is an emotional - - is emotional, but I'm no asking you to be - - to leave reason behind.
>
> I want you - - what I'm saying to you is that I want you to understand the gravity of what has happened here, and I want you to understand what has been left in [appellant's] wake.
>
> The crime did not end when [Melinda] fell in the street. The injury continues, and that is something that you should consider as what is the appropriate penalty here.

(RT 2866.)

The prosecutor then returned to the theme of how the nature of the crime threatened the judicial system, since appellant murdered Melinda because she was a witness to a crime. The prosecutor argued that the court system cannot function without witnesses who are willing to testify. (RT 2867.) The prosecutor further argued that the system failed to protect Melinda, noting that even though she was afraid, she still testified, only to be murdered by appellant. (RT 2867.) The prosecutor continued to argue as follows:

> And when you look at what - - like Sandra Ramirez, she's told to tell this girl, don't testify, and she does, and then Sandra Ramirez has been used as a pawn to get her there to be executed. Sandra Ramirez is told about - - again like we're talking about, dues and [the Mexican Mafia], he's already got someone working on it. And then she sees the person that he supposedly cares about - - and obviously he did in his own selfish way - - murdered.

Think about any witness. If you think about it, if they were to find out that they - - you just happen to be - - unfortunately witness a crime and you go to court and say the right thing and you find out, like Zury Terry, by the way, he killed the last witness that testified in this case, that his reach extended beyond the walls of his cell.

These witnesses have courage to try and do the right thing. They know the obligations that are placed upon them as well, the obligations that is placed upon all of us as citizens, that we at least try. But who would not hesitate knowing that? Who would not hesitate knowing that? Who would not hesitate knowing that a person such as [appellant] here has connections?

Remember, Sandra Ramirez received that letter. Just think about what trust these witnesses, these victims place in us, and it is your job to make sure that, through your search of justice and through your looking at what is the appropriate penalty, that that trust is not misplaced. Because if people ever feel that that trust is misplaced, we will not be able to function as a society. We cannot do anything but fall in some sort of chaos if people do not trust this system, do not even - - if they have certain misgivings, at least be able to say it is my duty to believe in this system, I will try and follow this, and place their lives, their need for justice in your hands.

What they must know is that if anything does happen to them or their families, that there is - - that it will not go unaddressed, that we, as a society, take this seriously, as a complete affront to the very core of our system, and that their trust is not misplaced and that yes, we will try to know their hearts, know what has been done to them, what damage has been done to them. And that we will say, yes, I've tried to know your heart, I've tried to know the emptiness that survivors feel, I've tried to

know the courage of the witnesses that are willing to come in. I've tried all of this, and I've looked at the defendant as well, and so then it comes back to you to say - - you look at the defendant and you'll have to say to him, I know what you are. I know what you've done. And we will not, we cannot, if we're to survive as a society, tolerate this. It cannot be done. It cannot be accepted. You have to say to him very clearly that this was way over the line. And that if you have anything to say about it at all, he will never be put in a position where he will be able to do this again.

(RT 2868-2870.)

At this point, appellant's counsel objected on grounds of "improper argument." The trial court noted the objection, but made no ruling. (RT 2870.) The prosecutor continued his argument by asking the jurors to consider the nature of the crime, and the courage of the witnesses who testified, including Melinda. He argued that although Melinda may not have realized the danger of testifying, the witnesses who followed her did. (RT 2870.) The prosecutor continued:

And if they had the courage to put their faith and their trust in this system, I'm asking you to have the courage to take a look at this and come back and - - look at your hearts and come back and say, justice demands this. We know what justice demands, and justice demands the ultimate penalty from this defendant. Justice demands the death penalty.

I know that's not - - don't think those words come easily off my lips. But I trust that when you look and consider what we're talking about here, what this means to us, what is the moral and just verdict, that you will come back with the death penalty. Thank you.

(RT 2870-2871.)

B. The Alleged Appeals To Passion Or Prejudice

Appellant first argues that the prosecutor committed misconduct by making comments calculated to arouse the jury's passion or prejudice by improperly urging the jury to protect Sandra Ramirez and Alma Cruz. (AOB 116-122.) He further argues that the prosecutor improperly told the jury that the rule of law depended on the imposition of the death penalty. (AOB 121-122.) These contentions are waived due to the failure to object on grounds of prosecutorial misconduct and the failure to request a curative admonition. The claims also fail on the merits.

