In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TODD JESSE GARTON,

Defendant and Appellant.

CAPITAL CASE

Case No. S097558

Shasta County Superior Court Case No. 98F4493
Honorable Bradley Boeckman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On October 8, 1998, the Shasta County District Attorney filed an information in case 98F4493 charging appellant, Todd Jesse Garton, and a codefendant, Lynn Noyes, with two counts of murder with special circumstances and three counts of conspiracy to commit murder. Count 1 charged the defendants with the murder of appellant's wife, Carole Garton, in violation of Penal Code section, 187, subdivision (a).[1] Count 2 charged them with the murder of Carole Garton's fetus (§ 187, subd. (a)). Two special circumstances were alleged with respect to each count: murder for financial gain (§ 190.2, subd. (a)(1); alleged only as to appellant) and multiple murders (§ 190.2, subd. (a)(3)). The defendants were charged in counts 3 and 4 with conspiracy to kill Carole Garton and her fetus, respectively, in violation of sections 182, subdivision (a)(1) and 187, subdivision (a). In count 5, they were charged with conspiracy to kill Noyes's husband, Dean Noyes (§§ 182, subd. (a)(1), 187, subd. (a)). For each count, it was alleged that a principal in the offense was armed with a firearm. (2 CT 86-91.)

On January 11, 1999, the trial court severed the cases against the two defendants. (4 CT 460; 1 RT 557-558.) On June 21, 1999, Lynn Noyes pled guilty to counts 1 and 5 and was sentenced to 25 years to life in prison. (5 CT 887-892; 17 RT 5034-5042.) As part of her plea bargain, Noyes agreed to testify against appellant. (2-CT 887-892.)

On July 13, 2000, appellant filed a motion to dismiss count 5 (conspiracy to kill Dean Noyes) for lack of jurisdiction on the ground that

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[1] All subsequent statutory references are to the Penal Code unless otherwise specified.

the attempted killing of Dean Noyes occurred outside of California. (5 CT 749-757.) The trial court denied the motion. (5 CT 929.)[2]

Jury selection began on October 24, 2000. (6 CT 1303; 21 CT 6227-6228, 6244.) The prosecution began presenting evidence on December 5, 2000, and both sides rested on March 15, 2001. (21 CT 6287-6288; 26 CT 7503-7507; 28 CT 8150-53, 8165-8168.) On March 22, 2001, after less than six hours of deliberations, the jury found appellant guilty on all counts and found all the special allegations true. (29 CT 8363-8367.)

The penalty phase began on March 27, 2001. (30 CT 8754-8756.) On March 28, the jury returned a verdict of death. (30 CT 8769-8771.)

On April 27, 2001, the trial court denied appellant's motion to modify the verdict to sentence him to life in prison without parole. Accordingly, it sentenced him to death on counts 1 and 2. It also sentenced him to 25 years to life, plus one year for the firearm enhancement on each of counts 3, 4, and 5. However, sentences on counts 3 and 4 were stayed pursuant to section 654. (31 CT 8903-8908.) That same date, the trial court issued a death warrant for appellant. (31 CT 8929-8931.)

Appellant's appeal is automatic under subdivision (b) of section 1239.

STATEMENT OF FACTS

A. Overview

Planning to start a new life with his paramour and avoid the responsibilities of fatherhood, appellant masterminded the killing of his pregnant wife by creating a fictitious assassination network and recruiting a financially desperate friend to accept a paid assignment from it. Inspired by espionage movies and news articles about the Irish Republican Army,

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[2] Appellant filed a petition for writ of mandate in the Third District Court of Appeal, which denied the petition on September 1. (6 CT 1148-1236, 1240.)

appellant created a fictitious entity called "The Company," headed by his alter ego, "Colonel Sean." Through this entity, appellant ordered his friend Norman Daniels to kill Carole Garton for purportedly betraying the IRA.

Appellant not only recruited Daniels, but he also purchased the murder weapon and suggested opportunities for the killing. Appellant also recruited Lynn Noyes, his lover, to keep tabs on Daniels and encourage him to complete his assignment. Believing appellant's warnings that he or his family would be killed by "Colonel Sean" if he did not act, Daniels walked into Carole Garton's bedroom in the Shasta County town of Cottonwood on May 16, 1998, and shot her repeatedly at close range as she lay in bed, killing her and her eight-month-old fetus.

The murder of Carole Garton and her fetus occurred three months after appellant, Daniels and a third man, Dale Gordon, attempted to kill Lynn Noyes's husband, Dean Noyes. The three men had traveled to Portland, Oregon, in February 1998 with a cache of weapons. They staked out a parking garage in downtown Portland, planning to shoot Dean Noyes after he exited his parked car on his way to work. When that attempt failed, appellant, Daniels and Gordon tried unsuccessfully to break into the Noyeses' home in Gresham, Oregon, to abduct and/or kill him.

Daniels, Gordon and Lynn Noyes were among the witnesses who testified against appellant, the latter two pursuant to plea bargains. The prosecution also introduced a mountain of circumstantial evidence including: a series of threatening e-mail messages from "Colonel Sean" to Daniels; materials in appellant's residence used to create a "hit package" on Carole; a $125,000 life insurance policy that appellant took out on his wife less than two months before the murder; and a recorded conversation after Daniels's arrest in which appellant assured Daniels that he would be paid.

Appellant denied any prior knowledge of the plans to kill his wife or Dean Noyes, and denied that he was in love with Lynn Noyes. The defense

argued that Lynn Noyes recruited Gordon and Daniels to kill her husband so that she could fulfill her fantasy of reuniting with appellant, her high school boyfriend. The defense also suggested that Gordon and/or Lynn Noyes orchestrated the killing of Carole Garton and pressured Daniels to carry out the murder without appellant's knowledge.

B. Prosecution Case-in-Chief

1. Background[3]

Appellant grew up in Shasta County and moved to Portland, Oregon, with his family in 1985 when he was 15 years old. (27 RT 7745; 28 RT 8078-8079.) Appellant frequently talked to his high school classmates about the Irish Republican Army. He had an "IRA" tattoo on his arm and claimed he had gone to Ireland to assist the group in carrying out acts of violence. (17 RT 5046-5050; 21 RT 6131-6133, 6154-6156.) He also collected news articles about the IRA and taped them inside a book titled, "The Anarchist Cookbook," which included chapters on building and using weapons and explosives. (23 CT 6515-6679; 18 RT 5115-5126.)

Appellant met Lynn Noyes in high school and they began dating.[4] (17 RT 5042; 28 RT 8091-8092.) Appellant later met Carole at an Arby's restaurant where they both worked. (17 RT 5067; 21 RT 6160; 28 RT 8098-8100.) Appellant and Carole began living together in 1987. (28 RT 8102-8104.) In 1989, appellant returned to Shasta County with Carole and graduated from Anderson High School. (28 RT 8090, 8097.) In 1990,

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[3] Some of this background information is taken from appellant's testimony, contained in volumes 27 and 28 of the Reporter's Transcript on Appeal.

[4] For simplicity's sake, respondent will hereafter refer to Lynn Noyes and Dean Noyes by their first names. Respondent also will refer to Carole Garton by her first name to avoid any confusion with appellant.

appellant asked Lynn to marry him; she turned him down because she was dating someone else at the time. (17 RT 5064-5065.)

Appellant joined the Marines in August 1990. (27 RT 7757-58; 28 RT 8115-8116.) While in the service, appellant wrote love letters to Lynn. (17 RT 5069; 28 RT 8117-8118, 8120.) But appellant also proposed to Carole, and they were married in March 1991.[5] (18 RT 5330.)

Appellant was discharged from the Marines as a lance corporal in September 1991. (27 RT 7758-7759.) Appellant and Carole then moved to Bend, Oregon, where appellant worked at various jobs, including as a bartender and a local band promoter. (28 RT 8160-8161, 8166-8168.) In the mid-1990s, the couple returned to Shasta County, and appellant began working for his father's company, G & G Fencing. (28 RT 8171-8173.) He also was a sales representative for Rancho Safari, a company that distributes camouflage gear and archery equipment. (28 RT 8173.)

Appellant told friends that he was a sniper for the government and had participated in several assassinations of drug kingpins and others in South America. (14 RT 4139-4145, 4162; 17 RT 5052-5053; 21 RT 6076-6077; 24 RT 6890, 7035-7036; 26 RT 7394.) He also told several people, including a prospective employer, that he had been a lieutenant in the Marines. (14 RT 4133-4134; 17 RT 5057; 21 RT 6069; 24 RT 6960, 7035-7036; 30 RT 8529, 8531.) He falsely claimed that he had earned a Purple Heart and a Navy commendation, medals which he displayed in his house. (14 RT 4147-4148; 17 RT 5058; 21 RT 6070-6073; 30 RT 8518.) While some friends doubted these claims, others believed appellant. As one long-

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[5] When Lynn learned about the marriage proposal, she sent Carole some of the letters that appellant had written to her in an attempt to prevent the wedding. (17 RT 5069.)

time friend said, "I believe he could sell a refrigerator to an Eskimo." (21 RT 6164.)

Lynn married Dean in May 1992. (17 RT 5071; 23 RT 6755.) In 1995, appellant and Lynn began an affair, having sex in hotels throughout Oregon. (17 RT 5073-5080; 19 RT 5632.) Appellant wrote love letters and poems to Lynn, often calling her "Maliki," his word for angel. (18 RT 5163-5166, 5358.) They wore matching Celtic crosses around their necks, which Lynn had purchased while they were in high school, as a symbol of their love for each other. (17 RT 5082-5084.)

In May 1998, while Lynn was in Shasta County to attend Carole's memorial service, she and appellant had sex in Lynn's hotel room. (19 RT 5379-5387.) A short time later, appellant paid for a credit report on Lynn as the first step in helping her find a rental house in Redding. (26 CT 7529-7530; 19 RT 5390-5393; 24 RT 6872-6874, 6908; 27 RT 7760.)

2. Preparations to Kill Dean

In January 1997, appellant began to discuss plans to kill Dean with his friend Dale Gordon.[6] (21 RT 6108, 6116.) Appellant, who had told Gordon that he was a paid assassin, described the planned killing of Dean as a "freelance hit." (21 RT 6109-6111, 6188.) Appellant told Gordon that he expected to collect $25,000 in insurance proceeds if Dean was killed, and he offered Gordon a share of those proceeds to assist him.[7] (21 RT 6116-6117, 6188, 6195.) At that time, Dean had a life insurance policy for about $125,000. (18 RT 5113; 24 RT 6791.) Desperate for money after his

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[6] Gordon testified pursuant to a plea agreement in which he pled guilty to attempted murder of Dean Noyes in return for a prison term of 10 years. (2 CT 881-886; 21 RT 6061-6062.)

[7] Gordon testified that appellant initially promised him $25,000, but lowered the figure to $10,000 and then to $5,000. (21 RT 6195.)

vehicle alignment business had just failed, Gordon agreed to participate.[8] (21 RT 6114, 6188-6189.) A gun enthusiast and a former mechanic in the Marines, Gordon believed appellant's claims of being a paid assassin because "Marines are always faithful to one another." (21 RT 6068, 6077.)

In the fall of 1997, appellant told Lynn that he knew people who could kill Dean if that is what she wanted. (18 RT 5111.) Appellant also told Lynn that he had learned Dean was having an affair with another woman. (18 RT 5109-5111.) Lynn later confirmed her husband's affair through the woman's husband. She then told appellant, "Go ahead and take him out." (18 RT 5110-5111.)[9]

In October 1997, appellant began to discuss plans to kill Dean with another friend, Norman Daniels.[10] (14 RT 4195.) Appellant told Daniels that Dean had embezzled money from a hospital and there were several contracts out on his life. Appellant said he was planning to kill Dean and collect on the contracts. (14 RT 4180, 4201-4202.) Appellant asked if Daniels would be interested in serving as a back-up gunman. (14 RT 4150-4152, 4168, 4183, 4192.) Appellant promised to pay Daniels either $1,000 or $10,000 for his assistance.[11] (14 RT 4260.) At the time, Daniels was

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[8] Gordon described himself during that period as suffering from "severe depression, suicidal thoughts, alcoholism." (21 RT 6192.)

[9] As previously noted, Lynn testified pursuant to a plea agreement in which she pled guilty to conspiracy to kill Dean in return for a prison term of 25 years to life. (2 CT 887-892; 17 RT 5034-5035.)

[10] At the time of appellant's trial, Daniels was awaiting his own trial on two counts of first-degree murder and two counts of conspiracy for his involvement in this case. (14 RT 4129-4130.) He testified in appellant's trial without any immunity; indeed a transcript of his testimony was later introduced at his own trial in 2002. (See *People v. Daniels*, C040856.) He was convicted of all four counts, and sentenced to 50 years to life in prison.

[11] Although Daniels testified that appellant promised to pay him $1,000, he apparently told Shasta County sheriff's detectives that appellant promised to pay him $10,000. (14 RT 4260.)

struggling to pay his bills and support his wife and six-year-old son with his job as a gas station attendant. (14 RT 4133, 4154-4155, 4174-4175.) Desperate for money, Daniels agreed to participate. (14 RT 4175-4176, 4181.) Like Gordon, Daniels also believed appellant's claims of being an assassin for the government.[12] (14 RT 4146.)

Appellant initially planned to kill Dean in San Francisco while he was attending a business conference there in January 1998. (14 RT 4193; 19 RT 5638-5639; 22 RT 6283; 24 RT 6869.) But that plan fizzled when Dean's company decided not to send him to the conference. (14 RT 4200; 22 RT 6284-6285; 23 RT 6870.)