In support of his argument that the prosecutor improperly urged the jury to protect Ramirez and Cruz, appellant notes that the prosecutor argued that appellant subjected Ramirez and Cruz to a continuing nightmare. Appellant next observes that the prosecutor concluded by telling the jury to protect Ramirez and Cruz, and that the future of our society was in the jurors' hands. Appellant finally asserts that the prosecutor told the jury the only way to accomplish this goal was to put appellant to death so he would never be in a position to "do this again." (AOB 119, citing RT 2856, 2869, 2870.) Of the statements appellant currently challenges, his trial counsel only objected when the prosecutor argued that the death penalty was appropriate so that "[Appellant] will never be put in a position where he will be able to do this again." (RT 2870.) Appellant's trial counsel objected to the latter comment on grounds of "improper argument." The trial court responded that the objection was noted. (RT 2870.)

Appellant did not object to the first two challenged comments. Although he objected to the final comment on grounds of "improper argument," he did not assign prosecutorial misconduct, nor did he ever obtain a ruling on the objection. Finally, with respect to all of the challenged comments, appellant never sought a curative admonition. Accordingly, appellant's claims of

prosecutorial misconduct have been waived. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

In any event, there was no misconduct. While it is misconduct for a prosecutor to "make comments calculated to arouse passion or prejudice" (see *People v. Mayfield* (1997) 14 Cal.4th 668, 803), there is a wider range of permissible argument in the penalty phase of a capital trial. As this Court has explained:

> Although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase [citation], at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience.

(*People v. Haskett* (1982) 30 Cal.3d 841, 863; see also *People v. Cox* (2003) 30 Cal.4th 916, 966.)

In the instant case, the prosecutor's argument was not so inflammatory as to be overly prejudicial. (See *People v. Smith* (2003) 30 Cal.4th 581, 634.) The prosecutor's argument focused on the evidence and the circumstances of the crime, which was permissible under section 190.3, subdivision (a). The prosecutor urged the jury to find that a murder committed for the purpose of preventing a witness from testifying was a particularly aggravated form of murder, because it undermined the entire criminal justice system. Such argument was permissible in the penalty phase of a capital case. (Cf. *People v. Mayfield*, *supra*, 14 Cal.4th at p. 803 [argument suggesting murder of a police officer was a particularly aggravated form of murder was permissible in penalty phase of capital case].)

Moreover, to the extent appellant claims the prosecutor committed misconduct by suggesting that appellant would pose a danger as long as he was imprisoned (see AOB 120), this contention is meritless. This Court has repeatedly held that argument directed at a defendant's future dangerousness is permissible at the penalty phase of a capital trial, provided that it is based on evidence of the defendant's past conduct rather than expert testimony. (*People v. Bradford* (1997) 14 Cal. 4th 1005, 1064; *People v. Fierro, supra*, 1 Cal.4th at p. 249; *People v. Davenport* (1985) 41 Cal.3d 247, 288.)

C. Contrasting Life In Prison With The Victim's Family Visiting Melinda's Grave Site

Appellant also argues that the prosecutor improperly contrasted life in prison with the victim's family visiting Melinda's grave site. He claims that the argument was an inflammatory call for vengeance and improperly used the victim impact evidence. (AOB 122-126.) Once again, this claim has been waived. Although appellant's counsel objected, the trial court did not make a ruling on the objection. Appellant's counsel never pressed for a ruling, nor did he request an admonition. (RT 2866.) Because an admonition could have cured any harm, appellant's claim has been waived. (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

In any event, the contention is meritless. The prosecutor's argument that if appellant was sentenced to life in prison he would still be able to read, watch television, exercise, and maintain relationships with family and friends, while the victim's family could only visit Melinda's grave site, merely stated the obvious. Due to Melinda's death, her family could have no further contact with her other than visiting her grave site. Furthermore, the prosecutor's comment was based on the evidence, Melinda's stepmother had testified that they visited Melinda's grave on holidays. (RT 2811.) Nor did the argument call for

vengeance. Although Melinda's grandmother testified that she was obsessed with thoughts of revenge, she never stated any opinion regarding the appropriate penalty. (RT 2818-2819.)

Finally, any misconduct was harmless. The prosecutor's penalty phase argument stressed that the jury was guided by CALJIC No. 8.85 with respect to the applicable aggravating and mitigating factors. (RT 2847-2848.) Moreover, the focus of the argument was on the circumstances of the crime, not on any improper appeals to passion or prejudice. Any improper argument was brief and isolated. Reversal is not warranted.