In October 1997, Gordon moved into appellant's house on Adobe Road in Cottonwood. (21 RT 6115.) On October 10, appellant and Gordon traveled to the Portland area to "scope out" opportunities to kill Dean. (25 CT 7299 [Exh. 62; hotel receipt]; 14 RT 4200-4201; 21 RT 6197; 22 RT 6205; 27 RT 7752 [stipulation].) While staying at a nearby hotel, appellant and Gordon visited Lynn at her house in the Portland suburb of Gresham. (22 RT 6204-6205; 27 RT 7752.) Appellant drew a diagram of the house and discussed with Lynn possible entry points other than the front door. (22 RT 6211.) Appellant also drove by Dean's office in downtown Portland. (22 RT 6212.) At one point during their visit, Lynn came to appellant's hotel room and they had sex. (17 RT 5075.)

On January 3, 1998, appellant and Gordon traveled to the Eugene/Springfield area, where they met with Lynn and further discussed plans to kill Dean. (25 CT 7350-7351 [Exhs. 195-196; hotel receipts];17 RT 5079-5080; 21 RT 6214-6216; 27 RT 7750-7751 [stipulation].) Lynn spent the night with appellant in his hotel room, while Gordon stayed in a

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[12] In perhaps the greatest understatement of the case, Daniels stated, "I take people at their word. . . I'm a trusting person." (14 RT 4146.)

separate room. (17 RT 5079-5080.) To show Lynn that he was serious about killing Dean, appellant brought several items that he intended to use, including guns, silencers and flexible handcuffs. (21 RT 6218.)

Over the next few weeks, appellant, Daniels and Gordon prepared to return to Portland to kill Dean. Appellant and Daniels went to factory outlet stores to purchase shoes, rain gear and wool caps to help them look like Oregon residents. (14 RT 4213.) They also test-fired Gordon's Tec-9 semi-automatic weapon and appellant's 10-22 Ruger rifle on federal land adjacent to appellant's house. (14 RT 4213-4216, 4220-4221.) Appellant calibrated a scope ("point sight") on the rifle. (14 RT 4222-4223.) Around the same time, Lynn mailed appellant keys to her home and vehicles, as well as photographs of her husband. (14 RT 4231-4232; 15 RT 4347; 18 RT 5144, 5170; 22 RT 6219-6220.) Appellant showed Daniels both of those items outside his house. (14 RT 4231-4232.)

During that same period, appellant showed Gordon and Daniels movies to inspire them to kill, including "Sniper," "The Jackal," "Day of the Jackal" and "La Femme Nikita." (18 RT 5208; 22 RT 6325-6326; 23 RT 6635; 29 RT 8337.) Appellant described these movies as "training videos." (18 RT 5208; 23 RT 6635.)

At some point before leaving California, appellant laid out the primary plan to kill Dean: the three men would follow Dean's Pontiac Fiero into a downtown garage on his way to work and gun him down as he exited the car. (14 RT 4233-4234; 15 RT 4258-4260; 22 RT 6250.) Appellant also laid out a back-up plan: using the keys provided by Lynn, they would enter the Noyeses' house and either kill Dean there or kidnap him to another location and kill him there. (14 RT 4235-4237.)

In late January or early February 1998, appellant, Daniels and Gordon met at the Moose Lodge in Anderson for a "final planning" meeting of the planned trip to the Portland area. (14 RT 4217-4218.) Appellant described

to Daniels and Gordon the streets and rail lines in Gresham and provided them details about their specific roles in the murder plot. (14 RT 4218.)

3. Attempts to Kill Dean in February 1998

On Friday, February 6, 1998, appellant, Daniels and Gordon drove to Portland to carry out their plan to kill Dean. Appellant first picked up Daniels at Daniels's trailer home after work, and brought Daniels to his house. (14 RT 4219, 4237.) They loaded up appellant's Jeep Wrangler with the "equipment" they would need for the mission—Gordon's Tec-9 assault weapon; appellant's Ruger 10-22 rifle with a home-made silencer; appellant's Rossi .357 handgun; appellant's Ram Line .22-caliber pistol; Gordon's Colt .45-caliber pistol; and Gordon's Beretta .22-caliber pistol. (14 RT 4219-4226; 17 RT 4927; 22 RT 6221-6222.) They also took extra ammunition and magazines for the weapons, latex gloves (to avoid leaving fingerprints), a few knives, plastic flexible handcuffs, a first-aid kit, and two walkie-talkies with microphones and earpieces. (14 RT 4219-4220, 4228; 22 RT 6243-6244.)

Appellant then called Gordon's boss at Redding Four Wheel Drive and said that Gordon needed to leave work right away because his mother was having a heart attack. (22 RT 6249-6250.) With that excuse, Gordon left work early and drove to appellant's house. (22 RT 6250.) When he arrived, the Jeep was already loaded and appellant was eager to hit the road. (*Ibid.*) Appellant said, "We need to get there right away. We're fighting time. We're fighting weather." (*Ibid.*) Gordon hopped in the Jeep and the three men headed north for Portland. (14 RT 4238; 22 RT 6250.) After crossing into Oregon, appellant went into a Circuit City store and purchased a third walkie-talkie.[13] (14 RT 4229; 16 RT 4758-4759; 22 RT 6244.)

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[13] After appellant's arrest, two Motorola walkie-talkies were found among his firearms. (27 RT 7703-7709.)

When the three men arrived in Portland late at night, they checked into a Quality Inn motel and snuck the weapons into their room through a window. (15 RT 4248; 22 RT 6247.) Shortly after checking into the motel, they drove to the garage where they expected Dean to park the next morning to become familiar with the layout and escape routes. (15 RT 4256-4257; 22 RT 6248-6249.) They then returned to the motel for a few hours of sleep. (15 RT 4255; 22 RT 6248.)

Before dawn on Saturday, February 7, the three men loaded their weapons back into the Jeep and appellant checked out of the motel. (15 RT 4255-4256.) They drove past the Noyeses' house in Gresham to make sure Dean's Fiero was still there before going out for breakfast. (15 RT 4256, 4264-4265; 22 RT 6249-6250.) They then drove downtown, parked the Jeep outside the garage, and waited for the Fiero to arrive. (15 RT 4262-4264; 22 RT 6250.) After waiting for about an hour, Daniels mentioned that, although he saw the Fiero in the driveway of the Noyeses' residence that morning, he did not see the Ford Bronco, the Noyeses' family car, which he had noticed the previous night.[14] (15 RT 4264-4266.) Appellant drove through the parking garage, as well as an adjacent garage, where Daniels spotted the Bronco. (15 RT 4267-4268.) Concluding that he had missed his opportunity to kill Dean that morning, appellant checked into another hotel, the Hampton Inn in Gresham, in order to carry out his back-up plan. (15 RT 4268-4269; 22 RT 6251.)

Appellant practiced firing the 10-22 Ruger rifle from the hotel window, making holes in the screen while trying to hit a Styrofoam cup on

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[14] Lynn testified that she had urged Dean to take the Bronco to work that day because she had changed her mind about wanting to kill Dean and knew that appellant would be looking for the Fiero. (18 RT 5142, 5177-5178, 5180.)

the road outside.[15] (15 RT 4270-4277; 22 RT 6252-6253.) The three men later drove to an open field so appellant could continue practicing his shooting. (15 RT 4323-4324; 22 RT 6262.) After dropping appellant off and circling the area in the Jeep, Daniels contacted appellant by walkie-talkie to alert him to an apparently homeless man walking in appellant's direction. (15 RT 4324-4325; 22 RT 6263-6364.) Later, appellant radioed Daniels and said, "Hot LZ. Extract. Extract," which Daniels interpreted as a signal to be picked up immediately.[16] (15 RT 4325-4326.) When Daniels and Gordon picked up appellant, he said that he had killed the homeless man by shooting him in the chest and face and that he covered the body with a tarp. (15 RT 4328-4331; 22 RT 6264-6265.) Both Daniels and Gordon believed appellant. (15 RT 4329; 22 RT 6266.) At trial, however, it was stipulated that no one had been killed in the field. (34 RT 9784.)

That afternoon, Lynn came to the hotel and tried to persuade appellant to abandon the plan and just go home. (18 RT 5151.) Appellant, who was "furious" that he had missed an opportunity to kill Dean in the parking garage, told Lynn that it was too late to call off the killing because "so many other people were involved." (18 RT 5179, 5181-5182.) Lynn left the hotel in tears. (18 RT 5182-5183.) She later called appellant said that she would send Dean and his visiting brother out to the movies because she did not want Dean to be killed in their home. (18 RT 5181-5182.) But Lynn was not sure if Dean would leave the house that night. (18 RT 5184.)

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[15] Daniels's and Gordon's testimony on this point was corroborated by forensic tests on the window screen that revealed lead residue around the holes and a white polyethylene substance, which apparently came from the archery foam appellant used in making the silencer. (23 RT 6700-6713, 6743-6745.)

[16] From his experience in the military, Daniels understood "LZ" to mean "landing zone." (15 RT 4325-4326.)

Appellant explained the new plan to Daniels and Gordon as follows: they would follow Dean and his brother to the movie theater, puncture one of his tires to delay him in the parking lot after the movie, and then shoot Dean there. (23 RT 6576.) The backup plan was to break into the Noyeses' residence, kidnap Dean and his brother from inside the house, drive them to a remote location in Dean's brother's car, and then kill them. (15 RT 4332-4333; 22 RT 6268; 23 RT 6577.) If they could not remove Dean from the house, they would kill him inside. (22 RT 6270.)

At about 11 p.m., the three men drove from their hotel to the Noyeses' house in Gresham. (15 RT 4332; 22 RT 6268.) Appellant initially parked his Jeep down the street from the house. Fearing that he would be spotted there, appellant moved the vehicle to the parking lot of a nearby topless bar, the 505 Club. (15 RT 4336-4340; 22 RT 6270.) The three men then walked to the Noyeses' house, concealing their weapons under their jackets and in a briefcase. (15 RT 4340-4344; 22 RT 6270.) Each man was carrying two guns: appellant was carrying his two handguns (the 357-caliber Rossi and the .22-caliber Ram Line), while Gordon had the 10-22 Ruger rifle and a handgun, and Daniels had the Tec-9 assault weapon and a handgun. (15 RT 4340-4343; 22 RT 6271-6273.)

Appellant went to the front door, while Daniels stood guard under a tree and Gordon hid under a nearby vehicle. (15 RT 4345-4346; 22 RT 6272-6374.) Appellant used the key provided by Lynn to open the lock. He called to Gordon to come to the door, saying, "Let's go, I've got the door open." (22 RT 6274.) But before Gordon could get to the door, appellant said it was not opening and they had to leave because the police

had been called.[17] (22 RT 6274-6275.) Over the walkie-talkie, appellant told Daniels, "Abort, abort. Mission scrubbed." (15 RT 4348-4349.)

The three men ran back toward the Jeep. (15 RT 4349-4350; 22 RT 6275.) As appellant ran, he threw the home-made silencer for the Ruger rifle over a brick wall; an object matching the description of the silencer was later found in a yard adjacent to the wall. (15 RT 4350-4351; 16 RT 4516-4517, 4749-4750; 22 RT 6275-6277.)[18] Appellant gave one of his guns to Gordon and instructed Gordon to head in a different direction, while appellant and Daniels made it back to the Jeep. (15 RT 4351; 22 RT 6275.) After pulling out of the parking lot of the 505 Club, appellant crossed over traffic divider while making a left turn, thinking he had seen a police car. (15 RT 4353-4354.) Appellant drove through the adjacent neighborhood with his headlights off, then parked the Jeep and began unloading the weapons into some bushes in front of a house. (15 RT 4354-4355; 22 RT 6278.) When he spotted Gordon on foot, appellant began to reload the guns back into the Jeep. (15 RT 4355; 22 RT 6279.) Appellant then drove "all over the place" to avoid police detection before returning to the hotel. (15 RT 4355; 22 RT 6280.) The three men spent another night at the Hampton Inn before returning to California the next morning. (*Ibid.*)

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[17] Lynn testified that the lock on the front door to her house had to be jiggled and turned both ways to open it. (18 RT 5175-5176.) There was no evidence that the police had actually been called.

[18] Jan Cousins, who found the object in March 1998, described it as an eight-inch long piece of plastic pipe, taped off at one end with threading on the other end, and stuffed with paper-like material. (16 RT 4518-4519, 4527-4530.) Not realizing its evidentiary value, Cousins discarded the piece of piping before the police inquired about it. (16 RT 4517-4519.)

Forensic tests on the Ruger rifle showed that the interior threads at the end of the barrel were embedded with polyvinyl chloride (PVC), which is used to make plastic pipe. (16 RT 4695-4707.)

Meanwhile, Lynn, fearing that appellant and his cohorts were going to break into her home and kill her husband, told Dean after midnight that she was experiencing severe cramps and vaginal bleeding and needed to go to the hospital. (20 RT 5771-5774; 24 RT 6785.)[19] Dean drove Lynn to Legacy Mount Hood Medical Center, where she was checked in shortly before 3:00 a.m. (18 RT 5531; 24 RT 6785.) A few days later, appellant told Lynn over the telephone that he had attempted to kill Dean at her house that night. (18 RT 5184-5185; 20 RT 5776-5777.)