XV.

THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURORS TO DISREGARD APPELLANT'S RESTRAINTS IN REACHING THE PENALTY VERDICT

Appellant contends the trial court erred in failing to instruct the jury, sua sponte, to disregard his restraints in reaching the penalty verdict. Appellant claims the failure to so instruct violated his right to due process, to a fair and impartial jury, and to a reliable penalty verdict. (AOB 128-131.) Respondent submits the trial court had no sua sponte duty to instruct the jury to disregard restraints that were not visible.

A. The Relevant Proceedings Below

During the guilt phase, the trial court interrupted Sandra Ramirez's direct examination and asked the jurors to leave the courtroom. (RT 1224.) Outside the presence of the jury, the trial court explained that it had done so because it appeared that Ricardo might be ill. The trial court stated that Ricardo had bent over from the waist, and the sheriff's deputy had placed a garbage can next to

him. At that point, the court had excused the jury. Once the jury had exited, Ricardo knocked the garbage can to one side, and the sheriff's deputies responded to Ricardo. As they did so, appellant started moving in his chair, attempting to get out of it or move with the chair. The trial court pushed the "panic button," and several additional sheriff's deputies arrived and subdued appellant and Ricardo. (RT 1225-1226.)[37/]

The trial court solicited suggestions from counsel on how to avoid further incidents. The prosecutor suggested that appellant's and Ricardo's hands should be restrained. The prosecutor stated that during the scuffle, appellant had scratched him and had attempted to get a hold of the bailiff as well. The prosecutor argued that restraining the defendants' hands would reduce the risk to the sheriff's deputies, and noted that this could be done in such a way that was not visible to the jury. (RT 1242.) Appellant's counsel responded that he would object to any restraint that was visible to the jury. (RT 1243.) The trial court asked the bailiff whether it was possible to restrain the defendants with handcuffs that would not be visible to the jury. (RT 1244.) The bailiff replied,

> [BAILIFF]: I think so, your Honor. On the front of the belt, the restraining belt, it has a D-ring on the front of it that we can run the handcuffs through, and that would lock their hands down at waist level, but in front. I don't know what you want to use to cover it from there, but that would be possible. It would be under the desk, at least for [appellant] and if we move [Ricardo] forward, his, too, would be under the desk.

(RT 1245.)

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37. Apparently, both appellant and Ricardo had been "belted in" to their chairs. (RT 1240; see also RT 92 [discussion of chairs with restraints that are not visible to jurors].)

The trial court stated that it would consider handcuffs for appellant but not Ricardo. Based on where appellant and Ricardo were sitting, the jury would not be able to see handcuffs on appellant, although it would be able to see handcuffs on Ricardo. The court also stated that it would consider whether to use a "react belt" on appellant and Ricardo. (RT 1249.)

When the proceedings resumed the following day, appellant was restrained with a security belt attached to the back of his chair, and also by handcuffs attached to a "'D' ring" in the front of the security belt. Appellant's counsel objected to the use of the handcuffs, arguing that they were unnecessary. (RT 1257.) Appellant's counsel further argued that the jury might be able to see or hear the handcuffs. (RT 1258.)

The trial court stated that based on the outburst, it had the discretion to remove both defendants from the courtroom or to have them wear electric belts. However, the court elected have the defendants wear handcuffs, "the most minimal, additional kind of restraint on them to insure as best we can without prejudicing the defendants in some way to assure that the safety and security of the courtroom can be accommodated." (RT 1261.) The trial court further concluded that, "unless the defendants make it so, the jury will not know that they are in cuffs." (RT 1262.)

At the penalty phase, the prosecution called Deputy Sheriff Angela Perez to testify about an incident at the county jail in which appellant committed a battery on a correctional officer. The prosecutor asked Deputy Perez to describe how she handcuffed him on the day of the jail incident. Deputy Perez responded as follows:

> With the chains in my hand. They're similar - - I don't know what he's wearing now, but it's a handcuff on each end and it - - it's got a chain, and I was holding him like this. As I'm walking over to him - -

he was sitting on the bench. I could see his hands clenched like this - - is when I told Deputy Romo again to call for backup.

(RT 2792.)

Appellant's counsel did not object and never requested that the jury be instructed to disregard appellant's restraints. Nor did the trial court sua sponte instruct the jury to disregard appellant's restraints. (See RT 2792.)