4. Further Discussions Regarding Killing Dean

Appellant returned to Gresham on the weekend of May 9-10 of 1998, and met Lynn at her house while Dean was away. With Lynn looking on, appellant stole several items of Dean's—including notebooks, a file binder/organizer, and computer disks—believing that they contained incriminating information. (18 RT 5257-5259; 23 RT 6797-6801; 27 RT 7753-7754.) On May 9, appellant called Daniels and provided him with private information about Dean, including his social security number, his bank account numbers, and his on-line passwords. (16 RT 4579-4583; 17 RT 4833-4834; 23 RT 6796-6797.) Appellant instructed Daniels to set up a new e-mail account under a fake name and send threatening messages to Dean using this information. (16 RT 4584-4592.) The goal was to lure Dean to a place where he could be extorted and killed, or just killed. (16 RT 4588, 4605.) Daniels sent several threatening e-mails to Dean, using the screen name "Bladerunner3." (23 RT 6802-6808.) But the plan fizzled

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[19] Lynn called her parents and had them come to her house to babysit for her children while she and Dean went to the hospital. She did not believe appellant would try to break in at that point because he would see that the Bronco was not in the driveway and realize that she and Dean were gone. (20 RT 5771-5775.)

out when Dean, who had served in Iraq during Operation Desert Storm in 1991, was not intimidated by the e-mails. (23 RT 6802, 6806-6808.)

After appellant was arrested, deputies found Dean's file binder on the floorboard of appellant's Isuzu Trooper. Inside the binder was appellant's .357-caliber Rossi in a holster. (13 RT 3824-3826; 24 RT 6780.) Several of Dean's computer disks were found in Daniels's residence; Daniels said the disks had been given to him by appellant. (22 CT 6472-6473 [Exhs. 113, 114; photos of computer disks]; 16 RT 4595-4596; 24 RT 6800-6801.)

Appellant and Lynn had discussed the possibility of shooting Dean on May 30 while Dean and Lynn would be walking to a restaurant in downtown Portland to celebrate their wedding anniversary with friends.[20] (19 RT 5398, 5635-5636; 23 RT 6815.) At that time, Dean had applied for a new, $500,000 life insurance policy; his old policy had lapsed in March 1998 when he left his job. (19 RT 5399-5400; 23 RT 6787-6791.) However, Dean's life insurance application was still pending on May 30, and appellant never traveled to Portland on that date.[21]

5. Conspiracy to Kill Carole and Her Fetus

In October 1997, Carole learned that she was pregnant with a due date of June 19, 1998. (26 RT 7549.) Appellant told several people that he was not the father of the baby, which was a lie. (18 RT 5207; 19 RT 5524-5525; 20 RT 5833; 22 RT 6339-6340; 26 RT 7549.) He told Lynn that he was pretending to be happy about becoming a father even though the prospect "made him sick." (19 RT 5524.) He told another friend that he

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[20] Lynn suggested to appellant that he should wound her while shooting to kill Dean so "it wouldn't look so obvious" that Dean was the intended target. (19 RT 5396-5397.)

[21] On June 8, Dean was notified that his life insurance application had been rejected because of an enzyme abnormality in his blood test. (23 RT 6792.)

did not want to be a parent because it would limit his freedom. (26 RT 7395.)

Sometime before March 12, 1998, appellant and Carole both applied for life insurance in the amount of $125,000. (17 RT 4797, 4801-4803.) On that date, a paramedical examiner came to their house to measure their vital signs and question them about their health. (17 RT 4797-4802.) The policy on Carole's life was issued on March 25, listing appellant as the primary beneficiary. The policy on appellant's life was issued on April 1, listing Carole as the beneficiary. Appellant and Carole provided written authorization for the monthly premiums to be deducted from their joint checking account. (26 CT 7516-7518, 7547-7548 [insurance documents]; 27 RT 7853-7854 [stipulation].)

In early April 1998, appellant approached Daniels about doing another "hit." (15 RT 4368-4369.) Unlike the attempted murder of Dean, appellant told Daniels that this was an "actual contract" killing, rather than a "freelance hit." (*Ibid.*) Appellant said the contract was issued by "The Company," a clandestine "assassination ring" that was headed by a man named "Colonel Sean" and was "out of Langley." (15 RT 4369, 4371.) Appellant told Daniels that he himself was a member of "The Company" and his code name was "Patriot." (15 RT 4375.) Appellant gave Daniels a business card with that name and his pager number. (15 RT 4374.) The name "Patriot" also was the basis of appellant's online screen name, "PATR553," with the numbers representing the first three digits of his social security number. (15 RT 4462; 26 RT 7553.) Appellant owned a VHS copy of the movie "Patriot Games." (14 RT 4020; 27 RT 7719.) In that movie, Harrison Ford plays an ex-CIA agent who returns to the agency and reviews a file with the title "Patriot." (27 RT 7787.) There is a

character in the movie named Sean, who is a former member of the IRA. (16 RT 4612-4613; 27 RT 7720.)[22]

Appellant told Daniels that if he agreed to do the hit, he would be paid $25,000. (15 RT 4379-4380.) He explained that Daniels would not learn the identity of the target until after he agreed; then he would be given a package containing the necessary information. (15 RT 4380.) Although he had some doubts, Daniels agreed to participate because he was "distraught" over his financial situation. (15 RT 4379.) Appellant subsequently told Daniels that the hit would have to be "up close and personal," meaning that Daniels would have to be within "talking distance" of the victim. (15 RT 4417-4418.)

On April 17, appellant and Daniels went to Jones' Fort, a Redding gun shop owned by appellant's friend Marshall Jones, to purchase a gun for Daniels's upcoming assignment. (15 RT 4382-4387; 24 RT 7011-7013.) Daniels wanted a .45-caliber semiautomatic, but appellant persuaded him to get a .44-caliber Rossi instead. (15 RT 4383-4384; 24 RT 7013.)

After the mandatory 10-day waiting period, they returned on April 27 to pick up the gun. (15 RT 4389-4390; 24 RT 7012-7013.) The receipt was issued to Daniels, and he filled out the federal registration form. (22 CT 6426-6428 [Exhs. 59, 60]; 15 RT 4386-4387.) However, appellant paid for the gun with $150 in cash plus a trade-in .20-gauge shotgun; he also gave Daniels $20 to pay for the background check. (15 RT 4388-4390.) In addition, appellant purchased two boxes of hollow-point bullets, a holster, and some gun cleaning supplies. (15 RT 4396, 4398.) Appellant told Daniels that "The Company" was paying for the gun. (15 RT 4394.) After

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[22] "Patriot Games" was played for the jury during the trial, along with several other movies of the same genre, which were possessed by appellant. (27 RT 7792-7794, 7843; 29 RT 8464, 8469-8470.)

purchasing the weapon, appellant took Daniels to a firing range to "break the barrel in." (15 RT 4397.)

At about 5:00 p.m. on April 27, appellant went to an Office Max store and purchased several items, including a Casio electronic label maker, extra label tape cartridges, AA batteries, a pager, and a bubble-lined manila envelope. (28 CT 8154 [Exh. 272; receipt]; 34 RT 9667-9669.) He paid for the items with a $172.90 check from the account of G & G Fencing. (28 CT 8156 [Exh. 273; check]; 34 RT 9675-9677.)

At around midnight on April 27, appellant came to Daniels's trailer home on Gas Point Road to deliver the "hit package"—an oversized manila envelope containing several items. (15 RT 4408.) The outside of the envelope bore a label with a clear background reading, "Newbie Recruit, Patriot Recruiter." (15 RT 4409.) The rear flap was sealed with a reddish wax seal with a design that resembled a ram's head. (15 RT 4409.)

As Daniels placed his thumb under the seal to open the package, appellant said, "Wait a second. I warn you before you open that, that if you open it, you are going to have to do what it tells you in that package, or you will end up dead." (15 RT 4410.) Daniels replied that he had already broken the seal, "so it looks like I'm going to have to go through with this." (*Ibid.*) When he opened the package, Daniels found a pager, three photographs, and several newspaper and magazine articles—some photocopied, some printed from a computer—that pertained to the IRA and Sinn Fein, the political arm of the IRA. (15 RT 4411, 4413-4416.)

All three photos were of Carole, including one in which she seemed to be posing with appellant and another man.[23] (15 RT 4418-4419.) Carole's face was circled with a marker while the faces of appellant and the other

[23] Daniels remembered having seen that photograph in appellant's house a few years earlier. (15 RT 4420.)

man were crossed out. (*Ibid.*) On the back of that photograph was another label with Carole's name, her date of birth and social security number. The label identified Carole as "TO," which appellant told Daniels stood for "target of opportunity." (15 RT 4426-4427.) It also contained the letters "WO" and the dates April 28, 1998, through May 20, 1998. Appellant told Daniels the letters stood for "window of opportunity," and the dates indicated the period during which the killing had to occur. (*Ibid.*) The package contained instructions on activating the pager, and instructed Daniels to give the pager number to appellant, but not to reveal the identity of the target. It also contained a warning that if Daniels failed to complete the mission, he "could be terminated." (15 RT 4428.)

Upon "learning" that Carole was the intended target, appellant seemed upset. But he did not attempt to dissuade Daniels from going ahead with the killing. (15 RT 4436.) Daniels expressed fear that he would get caught and he begged appellant to call off the hit. Appellant picked up the phone and began to dial but then hung up. He sighed heavily, ran his hands over his head and sat down in a chair. Appellant said, "Well, at least it's not me." (15 RT 4436-4437.)

Appellant told Daniels that Carole had been in the IRA since she was a teenager, and was responsible for bombing a bookstore in Britain, an event highlighted in one of the news articles in the hit package. (15 RT 4449, 4451-4453.) But Carole was now a target, according to appellant, because she had "changed her affiliation from green to orange." (15 RT 4450.) Appellant also told Daniels that Carole once shot "Colonel Sean" in the leg to escape from him. (15 RT 4449.)

Daniels felt "terrible" about the prospect of killing Carole and her fetus, but he believed that if he did not carry out his assignment, he and/or members of his family would be killed. (15 RT 4441-4442.) Daniels testified that appellant told him that "if I don't do what I'm told that I or my

son could end up either hurt or dead, or my son could end up kidnapped and used against me." (15 RT 4442.)

Daniels activated the pager the following morning (April 28) and gave the number to appellant, as instructed. (15 RT 4432-4433.) A few days later, Daniels, following appellant's suggestion, shredded the photographs of Carole and flushed the pieces down the toilet; he also burned the news articles in a barbecue outside his trailer.[24] (15 RT 4438; 17 RT 4939.) But Daniels kept the wax seal in his nightstand drawer, thinking he might need it to prove his version of events if he ever got caught.[25] (15 RT 4434-4435.) The design on the wax seal resembled that on a scuba bubble pin that appellant had received from the Marines. (26 RT 7482; 28 RT 8147; 29 RT 8298.) The scuba pin, which was found inside a glass mug next to appellant's "medals," had some red wax imbedded in it when it was seized by investigators. (13 RT 3922, 3937; 17 RT 5021-5022; 26 RT 7483.)

Sometime after Daniels received the "hit package," appellant told him that Lynn would be his "profiler"—a person monitoring him for "The Company" to make sure that he would follow through with his assignment. (15 RT 4444.) Appellant also gave Daniels the code name "Devlin," a character in novels by Jack Higgins.[26] (15 RT 4445-4446.)

Appellant provided a similar description of "The Company" to Lynn. (18 RT 5187-1889, 5206-5207.) He told her that Daniels wanted to join the

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[24] While most of the articles were burned beyond recognition, investigators retrieved some partly legible strips from the barbecue, which were introduced into evidence. (26 RT 7484-7487.)

[25] The wax seal also was introduced into evidence, as well as candle jars with red wax seized from appellant's house. (14 RT 4009; Exh. 35 [wax imprint]; 26 RT 7477; Exhs. 24A, 24B [candle jars].)

[26] The character, Liam Devlin, is an Irish gunman, poet and philosopher. (See http://en.wikipedia.org/wiki/Jack_Higgins [last visited April 23, 2013].) Daniels had suggested calling himself "Hamlet," but appellant wanted "Devlin," and Daniels eventually agreed. (15 RT 4445.)

network because he needed money and that he had received a hit package with his first assignment. (18 RT 5191-5192, 5206.) At first, appellant did not tell Lynn that Carole was the target. (18 RT 5206.) When appellant did reveal that information, he told Lynn that Carole had switched sides in the fight for Irish independence and had shot someone who now had a vendetta against her. (18 RT 5187-5189, 5207.) Appellant told Lynn that the matter was out of his control. (18 RT 5187-5188.)

Appellant told Lynn that "The Company" also needed her to relay messages to Daniels, to report on his activities, and to assess whether he would be able to "carry out what was in his package." (18 RT 5204, 5209.) Appellant told Lynn that she had no choice but to participate because she was already involved in the assassination network through the attempts to kill Dean, and that if she did not provide assistance, her children might be harmed. (18 RT 5204.) Lynn took those threats seriously. (20 RT 5836-5837.) She agreed to contact Daniels on line using her screen names "Jozaphine" and "Pandoora69." (18 RT 5194, 5235.)

On May 4, appellant used his home computer to create an e-mail account for "Company T" through USA.net, and provided an address for the company in Ireland.[27] (20 RT 5933; 25 RT 7115-7122.)

On May 6, Daniels received his first message from Company T with the subject line "doorway."[28] (22 CT 6420-6421 [Exh. 40]; 15 RT 4467.) Addressed to "Mr. Devlin," the message indicated that Daniels would be paid upon completion of his assignment, and that he was being assigned a

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[27] The prosecutor later argued to the jury that "Company T" stood for "Company Todd." (35 RT 10209.)

[28] Some of the e-mail messages introduced into evidence were recovered from appellant's computer, while others were obtained through subpoenas from USA.net. (See 25 RT 7086-7166; 25 RT 7260-7280 [testimony of Redding Police Detective James Arnold]; see also 20 RT 5922-6038 [testimony of Kathleen Flannes, postmaster for USA.net Inc].)

"Tagger" to ensure that he carried out his mission. (22 CT 6421 [Exh. 40]; 15 RT 4469-4473.) The message also included a list of code books, a code number and locations of book drops. (*Ibid.*) It read, in part:

> First off you have received your package and orders if anything of importance is not address [sic] please reply to us at once. Your physical will be required before any payment arrangements will be made. Upon delivery of your package you will received [sic] further training, support and payment. [¶] We understand that you are having a problem delivering the package, for this reason we have attached a Tagger to insure that delivery is met. Tagger is also in place in the case of Patriot becoming a liability. In such a matter the Tagger will identify himself to you using the code enclosed. You will need to be given the orders to apply use [sic] on Patriot, this will come in book form. Please be aware that you must meet your window and arrangements for safety and payment to be secured.

(22 CT 6421 [Exh. 40].)

Meanwhile, appellant suggested to Daniels that the weekend of May 9-10 would be a good time to kill Carole because appellant planned to be in Oregon visiting Lynn that weekend. (16 RT 4605.)

On May 11, Daniels received another e-mail from "Company T," which began by stating, "This is Sean." It went on to express impatience with Daniels and warned of dire consequences if he failed to carry out his assignment. (23 CT 6765 [Exh. 90; records from USA.net]; 16 RT 4620-4621.) The e-mail read, in part:

> My nerves are waring [sic] thin, I am not known to have a great deal of patence [sic] in such matters. So you listen good and hard at the following. You know to [sic] much and are already on the edge so this extra burst of information will only close the verifycation [sic] of your situation if you fail in anyway. We need you to deliver this package well and quick without any insident [sic]. I am one inch away from pulling you down and personally handeling [sic] this situation myself.

(23 CT 6765 [Exh. 90].)

Daniels responded to this e-mail by requesting a meeting with Sean, a vehicle and some money. (16 RT 4623-4624.) A short time later, Daniels received another e-mail from Sean denying his requests for a meeting and transportation, but agreeing to provide some money. (23 CT 6765 [Exh. 90]; 16 RT 4622-4624.)

The message also stated:

> You unfuck whatevers [sic] going on out there and deliver quick, well and unharmed. Then you and yours can go to Portland and have a fuckfeast with our people up there until your next assignment. You have proven nothing to me and I sign the checks, but you must have something going on because Jozaphine and Patriot are keeping you in good terms.

(23 CT 6765 [Exh. 90].)

The message concluded: "PERFORM TO EXSPECTATION [sic] OR BECOME A LIABILITY." (23 CT 6765 [Exh. 90].) Daniels interpreted this as a threat on his life, in part because appellant had warned him "that this Sean character doesn't mess around," and would not hesitate to kill anyone who upset him. (16 RT 4623.) A few days later, appellant offered Daniels some cash, but Daniels declined. (15 RT 4475; 16 RT 4614, 4624-4625, 4475.)

Daniels told Lynn about his assignment and sought her advice. (17 RT 4830, 4942; 18 RT 5339-5340, 5348.) Lynn suggested different ways that Daniels could kill Carole. (16 RT 4549.) Lynn, who felt sorry for Daniels, also exchanged messages with Daniels in Internet chat rooms; they occasionally had "cybersex" in one of those forums. (16 RT 4738-4739; 17 RT 4942-4943; 18 RT 5193-5194; 20 RT 5720-5722.) Meanwhile, Lynn passed along to appellant what Daniels had told her. (19 RT 5505-5506.)

On May 14, Lynn wrote an e-mail to Company T, expressing confidence that Daniels would carry out his assignment. (23 CT 6766 [Exh. 90].) She added: "[Y]ou neednt [sic] remind me about patriot though

hes [sic] where my loyalty is all the time and my love regardless of how it may seem." (*Ibid.*)

6. Murder of Carole and Fetus on May 16, 1998

After Daniels failed to act on the weekend of May 9-10, appellant suggested that the following Saturday, May 16, would be a good day to kill Carole because she would be alone in the house while he was manning a booth at a gun show in Anderson. (15 RT 4476.)

Daniels spent the night of May 15 at appellant's house, and went to the gun show with appellant the next morning; he helped appellant man the Rancho Safari booth. (15 RT 4478.) In the early afternoon of May 16, Carole stopped by the gun show on her way to visit the maternity ward of Mercy Medical Center. She came by again on her way back home. (15 RT 4479-4480; 24 RT 6901.) Looking for an opportunity to be alone with Carole, Daniels went back to the house with her, saying that he wanted to finish watching a video that he had begun the previous night. (15 RT 4480-4481.) Daniels drove Carole home in the Jeep while carrying his .44-caliber Rossi revolver in a holster on his waist. (15 RT 4482-4483.)

Carole watched part of the movie ("Killing Time") with Daniels and then went into her bedroom to rest. (15 RT 4480, 4484.) When Daniels finished watching the movie, he returned it to the video store and went home in the Jeep to change clothes. (15 RT 4485, 4487.) Daniels had originally planned to approach the Gartons' house through an adjacent field and sneak back inside through a rear door. (15 RT 4486-4487.) But he decided to park the Jeep in the front of the residence and enter through the front door. (15 RT 4486-4492.)

Daniels cocked the hammer on his gun and re-entered Carole's bedroom with the gun in his pocket. (15 RT 4493-4495.) As she lay in bed, Daniels struck up a conversation with her. (15 RT 4495-4496.) He then pulled out his gun and shot Carole in the head. (15 RT 4497.) Carole

covered her face with both hands, and Daniels shot her again in the torso, causing Carole to slide off the bed. (*Ibid.*) He then shot her three more times—twice more in the head and once more in the torso. (*Ibid.*) As she was being shot, Carole tried to crawl under the bed. (15 RT 4499.)

After shooting Carole, Daniels got back in the Jeep and drove it to a park-and-ride lot, and left it there in accordance with appellant's plan to make it look like the person who killed Carole also stole the vehicle. (16 RT 4499.) Daniels then walked back to his trailer home, cleaned the gun to remove his fingerprints, threw the spent shell casings in his front yard, and reloaded the weapon. (16 RT 4542-4545, 4551.) He then paged appellant and left him a message: "All done, going home." (25 CT 7343; Exh. 124 [pager company records]; 16 RT 4546.) Daniels also sent a brief e-mail to "Company T," stating, "Package Delivered." (23 CT 6766 [Exh. 90]; 16 RT 4552-4553.)

Sometime after 5:00 p.m., Gordon's girlfriend, Sara Mann, arrived at the Gartons' house, planning to meet with Gordon, appellant and some other people before going out to dinner.[29] (24 RT 6938-6939.) The front door was open, but it appeared that no one was home. (24 RT 6939-6940.) Mann decided to watch television and play a computer game while waiting for the others to arrive. (24 RT 6944.) Gordon showed up sometime after 6:33 p.m. (22 RT 6288; 24 RT 6944.) Appellant arrived about 10 minutes later. (24 RT 6944.)

When appellant entered the house, he asked, "Where's Carole?" (22 RT 6289; 24 RT 6945.) He then went outside. When he returned, he said the Jeep had been stolen and he told Mann to call 911. (24 RT 6945-6946.)

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[29] Mann had been working at the Gartons' house for the past few weeks, helping with housework and getting the baby's room ready. (24 RT 6940.) As previously noted, Gordon was living in the Gartons' house at this time.

Mann refused to do so because she had seen Daniels driving the Jeep while she was on her way to the house. (*Ibid.*) Appellant then urged Gordon to call 911, but Mann discouraged him from doing so. (24 RT 6946.) Appellant went into his bedroom and yelled out that Carole needed an ambulance. (24 RT 6947.) At that point, Gordon called 911. (22 RT 6294.) When Gordon entered the bedroom, he saw appellant trying to resuscitate Carole in a seemingly half-hearted manner. (22 RT 6297.)

A tape of the 911 call was played for the jury. (22 RT 6304.) While Gordon was on the phone, appellant called out, "Everything is still warm." (26 CT 7576.) Appellant yelled that he would take Carole to the hospital himself if an ambulance did not arrive soon. (26 CT 7578.) Appellant then spoke directly to the operator and said, "[T]hey're gonna need to revive her. I need revival and oxygen on stat. I want this to go smoothly when they come. This is an emergency." (26 CT 7579.)

Emergency personnel arrived at the scene at about 7:00 p.m. (13 RT 3796-3798.) When the EMTs approached the house, appellant criticized their response time and said he could do a better job. (13 RT 3800.) He told sheriff's deputies that he had tried to perform a tracheotomy on his wife. (13 RT 3763.) He also said his Jeep had been stolen. (13 RT 3775.) While standing in the driveway, appellant looked at his watch several times. He also grabbed his pager from his belt, looked at it, and threw it to the ground. (13 RT 3770.) Carole, who showed no signs of life when the EMTs arrived, was pronounced dead at the scene. (13 RT 3817.)

An autopsy showed that Carole suffered five gunshot wounds, which killed her. (14 RT 4097-4114.) The fetus died from a gunshot wound to its brain. (17 RT 5000.) Two shots went through Carole's neck, and one of the bullets entered her cerebellum. (14 RT 4106-4110.) Another gunshot entered her left cheek. (14 RT 4111-4112.) Stippling marks indicated that all three head shots were fired at close range—at distances ranging from 3

to 12 inches. (14 RT 4108-4109, 4111-4112; 16 RT 4691.) A fourth gunshot entered Carole's left buttocks and perforated her uterus, shattering the fetus's skull. (14 RT 4097-4098.) The fetus was 8 1/2 months old and could have lived outside the womb. (14 RT 4099.) The fifth gunshot went through Carole's chest. (14 RT 4101-4103.) A pathologist estimated that Carole and her fetus probably died within 30 minutes. (14 RT 4115.)

7. Attempted Cover-Up of Murders

After leaving the scene, Daniels tried to reach appellant but appellant did not immediately respond to his page. Daniels contacted Lynn, told her that he had killed Carole, and asked what to do next. (16 RT 4554-4555; 18 RT 5281-5283.) Lynn called appellant. When she relayed what Daniels had told her, appellant said, "Okay." (18 RT 5292.)

Appellant paged Daniels at about 2 or 3 a.m. on the morning of May 17. When Daniels called back, appellant told him to return to his trailer and get rid of the gun. (16 RT 4559-4560.) Daniels responded that he could not do so right away because he was at a friend's apartment in Anderson and asked appellant for help. Appellant replied that Daniels was on his own and that he had to return to his house "at all costs [to] get rid of the pistol." (16 RT 4561-4562.) Daniels called Lynn later that morning and said he had to "come in out of the rain"—a phrase appellant had taught him to use when he needed to go into hiding. (16 RT 4562-4563.) Lynn said she would try to contact appellant or someone in "The Company." (16 RT 4563.)

At appellant's suggestion, Lynn sent an e-mail to "Company T." (18 RT 5270-5280, 5284-5286.) The e-mail read, in part:

> sean your boy has become a man. however he needs advice. hes [sic] not sure if he should go home hes [sic] in the paper hes [sic] to be brought in for questioning-sheriffs orders. hes [sic] been in contact with me and will do so regardless. or should he leave immediately? if

he needs to do that if you can send me funds ill set him up here but I can only keep help to a minimum because of my situation.

(23 CT 6767 [Exh. 90].)

At about noon on May 17, Daniels got a ride back to his trailer and saw two police cars outside. (16 RT 4564-4565.) He asked his driver to take him back to Anderson. From there, he called Lynn from a pay phone to tell her that the police were staking out his house and he needed to escape. (16 RT 4571-4573; 27 RT 7716-7718.) Lynn, who was on another line with appellant at the time and taking her cue from him, initially said that there might be a hiding place for Daniels in New York. (16 RT 4574; 18 RT 5295.) But she later told Daniels that he had to return to the trailer and get rid of the pistol. (16 RT 4574-4575; 18 RT 5295.)

Daniels took a taxi home and was met by two Shasta County sheriff's detectives. (16 RT 4577-4578.) At first, Daniels denied any involvement in Carole's murder. (16 RT 4578.) But he eventually decided to tell the truth because his conscience was weighing on him and he thought that his family might still be in danger. (16 RT 4579.)

Sheriff's deputies executed a search warrant at Daniels's residence and found a loaded Rossi .44-caliber revolver under some pillows in the bedroom. (13 RT 3902, 3905, 3995.) They also found two spent .44-caliber cartridge casings in the front yard. (13 RT 3904-3905, 3848-3849.) Ballistics tests confirmed that the Rossi was the weapon used to kill Carole. (16 RT 4690-4691.)