B. There Was No Sua Sponte Duty To Instruct The Jury To Disregard The Restraints

When a trial court concludes that a defendant must wear *visible* restraints, the court has a sua sponte duty to instruct the jury that such restraints should have no bearing on the determination of the defendant's guilt. (*People v. Duran* (1976) 16 Cal.3d 282, 291-292.)

> However, when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided.

(*Ibid.*)

In the instant case, there is no indication that the restraints were visible to the jury. While Deputy Perez's testimony could be interpreted as suggesting that appellant was wearing some form of handcuffs, it was equivocal. Deputy Perez testified that she did not know what appellant was wearing at trial, indicating that restraints, if any, were not visible to her. The jurors could have inferred that appellant was not wearing any form of restraints, since Deputy Perez abandoned any attempt to compare the handcuffs appellant was wearing at the time of the jail incident to any restraints he was wearing in the courtroom. (RT 2792.) Because no restraints were visible and it was not clear that the jurors were aware that appellant was wearing restraints, the trial court had no

sua sponte duty to instruct the jury to disregard appellant's restraints. Such an instruction would have risked drawing initial attention to appellant's restraints. (Cf. *People v. Medina* (1996) 11 Cal.4th 694, 761 (*Medina II*) [where it was doubtful any jurors saw the defendant in shackles for more than a few seconds, and the defendant was absent from a large portion of the trial due to disruptive conduct, "a cautionary instruction could have called undue attention to the fact that defendant was a shackled, dangerous man"].)

In any event, any possible error was harmless. In *People v. Medina* (1990) 51 Cal.3d 870, 898 (*Medina I*), this Court held that any error in failing to instruct the jury to disregard a defendant's restraints during the sanity phase of the proceedings was harmless. This Court observed that the risk of substantial prejudice to a shackled defendant decreases after a finding of guilt. (*Ibid.*) In *People v. Slaughter* (2002) 27 Cal.4th 1187, 1214, this Court cited *Medina I* with approval and concluded that under any standard, it did not appear that the jury's penalty phase verdict would have been affected even if the jurors were aware that the defendant was wearing a restraint, since the jurors knew the defendant had been convicted of murdering two people during the commission of a robbery. Likewise, in the instant case, there is no indication that the jurors were aware of appellant's restraints during the guilt phase. Although it is possible that Deputy Perez's testimony in the penalty phase alerted the jurors to the possibility that appellant was wearing restraints, the reference was fleeting. Any error was harmless, and appellant's claim should be rejected.

XVI.

ANY ERROR IN FAILING TO DEFINE REASONABLE DOUBT AT THE PENALTY PHASE OR IN FAILING TO INSTRUCT THE JURY ON HOW TO CONSIDER PENALTY PHASE EVIDENCE WAS HARMLESS

Appellant claims the trial court's penalty phase instructions failed to provide appropriate guidance to the jury, and that the error was structural, requiring reversal. (AOB 132-139.) Respondent submits any possible error was not structural in nature, and was clearly harmless.

In the penalty phase, the trial court instructed the jury on the applicable law governing the penalty phase and instructed the jury to "disregard all of the instructions given to you in other phases of this trial." (RT 2883.) Evidence of one prior criminal act, battery on a peace officer, was introduced at the penalty phase. With respect to this act, the jury was instructed that it must be satisfied beyond a reasonable doubt that appellant had committed the act before the evidence could be considered as an aggravating circumstance. (RT 2886.) However, the trial court did not provide a definition of reasonable doubt at the penalty phase.

Appellant first claims that the trial court erred in failing to define reasonable doubt at the penalty phase. He asserts that because the trial court instructed the jury to disregard all guilt phase instructions, the jury was left with no definition of reasonable doubt. (AOB 132-134.) In *People v. Holt*, *supra*, 15 Cal.4th at p. 685, this Court addressed a similar argument and found any error harmless. This Court explained:

> Any possible error arising from the court's failure to redefine reasonable doubt was harmless. Having been correctly instructed at the guilt phase on the meaning of reasonable doubt, the jury would not be confused or uncertain regarding the term when resolving a factual issue to which that standard applied at the penalty phase. We note that the

jury did not request a further explanation of the reasonable doubt standard, as it surely would have done had it been confused as to the meaning of reasonable doubt.