On May 18, Daniels placed a phone call to appellant at the direction of sheriff's detectives, who recorded the call. (16 RT 4657.) At the beginning of the call, Daniels told appellant that he had confessed to killing Carole, saying, "I copped a plea of jealousy." (22 CT 6375a [transcript of call].) Appellant replied, "So you said you did it?" (*Ibid.*) He also said, "I'm gonna get on the phone to the big boys and see what we can pull

here." (22 CT 6376.) Appellant then told Daniels to have Daniels's lawyer contact him, saying, "I'll talk with him and see what we can do for you." (22 CT 6377.) Appellant added, "I just went to the wall for you here with the Record Searchlight, back and forth." (*Ibid.*)

Daniels told appellant he hoped he would not get the death penalty. (22 CT 6378.) Appellant replied, "Well, no, no we'll see what we can work out for ya. . . You know, I mean (sigh) we'll be there for ya man." (*Ibid.*) When Daniels expressed concern that appellant's parents would be upset with him, appellant told Daniels not to worry. "I mean obviously at this point man you just need help." (22 CT 6378.) When Daniels asked appellant if he could provide him money for a "better lawyer," appellant told Daniels he would be better off with an appointed lawyer "for the appeal." (22 CT 6379.) Appellant added: "And you know you're still gonna get yours, I'll see that, I'll see whatever monies you had coming goes to your ah, goes to your kid or your family or something." (*Ibid.*) Daniels understood appellant to be referring to the $25,000 he had been promised for killing Carole. (16 RT 4659.)

At appellant's request, Lynn came to California to attend Carole's memorial service. (19 RT 5379, 5390.) The following day (May 23), Lynn went with appellant to his house where he gathered some personal items. (19 RT 5406-5407.) Appellant returned to the house a short time later to retrieve the electronic label maker, some tiny cassettes and magnetic strips. (19 RT 5408-5409, 5418.) When Lynn asked appellant what those items were for, he said "it was something that was incriminating and he had to get rid of it because it was one of the few things that could tie him physically to this case." (19 RT 5409.)

Appellant and Lynn drove to a spot along the Sacramento River beneath a bridge. (19 RT 5413.) Appellant walked to the water's edge to see if the ribbon in one of the cassettes would dissolve in the water. (19 RT

5415.) When the tape did not dissolve, appellant burned it with a lighter. (*Ibid.*) Appellant then threw the ashes and other parts of the cassette into the river, along with the magnetic strips; he threw the unused cassettes into a garbage can. (19 RT 5415-5416.) A month later, sheriff's detectives retrieved the label maker from the river after Lynn led them to the location. (27 RT 7656-7658, 7701.) Crimes scene photos showed that the label maker had been on a bookshelf in appellant's residence on May 16, 1998. (13 RT 3943-3944.) However it was not there when detectives returned to the house on May 27 with a search warrant. (27 RT 7652, 7655.)[30]

Appellant instructed Lynn to tell police that she knew Daniels only through the Internet, and that Daniels was obsessed with Carole. (18 RT 5362.) He also told Lynn to reveal nothing about "The Company." (18 RT 5363.) When detectives came to Lynn's house in June 1998, Lynn quickly called appellant, who told her, "Just remember the truth that we had discussed and stick to that." (18 RT 5363-5364.) Meanwhile, appellant told Gordon not to tell the police anything about their trip to Portland in February or to reveal anything about Lynn. (22 RT 6354.)

In November 2000, after Lynn had pled guilty and was scheduled to testify in appellant's trial as part of her plea bargain, she received a letter in jail from a "Gabriel Michaels" at an unfamiliar address in Cottonwood. (19 RT 5568-5569.) Although the letter was not in appellant's handwriting, Lynn suspected that he had authored it because it contained terms and

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[30] Another crime-scene photograph shows a label with the words, "I love you, Baby," attached to a picture frame in appellant's bedroom. (26 RT 7496-7497, 7509-7510.) However, the label had been removed by May 27. (27 RT 7654-7655.) To show that the label on the picture frame had been made by the label maker found in the river, a detective purchased an identical Casio label maker and generated a new label with the words, "I love you, Baby." (26 RT 7509-7510.) Both the label maker and the exemplar were introduced into evidence. (*Ibid.*)

biblical references he often used. (19 RT 5579-5580.) Appellant's fingerprints were found on the letter. (19 RT 5551-5552.) The letter criticized Lynn's attorney for preventing Lynn from talking to appellant's trial attorney Russell Swartz, and urged her to contact Swartz directly and seek to withdraw her guilty plea. (19 RT 5573-5576.) The letter ended by stating, "If you do not respond to this—respond within a week to Swartz by letter to see him by word to your attorney, then this is farewell, Malichi, and be lost with the others, banished to eternal darkness." (19 RT 5575.)

8. Other Circumstantial Evidence

After Carole's murder, appellant stayed for a while at the home of Marshall Jones and his wife, Tracie. (24 RT 6908-6909.) He stored some personal possessions in the Joneses' garage, including a small file box. (24 RT 6909-6910.) After appellant's arrest, police discovered a notebook in that file box which contained writing in appellant's hand. (24 RT 6926; 27 RT 7626-7643.)

The notebook contained numerous pages of an apparent work of fiction featuring a character named "Sean" who meets a character named "Carole." (26 CT 7450, 7452, 7456, 7460, 7463, 7467, 7472-7474, 7477, 7481-7482, 7485-7486 [Exhs. 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233].) When appellant was asked to provide handwriting samples by rewriting selected sentences in the notebook dictated by a handwriting examiner, he spelled the male character's name as "Shawn." (26 CT 7453, 7457-7458, 7461, 7464-7465, 7470, 7475, 7478, 7495, 7497-7498 [Exhs. 221A, 222A, 222B, 223A, 224A, 224B, 225C, 228A, 229A, 242, 243]; 27 RT 7630-7633.) The prosecutor argued that appellant deliberately misspelled the name to distance himself from his other fictional character, "Colonel Sean." (35 RT 10197-10198.)

C. Defense Case

Appellant's defense consisted largely of his own testimony in which he maintained that he had nothing to do with the murder of Carole or the conspiracy to kill Dean. Appellant portrayed Lynn as jealous of Carole, Gordon as obsessed with Carole, and Daniels as a computer whiz capable of framing him. Some defense witnesses described appellant as happily married and eager to become a father. Others provided testimony to show that appellant had legitimate business in Portland. In addition, appellant's mother offered an innocent explanation for his purchase of the label maker.

1. Appellant's Testimony

Appellant provided the following testimony regarding his education, work experience, military service, and relationships with Carole and Lynn:

Appellant and his family moved from Redding to Portland in 1985 when his father got a job in nearby Troutdale. (28 RT 8078-8079.) In the months before he began attending high school in Portland, appellant learned about the Irish Republican Army from a man downtown who said he was a member of Sinn Fein. (28 RT 8078-8080.) Appellant said he became "extremely sympathetic" to the IRA because of his Irish heritage and because of his friendship with the man. (28 RT 8-85-8086.)

Appellant met Lynn on his second day of high school, and she became his girlfriend a few months later. (28 RT 8091-8092.) Appellant organized a rock band called Détente Touch, and Lynn was a "groupie" for the band. (28 RT 8092-8093, 8095.) To impress Lynn, appellant told her that he was a "bigwig in the IRA," even though he had never even been to Ireland. (28

RT 8110-8112.) But he denied telling Lynn that he worked as a sniper for the IRA or had killed anyone.[31] (28 RT 8111.)

Appellant moved out of his parent's house at age 16 and began working full-time at an Arby's restaurant and continued playing in his band. (28 RT 8098-8099.) Carole also worked there, and when they met it was love at first sight. (28 RT 8100.) Appellant ended his relationship with Lynn a short time later. (28 RT 8100-8101.) Appellant and Carole moved into an apartment together in 1987. (28 RT 8102-8103.) Carole was musical and she eventually became the lead singer in his band. (28 RT. 8101.) Although appellant had ended his relationship with Lynn, she kept coming to his band's performances. (28 RT 8103.) Appellant and Carole moved in with his parents in 1988 or 1989, and lived together until he joined the Marines in 1990. (28 RT 8105-8106.) Carole continued to live with appellant's parents after that. (28 RT 8120.)

Appellant spent about six months in Marine boot camp in San Diego. (28 RT 8117, 8120.) His stint in boot camp was twice as long as usual because he fell off a tower and broke his leg in several places. (28 RT 8120-8121.) He was promoted to lance corporal based on his high score on the rifle range and his determination to remain in boot camp despite his severe leg injury. (28 RT 8123-8124.) While in boot camp, appellant and Lynn wrote each other letters. (28 RT 8117-8118.) After appellant wrote to Lynn that he was engaged to marry Carole, Lynn responded that she was expecting to marry him. Lynn then forwarded to Carole some of appellant's letters to her to dissuade Carole from marrying him. (28 RT

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[31] Appellant testified that he first traveled to Ireland in 1991, and stayed with his friend from Portland who had moved there. (28 RT 8179-8180.) Appellant said he became somewhat disenchanted with the IRA after meeting some people associated with that group, but continued to be fascinated with Ireland. (28 RT 8181.)

8151-8152.) After appellant graduated from boot camp, he and Carole were married before a small family gathering in Reno. (28 RT 8128, 8151.) About a year later, Lynn wrote to appellant that she was pregnant and about to get married. (28 RT 8154.)

After boot camp, appellant went to Camp Pendleton for Marine Combat Training. (28 RT 8129.) He was trained in using various types of firearms, and coached other Marines on how to fire rifles. (28 RT 8137-8140.) He also received training in emergency first aid. (28 RT 8141.) In addition, appellant received diver training in Coronado, including a week in a scuba program.[32] (28 RT 8147; 29 RT 8269.) Appellant wanted to remain in the Marines but he could not pass the required physical exams because of his leg injury, so he was discharged. (28 RT 8148-8149.)

Appellant and Carole lived with appellant's parents in Anderson for about a month before moving to Shingletown. (28 RT 8157.) Appellant got a job there as a bartender at the American Legion. (*Ibid.*) Some customers "misread" appellant's rank as lieutenant, and he did not correct them "because tips went through the roof from there on out." (28 RT 8159.) He specifically denied that he ever told his friends, including Gordon and Jones, that he was a lieutenant. (29 RT 8264, 8270; 30 RT 8518, 8526-8527.) But he acknowledged stating on a job application that he had attained that rank. (30 RT 8529-8532.) He also acknowledged that he told some people, including Gordon, that he had traveled to Central America as part of a special operations unit. (28 RT 8159-8160; 29 RT 8271-8273.) But he denied that he told anyone that he had worked as a sniper for the government. (28 RT 8160, 8178; 29 RT 8273.)

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[32] On cross-examination, appellant admitted that he did not legitimately earn the scuba bubble pin. (30 RT 8557.) Appellant also admitted on cross-examination that he never earned the Purple Heart or Navy Commendation medals found in his home. (30 RT 8518.)

Appellant and Carole moved to Bend, Oregon, when Carole received a promotion in her job as a manager for a hotel chain. (28 RT 8161.) Appellant met Lynn on three or four occasions while living in Bend, including once while he was alone. (28 RT 8163.) Appellant claimed that during each visit, including those when he was accompanied by Carole, Lynn suggested that she and appellant have sex, but that he always refused. (28 RT 8164-8165.) While living in Bend, appellant worked at a pizza parlor and as a concert promoter. (28 RT 8161, 8166-8169.)

Appellant and Carole returned to Redding because she was unhappy with her job. (28 RT 8171.) They rented an apartment in Anderson for two years before moving to Cottonwood. (28 RT 8171-8172.) Carole got a job with a local insurance firm. (28 RT 8172.) Appellant worked for and then bought out his father's fencing business; he also worked for two other fencing companies. (28 RT 8172-8173; 29 RT 8196.) He also became a sales representative for Rancho Safari, a distributor of camouflage and archery equipment. (28 RT 8173.)

Appellant attended gun shows throughout Northern California and Oregon to sell Rancho Safari equipment. (29 RT 8198, 8208-8209.) He also sold gun-related videos and walkie-talkie radios at those shows. (29 RT 8200-8205.) Appellant said that some of the sniper-related videos seized from his house were loaned to him by a friend to see if he wanted to order copies for sale at gun shows. (29 RT 8201-8202.) Appellant also said that he purchased a few Motorola radios from Circuit City to be sold at the gun shows. (29 RT 8206.) Those items were popular among militia groups who feared that communications would be disrupted by computer crashes predicted at the start of the new millennium. (29 RT 8204-8205.)

Appellant claimed that Carole nicknamed him "Patriot," but he did not know why. (28 RT 8186-8187.) He also claimed that the "Patriot" business cards he used were a gift from Carole. (29 RT 8380.)

Regarding Daniels, appellant testified that they met while attending Shasta Community College, and they quickly became friends. (29 RT 8235-8236, 8250.) Daniels taught appellant how to use a computer. (29 RT 8236.) Appellant was best man at Daniels's wedding. (29 RT 8250.) When Daniels returned to the Shasta area in 1997, he and appellant rekindled their friendship. (29 RT 8238-8239.) Daniels helped appellant set up an Internet site for Rancho Safari, and also helped appellant and Carole establish Internet access on their home computer. (29 RT 8238-8243.) Daniels set up a computer desk top and other programs for appellant. (29 RT 8250.) Daniels also used that computer to access the Internet when he came to appellant's house. (29 RT 8245.) Appellant said that his computer password was on a post-it note beside the computer so anyone in the house could use it. (29 RT 8249.)

Regarding Gordon, appellant testified that they met while he was doing some construction work for a vehicle alignment shop operated by Gordon. (29 RT 8264, 8274.) An accident at the shop resulted in its being closed the next day, and Gordon eventually went to work for appellant's fencing business.[33] (29 RT 8275-8276.) Gordon, like appellant, was an ex-Marine, and they became good friends. (29 RT 8264.) Appellant allowed Gordon to move into a vacant bedroom in his house. (29 RT 8276-8277.) When Gordon moved in, he brought with him about 15 weapons and an assortment of books about guns. (29 RT 8278, 8283-8285.) One of those guns was the Ruger 10-22 rifle, which Gordon allowed appellant to use and modify. (29 RT 8286.) Gordon also had written and published a book of

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[33] Gordon testified that the accident was caused by appellant's directing a customer to drive his own vehicle off the rack, which resulted in the vehicle falling into a pit. He blamed appellant for the resulting failure of the business. (22 RT 6411-6412; 32 RT 9357; 33 RT 9379.) Appellant denied that Gordon blamed him for the accident. (29 RT 8275-8276.)

an elaborate role playing game, and Daniels was helping Gordon develop a web site for the game. (29 RT 8279.) Contrary to Gordon's testimony, appellant testified that he never told Gordon that he was a lieutenant in the Marines or worked as a sniper. (29 RT 8270, 8273.)

Appellant maintained that he had no knowledge of any plans to kill Dean. (29 RT 8354.) He said that he, Daniels and Gordon traveled to Portland in February 1998 on business for Rancho Safari.[34] (29 RT 8290.) Appellant acknowledged that they brought several weapons, including a Remington rifle, as well as ammunition, Motorola walkie-talkies, and gun cleaning supplies. (29 RT 8291-8295.) But appellant said he never saw Gordon's Tec-9 assault weapon on that trip. (29 RT 8299.) He said he visited a Copeland's sporting goods store in downtown Portland, among other businesses. (29 RT 8303-8304.)

Appellant claimed that he did not shoot any of the guns that he and his friends brought with them on the trip. (29 RT 8300.) He denied that he ever went looking for Dean, either at his home or at a downtown parking garage. (29 RT 8304-8305.) He acknowledged that Lynn visited him at the Hampton Inn on the second day of their trip, but he denied that they talked about killing Dean. (29 RT 8325.) Instead, he said, they discussed Lynn's suspicion that Dean was cheating on her and embezzling money from his employer. (29 RT 8325-27.) Appellant said he and Lynn never discussed killing Dean at any other time. (29 RT 8334.)

Appellant testified that Daniels and Gordon left the hotel at about 10:00 p.m. to visit a nearby topless bar. (29 RT 8330-8331.) They took appellant's Jeep and arrived back at the hotel at about 2:30 a.m. (29 RT 8332.) There was no mention of going to the Noyeses' residence. (*Ibid.*)

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[34] On cross-examination, appellant acknowledged that he did not sell any Rancho Safari merchandise during that trip. (30 RT 8593.)

Appellant said he had no knowledge of any bullet holes in the window screen of the hotel room. (29 RT 8333.) He said he never saw a silencer during that trip, and he did not throw one over a wall. (29 RT 8333-8334.) Appellant said his group left the hotel the following morning, spent some time at a casino in Oregon along Interstate 5 and then returned home. (29 RT 8332-8333.)

Appellant acknowledged that he met Lynn previously at a hotel in the Eugene/Springfield area. But he insisted that they did not have sex on that occasion. (29 RT 8334-8335.) He claimed he and Gordon were in that area to drum up business for Rancho Safari. (30 RT 8729-8730.) Appellant also denied that he had staged a burglary at the Noyeses' house on the weekend of May 9-10. (30 RT 8495-8496.) He claimed that he was with Carole that weekend in Gresham. (*Ibid.*) While there, appellant said, he called Daniels a few times to have him check on a fencing job that they were working on. (30 RT 8756-8757.)

Appellant maintained that he had nothing to do with Carole's murder, and had no idea that she was going to be killed. (28 RT 8077; 29 RT 8353.) He testified that he never discussed with Gordon or Daniels the prospect of either being a paid assassin. (29 RT 8336-8337.) He denied any knowledge of "The Company" or "Company T." (29 RT 8212, 8336.) Appellant said that Daniels and Gordon spent a lot of time watching "The Jackal," a movie about a professional assassin. (29 RT 8337-8339.) Appellant denied that he ever watched the movies "Ultimate Sniper" or "Pro Sniper," which also were seized from his house.[35] (29 RT 8388.)

Appellant testified that Gordon liked to make candles from wax that Carole had bought. (29 RT 8339-8340.) Appellant denied that he himself

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[35] Each of those three movies was played for the jury at the request of the defense. (29 RT 8464, 8469-8470; 30 RT 8698.)

used the wax to seal an envelope, and he denied that he ever put his scuba bubble in any wax. (29 RT 8340, 8353.) Appellant also denied that he prepared or saw the "hit package" that Daniels described in his testimony. (29 RT 8344, 8351-8352.) He denied ever discussing with Daniels plans to kill Carole or anyone else. (*Ibid.*)

Appellant said that he owned a label maker, but it was not of the type that was recovered from the Sacramento River. (29 RT 8342-8243.) Instead, it was a mechanical device that produced labels with raised lettering. (29 RT 8342-8343.) Gordon had an electronic label maker that produced lettering on clear tape. (29 RT 8343.) Appellant denied throwing an electronic label maker in the river. (29 RT 8343.)

Appellant acknowledged that he was with Daniels when Daniels purchased a Rossi firearm at Jones' Fort. (29 RT 8344-8346.) He said he loaned Daniels $50 to purchase a holster, but denied giving Daniels any money for the gun. (29 RT 8347-8349.) He also denied that he ever discussed with Daniels shooting anybody with the gun. (29 RT 8351.)

Appellant testified that he did not realize until after Carole was killed that she had a life insurance policy; he believed only his life was insured as a result of the applications filed in March 1998. (29 RT 8358; 30 RT 8562, 8738.) Because Carole worked for an insurance company, she handled the insurance applications. (29 RT 8359-8360.) He said that he did not realize the premiums for both policies were deducted from their bank account. (30 RT 8559-8560.)

Regarding the events of May 16, 1998, appellant testified that he went to a gun show in Anderson to sell Rancho Safari merchandise. (29 RT 8354.) Daniels was working with him, and he allowed Daniels to borrow his Jeep to take Carole home, finish watching a rented movie, then return the movie and go grocery shopping. (29 RT 8355-8356, 8361-8362.) The plan was for appellant to meet them at home when they returned from their

errands, and they would be joined there by Gordon and Sara Mann. (29 RT 8357.)

Appellant testified that he left the gun show and went to his parents' house for about 20 minutes before heading home. (29 RT 8361.) At about 4:00 or 5:00 p.m., while appellant was at his parents' house, he received a page from Carole stating, "All done going home." (29 RT 8360-8361.) When appellant entered his house, Gordon and Mann were already there. (29 RT 8362.) Appellant asked where Carole was and went outside. (29 RT 8362.) He denied that he was looking for the Jeep, that he said the Jeep had been stolen, or asked anyone to call the police. (29 RT 8262-8263.)

When appellant went through his bedroom on the way to the bathroom, he saw Carole lying on the floor next to the bed. (29 RT 8364-8365.) He approached her and saw blood around her head; then he yelled for Gordon and Mann to call 911. (29 RT 8365.) He eventually noticed bullet holes and began to perform cardiopulmonary resuscitation, thinking that he had detected a light pulse. (29 RT 8367-8368.) He thought about performing a tracheotomy and asked Gordon for a hose, tubing, a knife and a flashlight. (29 RT 8372-8373.) Appellant said he was frustrated and mad that it took the EMTs so long to show up. (29 RT 8374.) After Carole was murdered, appellant testified, he discovered missing from under the bed a lock box that contained $4,980 in cash. (29 RT 8381-8382.)

Appellant said he had no reason to believe that Daniels killed Carole. (29 RT 8369.) When appellant learned that Daniels had been arrested for the murder, he was angry because he thought the police had the wrong man. He voiced that opinion to the press. (29 RT 8375.)

Appellant claimed that when Daniels called him on May 18 (the call recorded by sheriff's detectives), he did not realize that Daniels was

admitting that he killed Carole.[36] (29 RT 8376-8377; 30 RT 8568, 8574.) Appellant testified that when he promised that Daniels would be paid, he was referring to $250 that he owed Daniels for his work on a recent fencing job. (29 RT 8377; 30 RT 8567, 8758-8759.) When appellant told Daniels that he would discuss the matter with "the big boys," he was referring to his father and older brother. (*Ibid.*) When appellant referred to "The Company," he was referring to G & G Fencing. (29 RT 8378.)

Appellant also claimed that the letter Lynn received while in jail from "Gabriel Michaels" (which urged her to change her guilty plea and contact appellant's trial lawyer) was written by another inmate who had written many other letters to Lynn. (29 RT 8383-8385.)

Throughout his testimony, appellant referred to his unborn child as "Jessie." (28 RT 8172; 29 RT 8268, 8286.) He said that he had purchased a new rifle for "Jessie" after he learned that Carole was expecting a boy. (29 RT 8268, 8286.)

2. Other Defense Witnesses

Recalled as a defense witness, Gordon acknowledged writing numerous letters to Lynn since his arrest, including a Valentine's Day greeting, sometimes using the names of other inmates. (32 RT 9353-9354, 9376.) He also acknowledged writing many letters to the prosecutor, Greg Gaul, including one in which he admitted that he once dreamed of being a "super hero killer" and was "looking for any excuse to use guns." (32 RT 9353-9357.) Gordon further acknowledged drawing a stick figure cartoon of Carole with a dialogue bubble stating, "I'm a natural at everything." (32 RT 9358.) Gordon testified that he adored Carole, saying, "We were like

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[36] Appellant testified that it took him a few days to realize the meaning of Daniels's statement, "I copped a plea of jealousy." (30 RT 8574-8576, 8674-8675.)

best friends. She was an incredible person. I loved her like a sister." (32 RT 9358.)

Gordon also testified that he believed appellant had robbed his alignment shop and blamed appellant for destroying his business. (32 RT 9357, 9379.) On cross-examination, Gordon testified that appellant encouraged him to kill certain persons with whom appellant had financial disputes, and that they once armed themselves and went looking for those persons. (32 RT 9587-9590.)

Corrina Howard, a barmaid at the Anderson Moose Lodge, testified that appellant was "great with kids," and had agreed to coach a youth soccer team at her request. (28 RT 7974-7976.) She said appellant seemed eager to become a father. (28 RT 8004.) Howard also testified that in January or February of 1998, she overheard appellant, Daniels and Gordon discussing an upcoming trip to Oregon to sell camouflage gear, but there was no talk of killing anyone. (28 RT 7981-7983, 7997-8001.)

Dale Streetman, a former Marine who met appellant at Camp Pendleton, testified that appellant was excited about becoming a father. (28 RT 8045.) He said that appellant and Carole had a "loving relationship," and that they did "everything together." (28 RT 8046-8047.)

Susan Spencer, a public health assistant in Shasta County who teaches childbirth education classes, testified that appellant was in one of those classes in April 1998. (28 RT 8049-8050.) Although appellant initially said he was taking the class "under duress," he appeared to enjoy it and was an active participant. (28 RT 8050-8052.)

Jim Kneeland, who works for Archers Afield, an archery shop in Portland, testified that a representative of Rancho Safari came into his store

sometime before 1999 to introduce himself.[37] (31 RT 9058-9061.) Shaun LaCasse, who operates The Gun Room, a sporting goods store in Portland, testified that he spoke with a sales representative in 1997 or 1998 about purchasing "gillie suits," a type of camouflage wear.[38] (31 RT 9065.)

Charles Hawkins, who participated in an archery competition with appellant, testified that he loaned appellant the movies "Pro Sniper" and "Ultimate Sniper" either in April or May of 1998. (32 RT 9116-9118.) On cross-examination, Hawkins said that Daniels was with appellant when he borrowed the movies and appellant told Daniels that he trained with the instructor in the movie while in the Marines and considered the instructor his "mentor." (32 RT 9119-9120.)

Patricia Garton, appellant's mother, testified that she asked appellant to purchase an electronic label maker for her to give as a gift to a friend, and that she was with appellant when he made the purchase at an Office Max in April 1998. (33 RT 9408-9411.) She gave the label maker to her friend a few days later. (33 RT 9411.) Patricia Garton also testified that she asked appellant to purchase a pager for her, which she gave to Carole because it did not work on her telephone plan. (33 RT 9427-9428.)

Kenneth Richardson, appellant's older brother, testified that appellant and Carole seemed happy together. (30 RT 8699.) Appellant was excited about the prospect of being a father, and he planned to name the child "Jessie James" if it was a boy. (30 RT 8700.) Richardson also testified that appellant referred to equipment for G & G fencing as "company

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[37] On cross-examination, Kneeland said he could not identity appellant as the representative he spoke with. (31 RT 9062.)

[38] LaCasse could not recall if the representative identified himself as being with Rancho Safari. (31 RT 9065.) He was not asked at trial to identity appellant as the representative. (31 RT 9066-9067.)

equipment," and that their mother used the phrase "big boys" to refer to appellant's older brothers. (30 RT 8704-8705, 8720.)

D. Rebuttal Evidence

Sharon Lonie, owner of North Cal Printing, testified that appellant ordered two sets of business cards printed in April 1998—including one set with the word "Patriot" and an 800 telephone number. (32 RT 9236-9240.) Appellant paid for these cards himself and Carole was not involved in ordering or paying for them. (32 RT 9240-9246.) Lonie also testified that appellant asked her to print a second flier for Carole's memorial service that included an image of the Celtic cross he wore around his neck, instead of the dove that was included in the original design. (32 RT 9246-9248.)