(*Ibid.*)

Likewise, in the instant case, the jury did not request an explanation of reasonable doubt, signifying that there was no confusion about the meaning of the term. Furthermore, there was only one alleged prior criminal act involving violence or threatened violence, i.e., the battery upon a correctional officer. In defense counsel's penalty phase argument, he essentially conceded the truth of this allegation, suggesting that this sole, relatively minor incident in a two-year period of incarceration should be construed as a mitigating factor. (See RT 2877.) Accordingly, as in *Holt*, any possible error was harmless.

Appellant also contends that the trial court should have instructed the jury that the guilt phase instructions concerning the consideration of evidence, i.e., CALJIC Nos. 2.20 [Credibility Of Witnesses], 2.70 [Confessions And Admissions Defined], and 2.71 [Admissions Defined], were still relevant and continued to apply in the penalty phase. This Court has held that the failure to reinstruct on applicable evidentiary principles after instructing the jury pursuant to CALJIC No. 8.84.1 in the penalty phase is subject to harmless error review. (*People v. Moon* (2005) 32 Cal.Rptr.3d 894, 921; *People v. Carter* (2003) 30 Cal.4th 1166, 1221.) The relevant inquiry is whether it is likely that the omitted instructions affected the jury's evaluation of the evidence. (*People v. Moon*, *supra*, 32 Cal.Rptr.3d at p. 922.) In *Moon*, this Court concluded that, "the penalty phase evidence was entirely straightforward, and the trial court's failure to reinstruct the jury with any applicable guilt phase instructions was harmless under any standard." (*Ibid.*)

Similarly, in the instant case the evidence in the penalty phase was very straightforward. The prosecution called a total of five witnesses in the penalty

phase, and the defense called no witnesses. The prosecution's witnesses included two sheriff's deputies who testified about appellant's battery on a correctional officer at the jail, as well as three of the victim's family members who provided victim impact testimony. Defense counsel engaged in very limited cross-examination of the two sheriff's deputies. The cross-examination was apparently designed to establish that such skirmishes were not unusual in a custodial setting, and that correctional officers are trained to deal with such circumstances. In closing argument, defense counsel did not dispute that the jail incident occurred but rather attempted to downplay its significance by suggesting that only one minor incident in two years of incarceration should be considered as a mitigating circumstance. (RT 2877.) Defense counsel did not cross-examine any of the victim's family members, nor did he challenge the veracity of their testimony in closing argument. In light of the complete absence of any conflicts in the penalty phase evidence, any possible error in failing to reinstruct on relevant evidentiary principles was harmless under any standard. (See *People v. Moon*, *supra*, 32 Cal.Rptr.3d at pp. 921-922.)

XVII.

INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED

Appellant claims that California's failure to conduct intercase proportionality review of death sentences violates his Eighth and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment. (AOB 140-143.) This Court has previously rejected the claim that such review is required. (See *People v. Snow*, *supra*, 30 Cal.4th at pp. 126-127; *People v. Kipp* (2001) 26 Cal.4th 1100, 1139; *People v. Lucero* (2000) 23 Cal.4th 692, 741.) Accordingly, appellant's claim should likewise be rejected.

XVIII.

CALIFORNIA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL

Appellant raises a variety of constitutional challenges to the California death penalty statute and instructions, all of which have been previously rejected by this Court. (AOB 144-171.) Because appellant offers no compelling reason for reconsideration, his claims should likewise be rejected.

Appellant claims that the California death penalty statute unconstitutionally fails to define the burden of proof on whether an aggravating circumstance exists, whether the aggravating factors outweigh the mitigating factors, and whether death is the appropriate penalty. (AOB 144-157.) This claim has been previously rejected by this Court. (See *People v. Maury* (2003) 30 Cal.4th 342, 440.) So has appellant's claim urging that a proof-beyond-a-reasonable-doubt standard is required for finding the existence of an aggravating circumstance (see *People v. Snow*, *supra*, 30 Cal.4th at p.126), that aggravating circumstances outweigh mitigating ones (*ibid.*), and that death is the appropriate punishment (see *People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.)

Insofar as appellant contends that the jury should have been instructed on some standard of proof to guide its decisions on whether to impose the death penalty (AOB 163-166), this claim has been rejected in prior decisions of this Court, and should be rejected here. (*People v. Box*, *supra*, 23 Cal.4th at p. 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418.) Insofar as appellant contends that the United States Supreme Court's decisions in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*), *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (*Ring*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 148 L.Ed.2d 435] (*Apprendi*) compel a different conclusion (see AOB 151-

157), this Court has squarely rejected this argument. (See *People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731.)