Faye Call, a friend of appellant's and Carole's, testified that Carole visited her at home by herself on May 10, 1998. (34 RT 9659-9662.) Before Carole left, Call loaned her two video movies. (34 RT 9662.) At Carole's memorial service, Call told appellant that she had seen Carole on Mother's Day and had loaned her two movies. Appellant told Call, "I wondered where that had come from." (34 RT 9664.)

Krista Woelfer testified that appellant and Carole visited her in Portland on Saturday, April 11, 1998, the day before Easter. (34 RT 9810.) Appellant and Carole were in town on their way to visit Carole's father in Vancouver, Washington. (34 RT 9812.) Woelfer and appellant went out to a bar that evening while Carole stayed at Woelfer's house watching television. (34 RT 9813, 9815-9816.) While at the bar, appellant made several phone calls and then told Woelfer that he was going to meet a male friend there; she went home without him. (34 RT 9813-9814.)

Lynn testified that appellant called her at home during Easter weekend of 1998 and said he was in Portland and wanted to see her. (34 RT 9827-9828.) Appellant said he was at the bar with Woelfer and that if Lynn did not meet him there he was going to leave and have sex that night

with Woelfer. (34 RT 9829-9830.) When Lynn got to the bar, appellant was alone. (34 RT 9830.) She and appellant left the bar in Lynn's Bronco, drove to a park, and had sex in the vehicle. (34 RT 9831-9832.) On cross-examination, Lynn acknowledged that she told detectives that she did not see appellant that weekend. (34 RT 9837, 9847, 9860-9861.)

E. Penalty Phase

The prosecution called four members of Carole's family to testify in the penalty phase. They all described Carole as cheerful, kind-hearted, fun-loving, athletic, outdoorsy, and excited about becoming a mother. (37 RT 10519-10523 [brother Michael Holman]; 37 RT 10527-10531 [brother Donald Holman]; 37 RT 10535-10543 [stepmother Victoria Holman]; 37 RT 10559-10564 [father James Holman].) The survivors described their family as very close and said Carole's death was devastating. (37 RT 10521, 10524, 10530, 10545, 10547, 10565.)

The defense did not call any witnesses during the penalty phase. Defense attorney Russell Swartz began his argument by stating:

> I have a message as counsel for Mr. Garton to deliver to you. Mr. Garton points you to the following. [¶] Norman Daniels has killed his wife Carole Anne Garton. Norman Daniels has killed his son Jesse James Garton. Norman Daniels took his family from him. The police took his freedom from him and placed him in a cell. The District Attorney accused him and took his reputation. The verdict has taken his honor. The only thing of value that Todd has left is his life. To Todd, life without family, freedom, or honor, has little value. You might as well kill him. He is neither asking nor he expects more than death from you.

(37 RT 10733.)

But Swartz said that as counsel for appellant, he was asking the jury to spare appellant's life. (37 RT 10733.) As a mitigating factor, he argued that appellant had no prior criminal record. (37 RT 10734.) He also argued that there was lingering doubt over appellant's guilt, saying that Daniels

had a motive to frame appellant. (37 RT 10734-10736.) Highlighting some deprivations appellant would experience as an inmate serving a life term, Swartz asked the jury to show mercy for his client. (37 RT 10737-10742.)

ARGUMENT

I. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY REFUSING TO ALLOW HIM TO WEAR HIS WEDDING RING DURING TRIAL BECAUSE OF JAIL SECURITY CONCERNS

Appellant contends that his federal and state constitutional rights were violated when the trial court denied his request to wear his wedding ring during the trial, which he had been prohibited from wearing at the Shasta County Jail for security reasons. He argues that the trial court's ruling violated his right to present evidence in his defense, to be dressed in civilian attire, and to a reliable guilt and penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. He also claims that the trial court abused its discretion in finding that allowing him to wear the ring in court could result in a jail security problem. (AOB 151-168.)

Appellant's claims are without merit. An in-custody defendant's constitutional right to wear civilian clothing while on trial does not include the right to wear jewelry. Further, contrary to appellant's contention, whether or not he wore a wedding ring at trial was not relevant to any disputed issue at trial; thus, the denial of appellant's request did not implicate his constitutional right to present a defense. Similarly, any possible error in refusing to allow appellant to wear the wedding ring was harmless in light of its lack of probative value and the overwhelming evidence of appellant's guilt.

A. Background

At the time of trial, appellant had been in custody at the Shasta County Jail for about two years, held without bail. (3 RT 1076, 1079.) At a pre-trial hearing, defense counsel informed the trial court that, in addition to wearing civilian attire during the trial, appellant wanted to wear his wedding ring and a necklace with a religious medallion. (3 RT 1015.) The court stated that the request appeared to be "problematic" because inmates at the county jail are not allowed to wear jewelry there. (*Ibid.*) Counsel offered to take custody of the ring and give it to appellant each morning before trial and then take it back at the end of each day. (*Ibid.*)

The prosecutor objected, stating that bringing the necklace into jail could pose a security problem, and that appellant's request to wear his wedding ring was only intended to persuade the jury that he is still "bonded with his wife" and had nothing to do with her murder.[39] (3 RT 1017.) The court expressed a concern that requiring a courtroom marshal to keep track of appellant's jewelry throughout a trial expected to last at least 50 court days could be burdensome. But the court also said it understood that if appellant were not in custody, he would be able to wear his wedding ring as a symbol of his love for Carole. (3 RT 1018-1019.) The court said it would consult with security staff before making a decision. (3 RT 1019.)

At his next court appearance, appellant placed the ring on his finger, and counsel described it as a gold band with a design not visible from more than two or three feet away. (3 RT 1070.) The necklace was described as a pendant with a "rawhide strap" holding a medallion about twice as thick as quarter. (3 RT 1070-1071.)

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[39] Appellant had told the court that he planned to wear the necklace under his shirt, so that neither the leather band nor the cross would be visible to the jury. (3 RT 1015-1016.)

The trial court said that the marshal's office had informed it that the jail has a general policy of prohibiting metal jewelry because such objects can be turned into weapons or used for barter, which also can create security problems, but that inmates can apply for exceptions for religious items. (3 RT 1072-1073.)[40] The court said that, because appellant would be wearing a tie and a belt as part of his civilian attire, and because those items are prohibited inside the jail, they had to be given to or taken from him four times a day during trial. (3 RT 1073-1074.) The court added that if it granted appellant's request, the marshal would have to keep track of two small additional items on at least 100 occasions throughout the trial, increasing the chances that one of the pieces of jewelry could be missed or misplaced and end up inside the county jail. (3 RT 1074.)

Defense counsel suggested that the marshal responsible for safekeeping the items could use a checklist, and he repeated his offer to personally take responsibility for the wedding ring. (3 RT 1075.) He added that if one of the metal objects inadvertently entered the jail that would be obvious "within a day." (3 RT 1076.) He also asked that the marshal who expressed concerns to the trial court about jail security be required testify that "his personnel is [sic] not competent enough to remember two additional items." (3 RT 1077.)

The trial court responded as follows:

> Well, nobody said they are not competent enough. The issue is how many additional duties is it appropriate for the Court to impose on them to accommodate this defendant, and what are the good reasons that they should do so? Every one of those steps, whether it's taking a belt and a tie, then taking a necklace out from under his shirt and taking a ring and handing them to you, is a step that takes time. And handling those things four times a day, there's got to be a good

[40] The prosecutor later stated that appellant had not requested an exemption to allow him to wear the medallion in jail. (3 RT 1077.)

reason that that's done. And so far you haven't persuaded me that there is a good reason. And to undertake any security risk you want to is inappropriate, is without good reason.

If you wanted to follow your logic, counsel, we could say that every defendant who comes to court should be permitted to put on whatever jewelry he chooses, or she chooses, because every bailiff we have is certainly competent enough to have a checklist, and make sure that they are all removed and handed to counsel. That might be true, but it's inappropriate.

Why take the risk unless there is a reason? And why add to the duties of a busy bailiff? So I'm unpersuaded that that needs to be done. And I don't see it as an issue of competence. . . .

(3 RT 1078.)

Defense counsel said that prohibiting his client from wearing the requested items of jewelry amounted to "additional discrimination against him because he's in custody. That is unnecessary." (3 RT 1079.) He argued that if appellant were not in custody at the time of trial, he would be allowed to wear both the wedding ring and the medallion. "And so what we're now saying is that he is being deprived of the rights that any other person would have to correctly appear or make a normal appearance before a jury because of the no-bail situation." (3 RT 1079.) Counsel added that the lack of a wedding ring on appellant's hand might be interpreted by jurors as "abandonment of his wife, in some sense or another." (*Ibid.*)

On that latter point, the trial court said that "there are a great many married men who never have worn wedding rings. It would really shock me to think that any juror would start making negative assumptions about a man whose wife died roughly two years ago because he isn't currently wearing a ring, never having any knowledge about whether he ever wore a ring." (3 RT 1080.) The court then denied appellant's request to wear either the wedding ring or the medallion. (3 RT 1080-1081.)

B. The Trial Court's Ruling Did Not Violate Appellant's Constitutional Rights

On appeal, appellant does not challenge the trial court's refusal to allow him to wear the necklace and medallion, only its refusal to allow him to wear the wedding ring. (AOB 151 fn. 56.) As previously noted, he contends that the court's ruling in that regard violated his federal constitutional rights to present a complete defense, to wear civilian attire during trial, and to a reliable verdict. Although appellant did not raise these constitutional theories in the trial court, he is not precluded from raising them on appeal to the extent that they do not invoke facts or legal standards different from those the trial court was asked to apply. (See *People v. Tate* (2010) 49 Cal.4th 635, 687, fn. 28; *People v. Lewis* (2008) 43 Cal.4th 415, 446, fn. 6; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.) But based on the facts and legal standards presented below, his constitutional claims are without merit.

1. Right to Wear Civilian Clothing Does Not Include Jewelry

Appellant argues that the trial court's denial of his request to wear his wedding ring infringed his constitutional right to wear civilian clothing during trial. (AOB 157-158.) He is mistaken.

It is well established that a defendant in custody at the time of trial has a constitutional right to appear in the courtroom wearing civilian clothing instead of jail attire. (See *Estelle v. Williams* (1976) 425 U.S. 501, 504-506; *People v. Taylor* (1982) 31 Cal.3d 488, 494-496.) That right is part of the right to a fair trial under the due process clause of the Fourteenth Amendment. (See *Estelle v. Williams*, *supra*, 425 U.S. at 503.) However, no court has ever found that an in-custody defendant has a concomitant right to wear jewelry or any other accessory. That is because the reasons for the constitutional rule have nothing to do with personal expression.

As this Court has explained, compelling a defendant to go on trial in jail clothing undermines the presumption of innocence by constantly reminding the jury that that he is in custody. (*People v. Taylor*, *supra*, 31 Cal.3d at 494.) "In most instances, parading the defendant before the jury in prison garb only serves to brand the defendant as someone less worthy of respect and credibility than others in the courtroom." (*Ibid.*) Beside the potential prejudice raised in the minds of jurors, a defendant "may be handicapped in presenting his defense by the embarrassment associated with his wearing jail garb." (*Id.* at p. 495.) In addition, forcing a defendant to wear prison clothing implicates equal protection principles by subjecting inmates who cannot afford to bail to inferior treatment based on economic status. (*Ibid.*)

Appellant's request to wear his wedding ring at trial implicated none of these principles. The absence of a wedding ring did not alert jurors to his custodial status. (Cf. *People v. Williams* (1995) 33 Cal.App.4th 467, 475-476 [forcing defendant to wear jail wristband during trial did not violate his due process rights because if any jurors noticed it, they likely would not have known what it was].) Nor did it suggest that he was unworthy of respect or credibility based on his appearance. Nor did it inhibit appellant from testifying or cooperating with his attorneys.

Contrary to appellant's suggestion (AOB 158), the fact that the trial court observed that he could have worn his wedding ring if he were not in custody does not show that the decision infringed upon his constitutional rights. The court also could have observed that if appellant were not in custody, he would be able to eat lunch outside the courthouse or spend more time with his lawyer at the end of trial each day. Like not being able to wear a wedding ring, none of those circumstances infringes on a defendant's right to a fair trial. In short, the trial court did not violate

appellant's right to be tried in civilian clothes when it denied his request to wear his wedding ring during trial.

2. As an Object to be Worn at Trial, The Wedding Ring Had No Probative Value

Appellant also contends that the trial court's denial of his request to wear his wedding ring violated his Sixth Amendment right to present evidence because the presence of the ring would have supported his testimony on a "critical disputed fact"—that he loved his wife and child, contrary to the prosecution's theory of the case. (AOB 153-156, 164.) However, as an article of clothing or jewelry to be worn during the trial, the ring had no probative value in determining whether appellant had the intent or motive to kill Carole. Thus, the court's denial of appellant's request did not infringe appellant's constitutional rights.