Finally, appellant argues that the penalty phase instructions violated his constitutional rights because they did not require the jury to unanimously agree as to the aggravating factors. (AOB 166-169.) However, this Court has repeatedly held that juror unanimity is not required for the aggravating factors. (*People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Horning* (2004) 34 Cal.4th 871, 913; *People v. Brown* (2004) 33 Cal.4th 382, 402.) Recent decisions by the United States Supreme Court in *Ring* and *Blakely* have not changed this conclusion. (See *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Brown, supra*, 33 Cal.4th at p. 402; see also *People v. Cox* (2003) 30 Cal.4th 916, 972.) Moreover, the failure to require unanimous agreement on the aggravating factors does not lead to an unreliable sentencing determination that violates the Eighth Amendment. (See *People v. Jackson, supra*, 13 Cal.4th at p. 1246; *People v. Raley, supra*, 2 Cal.4th 870, 910.) Thus, appellant's claim must be rejected.

XIX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ITS SENTENCING DISCRETION PURSUANT TO CALJIC NO. 8.88

Appellant contends the trial court's use of CALJIC No. 8.88 in instructing the jury at the penalty phase resulted in numerous errors due to alleged flaws in that instruction.[38] (AOB 172-183.) Because similar challenges to this instruction have been repeatedly rejected by this Court, appellant's contention likewise should be rejected.

Appellant claims the instruction is impermissibly vague in that it states that to return a verdict of death, each juror must be persuaded the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances that it warrants death rather than life without the possibility of parole. Appellant contends the instruction's use of the phrase "so substantial" is impermissibly vague, directionless, and impossible to quantify. (AOB 173-176.) This contention has been previously rejected by this Court and appellant offers no persuasive reason for reconsideration of the prior rulings. (See *People v Carter*, *supra*, 30 Cal.4th at p. 1226; *People v. Boyette*, *supra*, 29 Cal.4th at p. 465.)

Appellant further argues that the instruction told the jurors they could return a judgment of death if persuaded the aggravating circumstances were so substantial in comparison to the mitigating circumstances that it "warrants" death, and that the use of the word "warrants" did not inform them they could return a verdict of death only if they found that penalty was appropriate, not merely authorized. (AOB 176-178.) This claim has been previously rejected (see *People v. Boyette*, *supra*, 29 Cal.4th at p. 465), and should be rejected in

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38. The text of CALJIC No. 8.88, as read by the trial court, is set forth in its entirety at pages 2889 through 2891 of the Reporter's Transcript. (See also CT 1103-1104.)

this case, especially since the trial court below expressly informed the jury that "[i]n weighing the various circumstances you determine under the relevant evidence which penalty is *justified and appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (RT 2890, emphasis added.)

Appellant also complains the instruction failed to inform the jurors that if they determined the mitigating evidence outweighed the aggravating evidence, they were required to return a sentence of life without parole. (AOB 178-182.) No such instruction was required. (*People v. Moon* (2005) 2005 WL 1981450.)

Finally, appellant contends the instruction was defective because it failed to inform the jury that, under California law, neither party in a capital case bears the burden of persuading the jury of the appropriateness or inappropriateness of the death penalty. Appellant argues that the jury must be clearly informed of the applicable standards, so that it will not improperly assign the burden to the defense. (AOB 182-183.) This Court has held that except for proof of other crimes, a trial court should not instruct at all on the burden of proof at the penalty phase, because the sentencing decision is inherently a moral and normative one rather than a factual one, and is thus not susceptible to such quantification. (*People v. Box, supra,* 23 Cal.4th at p. 1216; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Insofar as appellant cites *People v. Hayes* (1990) 52 Cal.3d 577, 643, for the proposition that the jury must be given an instruction on the lack of burden of proof at the penalty phase (AOB 182-183), the case does not hold that such an instruction must be given. Based on the foregoing, appellant's challenge to CALJIC 8.88 should be rejected.

XX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING AND MITIGATING FACTORS IN PENAL CODE SECTION 190.3

Appellant contends the instructions regarding the mitigating and aggravating factors in section 190.3 and the application of these sentencing factors rendered his death sentence unconstitutional. (AOB 184-201.) The claims raised by appellant have been repeatedly rejected by this Court and should be rejected here.

Appellant first argues that instructing the jury on the sentencing factors of section 190.3, subdivision (a), which directs the jury to consider as aggravation the "circumstances of the crime" resulted in the arbitrary and capricious imposition of the death penalty, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 185-186.) The United States Supreme Court has held that instructing a jury to consider the circumstances of a crime under section 190.3, subdivision (a), does not violate the Eighth Amendment. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Furthermore, this Court has repeatedly rejected the argument that allowing the jury to consider the circumstances of the crime as a factor in aggravation results in arbitrary and capricious application of the death penalty. (See *People v. Schmeck* (2005) 2005 WL 2036176; *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Smith*, *supra*, 35 Cal.4th at p. 373; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Accordingly, appellant's claim should be rejected.

Appellant next argues that instructing the jury that it could consider as an aggravating factor unadjudicated criminal activity involving force or violence under Penal Code section 190.3, subdivision (b), violated his federal constitutional rights to due process, equal protection, and a reliable penalty determination, and that to the extent the evidence was permissible, the failure

to instruct on the requirement of jury unanimity violated appellant's rights to a jury trial and to a reliable penalty determination. (AOB 187-194.) This claim has been rejected in prior decisions of this Court, and should be rejected here. (*People v. Turner* (2004) 34 Cal.4th 406, 439; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.)

Appellant also argues that the failure to delete inapplicable statutory sentencing factors in CALJIC No. 8.85 introduced confusion, capriciousness, and unreliability in the capital decision-making process, in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 195-196.) This Court has previously rejected this argument. (*People v. Dickey* (2005) 35 Cal.4th 884, 928; *People v. Box* (2000) 23 Cal.4th 1153, 1217 Appellant offers no compelling reason for this Court to reconsider its previous decisions on this issue. Accordingly, appellant's contention should be rejected.

Appellant claims that the use of "restrictive" adjectives such as "extreme" (factors (d) and (g)) and "substantial" (factor (g)) in the list of mitigating factors in section 190.3 acted as a barrier to the consideration of mitigating evidence, in violation of the Sixth, Eighth, and Fourteenth Amendments. (AOB 196.) This claim has been previously rejected by this Court and should be rejected here. (*People v. Morrison*, *supra*, 34 Cal.4th at pp. 729-730; *People v. Lewis*, *supra*, 26 Cal.4th at p. 395.)

Appellant further argues that the failure to require the jury to base a death sentence on written findings regarding the aggravating factors violated his due process right to meaningful appellate review and his right to equal protection of the law under the Eighth and Fourteenth Amendments. (AOB 197-199.) This Court has previously held that written findings on aggravating factors used as a basis for imposing the death penalty are not constitutionally required. (*People v. Kraft* (2000) 23 Cal.4th 978, 1078.) Accordingly, appellant's claim should be rejected.

Lastly, appellant argues that California's death penalty statute violates the constitutional guarantee of equal protection because it affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. (AOB 199-201.) This claim has been previously rejected and should be rejected here. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1182.)

XXI.

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant claims California's death penalty procedure violates the International Covenant of Civil and Political Rights ("ICCPR"), an international treaty to which the United States is a party. (AOB 202-216.) Appellant fails to demonstrate that he raised this specific constitutional claim in the trial court; respondent therefore submits that his claim is not cognizable on appeal. (See *People v. Burgener*, *supra*, 29 Cal.4th 833, 869 ["It is elementary that defendant waived these claims by failing to articulate an objection on federal constitutional grounds below"]; *People v. Catlin*, *supra*, 26 Cal.4th at p. 122; *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13.) Moreover, assuming for argument's sake his claim is reviewable, this Court has rejected the notion that California's death penalty statute somehow violates international law.

Appellant has failed to establish the basic prerequisite: that his trial involved any violations of state and/or federal law. (See *People v. Bolden* (2002) 29 Cal.4th 515, 567; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) Morever, he fails to demonstrate standing to invoke the jurisdiction of international law in this proceeding because the principles of international law apply to disputes between sovereign governments, not individuals. (*Hanoch Tel-Oren v. Libyan*

Arab Republic (D.C. 1981) 517 F.Supp. 542, 545-547.) Appellant does not have standing to raise claims that his conviction and sentence resulted from violations of international treaties. Article VI, section 2, of the United States Constitution provides, in pertinent part, that the Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land. Treaties are contracts among independent nations. (*United States v. Zabaneh* (5th Cir. 1988) 837 F.2d 1249, 1261.) Under general principles of international law, individuals have no standing to challenge violation of international treaties in absence of a protest by the sovereign involved. (*Matta-Ballesteros v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; *United States ex rel. Lujan v. Gengler* (2d Cir. 1975) 510 F.2d 62, 67.)

Treaties are designed to protect the sovereign interests of nations and it is up to the offended nations to determine whether a violation of sovereign interests occurred that requires redress. (*Matta-Ballesteros v. Henman, supra*, 896 F.2d at p. 259, and cases cited therein.) It is only when a treaty is self-executing, that is when it prescribes rules by which private rights may be determined, that it may be relied upon by individuals for the enforcement of such rights. (*Dreyfus v. Von Finck* (2nd Cir. 1976) 534 F.2d 24, 30.)

In order for a provision of a treaty to be self-executing without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts. (*Fujii v. State of California* (1952) 38 Cal.2d 718, 722.) In determining whether a treaty is self-executing, courts look to the following factors: (1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.

(*Frolova v. Union of Soviet Socialist Republics* (7th Cir. 1985) 761 F.2d 370, 373; *American Baptist Churches in the U.S.A. v. Meese* (N.D.Cal. 1989) 712 F.Supp. 756, 770.)

In this case, appellant fails to cite any persuasive authority that the treaty he relies upon is self-executing. No language in the ICCPR appears to create rights in private persons. Therefore, appellant is incapable of asserting a personal cause of action under the ICCPR.

Finally, as previously decided by this Court, this claim lacks merit. (See *People v. Snow*, *supra*, 30 Cal.4th at p. 127 ["International law does not compel the elimination of capital punishment in California."]; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 778-779; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *People v. Ochoa*, *supra*, 26 Cal.4th at p. 462.) In *Ghent*, this Court held that international authorities similar to those now invoked by appellant do not compel elimination of the death penalty and do not have any effect upon domestic law unless they are either self-executing or implemented by Congress. (*People v. Ghent*, *supra*, 43 Cal.3d at p. 779; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; see *People v. Ochoa*, *supra*, 26 Cal.4th at p. 462 [rejecting claim that California's death penalty law violates international norms].)

In sum, appellant waived this claim and has no standing to invoke international law as a basis for challenging his state conviction and judgment of death. Moreover, appellant has failed to state a cause of action under international law for the simple reason his claims of due process violations asserted throughout the appeal are without merit. Further, this Court is not a substitute for international tribunals and, in any event, American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal and state

statutory or judicial law. Finally, this Court's earlier conclusions in *Ghent*, *Hillhouse*, *Jenkins*, *Ochoa*, and *Snow* preclude relief.

For all the foregoing reasons, appellant's challenges to the death penalty, if reviewable, are meritless. (See *People v. Price*, *supra*, 1 Cal.4th at p. 490; *People v. Pride* (1992) 3 Cal.4th 195, 268-269.)

XXII.

NO REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ALLEGED ERRORS

Appellant contends his conviction and death sentence should be reversed based upon the cumulative effect of alleged errors. (AOB 217-220.) For the reasons stated as to each of the arguments appellant has raised in this appeal, there were no errors requiring reversal of the guilt or penalty verdicts.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: December 15, 2005.

Respectfully submitted,

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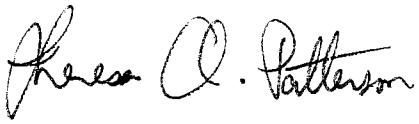

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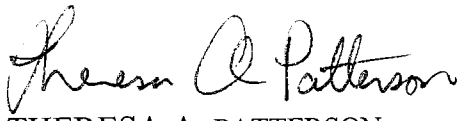
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 43760 words.

Dated: December 15, 2005.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE

Case Name: **People v. Juan Manuel Lopez (CAPITAL CASE)** No.: **S073597**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 16, 2005, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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Attention: Michael Millman
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San Francisco, CA 94105-3647

Los Angeles County Superior Court
Van Nuys Courthouse West
Northwest District
14400 Erwin St. Mall
Van Nuys, CA 91401-2705
FOR DELIVERY TO:
HON. MEREDITH C. TAYLOR, Judge

John Nantroup
Deputy District Attorney
Los Angeles County
District Attorney's Office
Clara Shortridge Foltz Building
210 West Temple Street
Los Angeles, CA 90012-3210

On December 16, 2005, I caused fifteen (15) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at **Ronald Reagan Bldg., 300 S. Spring Street, Fl. 2, Los Angeles, CA 90013-1233** by **Personal Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 16, 2005, at Los Angeles, California.

C. Damiani
Declarant

C. Damiani
Signature

TAP/cd
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