A criminal defendant has a Sixth Amendment right to present his own version of the facts and to call witnesses to establish a defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Washington v. Texas* (1967) 388 U.S. 14, 23.) However, a defendant's right to introduce evidence is not absolute, and the constitution affords trial judges "'wide latitude' to exclude evidence that is 'repetitive . . , only marginally relevant' or posses and undue risk of 'harassment, prejudice, [or] confusion of the issues.'" (*Crane v. Kentucky*, 476 U.S. at pp. 689-690, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; see also *Holmes v. South Carolina* (2006) 547 U.S. 319, 327 [trial judges may exclude proffered defense evidence "if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury"].) As this Court has stated, a defendant's constitutional right to present evidence applies only to "relevant and material" evidence, i.e., "all relevant evidence of *significant* probative value to his defense." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, quoting *People v. Reeder* (1978) 82 Cal.App.3d 543.). "Although the

complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.)

Preliminarily, it should be noted that appellant did not request to introduce the wedding ring into evidence; he only sought to wear the ring in the apparent hope that jurors would notice it and draw an inference that he still loves his wife and thus could not have plotted her death. Appellant fails to cite, and respondent is unaware of, any case law stating that items of clothing or jewelry worn by a defendant during trial can constitute evidence, absent a request to introduce that particular item into evidence. Merely as an item worn by appellant, the ring would not have constituted "evidence" for purposes of Evidence Code section 140, which defines evidence to include "material objects . . . presented to the senses that are offered to prove the existence or nonexistence of a fact." Because defense counsel did not seek to "offer" the ring into evidence—either directly or as demonstrative evidence—it would not seem to qualify as evidence under Evidence Code section 140.

At most, legal authority suggests that a defendant's attire can form part of his "demeanor" that may be considered by the jury in evaluating his credibility when he testifies. (See *United States v. Schuler* (9th Cir. 1987) 813 F.3d 978, 981, fn.3 ["When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. In this circumstance, courtroom demeanor has been allowed as one factor to be taken into consideration."]; *Dyer v. MacDougall* (2d Cir. 1952) 201 F.2d 265, 268-269 ["It is true that the carriage, behavior, bearing, manner and appearance of a witness—in short, his 'demeanor'—is part of the evidence. . . . They [jurors] may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness."]; Timony,

Demeanor Credibility (2000) 49 Cath. U. L. Rev. 903, 907 ["Generally, demeanor includes the witness's dress, attitude, behavior, manner, tone of voice, grimaces, gestures and appearance."]; *Black's Law Dictionary* 496 (9th ed. 2009) [defining "demeanor" of a witness or other person as relating to "physical appearance; outward bearing or behavior," and "demeanor evidence" as a the "behavior of [a] witness on the witness stand which may be considered by [the]trier of fact on [the] issue of credibility"].) However, dress and personal appearance during trial are not probative of guilt. (See *United States v. Dellinger* (7th Cir. 1972) 472 F.2d 340, 390-391.) Nothing in the trial court's ruling prevented defense counsel from introducing the ring into evidence and eliciting testimony from appellant about what it meant to him. For example, the defense could have elicited evidence that, throughout his marriage, appellant wore a wedding ring, and that he continued to wear a wedding ring even after Carole was killed.[41]

In arguing that his wedding ring could have been evidence apart from demeanor evidence when he testified at trial, appellant cites *People v. Garcia* (1984) 160 Cal.App.3d 82. (AOB 155-156.) In that case, the appeals court stated, "Ordinarily, a defendant's nontestimonial conduct in the courtroom does not fall within the definition of 'relevant evidence' as that which 'tends to logically, naturally, [or] by reasonable inference to prove or disprove a material issue' at trial." (*Id.* at p. 91.) In a footnote, the court added that it did not disapprove "of the routine practice of a jury viewing the defendant's physical appearance to see if it comports with a physical description given by a witness or to determine if the physical appearance of a defendant supports a factual finding that must be made by

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[41] To show that appellant loved his wife, the defense introduced into evidence a pocket watch that appellant carried "every day" which contained a photograph of Carole on the inside cover. (30 RT 8668-8669.) The defense could have introduced the wedding ring for the same purpose.

the trier of fact." (*Id.* at p. 91, fn.7.) Contrary to appellant's suggestion, this footnote does not apply to his proffered evidence. Because appellant's identity was not at issue in the case, there was no need for the jury to assess his appearance at trial for that purpose. And because the jury was not required to make any findings about whether appellant loved or loves his former wife, the presence of a wedding ring on his finger would not have been relevant for that purpose either.

If anything, *Garcia* undermines appellant's argument by stating that, while jurors might be influenced by their perception and impressions of a non-testifying defendant's courtroom demeanor, that circumstance "cannot be judicially endorsed as evidence of his guilt." (160 Cal.App.3d at p. 92.) In the instant case, while jurors might have drawn certain inferences based on the presence or absence of a wedding ring on appellant's finger while he sat at the defense table, any such inferences would have been inappropriate because they were not based on evidence.

Accordingly, the issue here boils down to whether the presence of a wedding ring on appellant's finger would have any legitimate evidentiary value in evaluating his credibility as a witness. The answer must be no.

Appellant testified that he had nothing to do with the murder of his wife. (28 RT 8077; 29 RT 8354.) He denied any knowledge of "The Company" and denied that he ever discussed with Gordon or Daniels the prospect of either of them becoming a paid assassin. (29 RT 8212, 8336-8337.) Appellant also maintained that he had no knowledge of any plans to kill Dean Noyes. (29 RT 8354.) He denied that he had an affair with Lynn while married to Carole. (28 RT 8164-8165; 29 RT 8334-8335.) Appellant denied knowing that Carole had a life insurance policy at the time of her death or that he was the beneficiary. (30 RT 8562, 8738.) He testified that he and Carole shared many interests, including target shooting, hunting, camping and music. (28 RT 8174-8176.) Although appellant did

not expressly testify that he loved Carole, the thrust of his testimony was that he had no reason to want to kill her.

To the extent that appellant's demeanor factored into the jury's determination of whether he was telling the truth, the relevant factors would have been appellant's tone of voice, his facial expressions and body language. Whether or not appellant had a wedding ring on his finger at the time of trial would not have assisted the jury in weighing his credibility. It only would have been an object of potential sympathy, which jurors were instructed not to consider in reaching their verdict. (See 29 CT 8382; CALJIC No. 1.00.)

In sum, because the presence of a wedding ring on appellant's finger during trial would not have assisted the jury in evaluating his credibility, and because it would not have been relevant to any disputed issue at trial, the trial court did not violate appellant's Sixth Amendment right to present a complete defense when it denied his request. (See *People v. Cunningham*, *supra*, 25 Cal.4th at 999 [no constitutional violation in preventing defense from eliciting certain testimony because "defendant's offers of proof simply did not indicate that relevant evidence of significant probative value would be forthcoming"]; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1014-1015 [rejecting claim that trial court's exclusion of proffered defense evidence violated defendant's constitutional rights to present a defense because the evidence "had so little probative value"].)

C. No Abuse of Discretion

For a variety of reasons, appellant also contends that the trial court abused its discretion in denying his request to wear his wedding ring. (AOB 158-166.) Because the "abuse of discretion" standard generally applies to evidentiary rulings challenged on state-law grounds (see, e.g., *People v. Cox* (2003) 30 Cal.4th 916, 955), it would appear that this argument challenges the trial court's ruling on such grounds. Under that

standard, reversal is not warranted unless a reviewing court concludes that 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.) Appellant has failed to show that the trial court's ruling constituted such an abuse.

First, contrary to appellant's suggestion (AOB 159), the trial court did not base its ruling on a belief that jurors would be unable to see appellant's wedding ring if he were allowed to wear it. At one point, the trial court stated that it recalled defense counsel saying that the prosecutor could not see the ring, and thus neither could the jury, which would be farther away. (3 RT 1080.) Defense counsel noted that the prosecutor actually said that he could not see the design on the ring. (*Ibid.*) The court said, "Okay." (*Ibid.*) The court's response indicated that it realized it had misunderstood either defense counsel or the prosecutor, but now stood corrected. Indeed, the court's very next comment reflected a presumption that at least some jurors would notice that appellant was not wearing a ring.

Appellant also argues that the trial court's denial of his request could have led reasonable jurors to conclude that he had abandoned his wife and discount his entire testimony on that basis. (AOB 159-160.) Respondent submits that only an irrational juror would conclude that appellant was a liar (or a murderer) simply because he was not wearing a wedding ring at the time of trial. Jurors were instructed to base their verdict solely on the evidence at trial, and whether or not appellant was wearing a wedding ring was not evidence. Moreover, as the trial court recognized, although many people continue to wear their wedding ring after their spouse has died, many others do not, particularly if they are young and have entered into new relationships. Respondent submits that the absence of a wedding ring

on a young man's hand two years after the death of his wife would not be interpreted by most people as a sign of lack of love, past or present.[42]

The jurors in this case were instructed not to be "influenced by pity for or prejudice against Mr. Garton" or by "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (CALJIC No. 1.00; 29 CT 8382.) Jurors are presumed to follow the trial court's instructions. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Accordingly, the trial court could properly assume that jurors would not view appellant's testimony unfavorably simply because he was not wearing a wedding ring.

In a related argument, appellant contends that the trial court's ruling invaded the province of the jury by preventing it from drawing its own conclusions about appellant's demeanor. (AOB 162-164.) This argument is premised on appellant's contention that the court's ruling prevented him "from presenting the best and strongest evidence of his love for Carole to the jury and from rebutting the prosecutor's assertions that he did not love her . . ." (AOB 164.) However, as previously discussed, the mere absence of a wedding ring on appellant's finger at the time of trial had no probative value, and the trial court was not required to consider how an irrational juror might interpret that circumstance. Not surprisingly, appellant cites no authority for the novel proposition that a trial court can invade the province of the jury by excluding certain evidence. The only cases he cites pertain to jury instructions that precluded jurors from determining elements of an offense. (See *Carella v. California* (1989) 491 U.S. 263, 265 [jury instructions violated Fourteenth Amendment by directing jurors to presume certain elements of crimes satisfied if they found certain facts to be true];

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[42] At the start of trial in December 2000, appellant was 30 years old. (27 RT 7745.)

People v. Kobrin (1995) 11 Cal.4th 416, 423 [in prosecution for perjury, jury rather than trial court must be allowed to decide the issue of materiality].) Those cases are inapposite and offer no support for his argument.

Appellant contends that the trial court abused its discretion because it denied his request based on the mere possibility that courtroom personnel might not be able to keep track of his wedding ring along with certain items of his court clothing. He further contends that the trial court abdicated its decision-making authority to courtroom marshals. (AOB 161, 165-166.) However, in evaluating the risks of allowing appellant to wear his wedding ring, the trial court could properly consider the concerns of jail and courtroom security personnel, just as trial courts routinely consider such concerns in determining courtroom security measures. Simply because appellant disagreed about the potential risk for jail security does not render the court's decision capricious or absurd. Furthermore, the record clearly shows that the trial court did not abandon its decision-making authority, but rather sought information from the marshal before making an independent determination of the risk to jail security. Nor was the trial court required to accept defense counsel's offer to take custody of the ring; the court's concern about the numerous opportunities for a custodian to miss it would have applied equally to defense counsel.

In sum, the trial court did not abuse its discretion in denying appellant's request to wear his wedding ring during the trial. Further, the trial court's ruling did not prevent appellant from attempting to offer the ring as evidence, or use it in some legitimate manner as part of his defense that he had nothing to do with Carole's murder. The trial court's ruling was justified by legitimate concerns about jail security, and appellant has failed to show that it was arbitrary, capricious or wholly outside the bounds of reason.

D. Any Possible Error was Harmless

Even if the trial court erred in refusing to allow appellant to wear his wedding ring during the trial, any such error was harmless given the ring's lack of probative value and the overwhelming evidence that appellant masterminded the killing of his wife.

Appellant argues that because the trial court's ruling undermined the presumption of innocence, any error must be reviewed for harmlessness beyond a reasonable doubt, using the standard for constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (AOB 166-168.)

However, as discussed above, the trial court's ruling did not infringe on appellant's constitutional rights, either by signaling to the jury that he remained in custody or by preventing him from introducing evidence of significant probative value. Thus, assuming for the sake of argument that the trial court erred, such error should be reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, which precludes reversal unless it is reasonably probable that appellant would have obtained a more favorable verdict had defense counsel been permitted to introduce the proffered evidence. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 999.) Appellant cannot make that showing here.

As previously discussed, the mere presence of a wedding ring on appellant's finger would have had no probative value as to whether appellant was telling the truth when he denied any involvement in the murder of Carole. After hearing the vast amount of evidence that appellant masterminded his wife's death—including testimony from the triggerman (Daniels) and his paramour (Lynn Noyes), as well as computer records and other physical evidence corroborating their testimony, and appellant's own incriminating statements to Daniels captured on tape—jurors probably would have viewed the wedding ring as nothing more than a prop. In any event, it would not have blunted the force of the prosecution's evidence.

Appellant argues: "The absence of a wedding ring served as a constant reminder throughout the trial that appellant might have participated in the alleged plots to kill Carole and Dean because, as the prosecutor argued, he did not love her." (AOB 168.) To the extent that the jury might have been persuaded that appellant was incapable of killing his wife if he expressed his love for her at the time of trial, appellant had ample opportunity to do so when he testified. Contrary to appellant's claim (AOB 154), he did not directly testify that he loved Carole and was looking forward to the birth of his son. Nor did he testify that he was grief-stricken or devastated after her death. It is doubtful that the mere presence of a wedding ring on appellant's finger would have countered the negative impression appellant's testimony and manner made on the jury.

Furthermore, although appellant did not wear his wedding ring during the trial, the defense introduced into evidence a small gold pocket watch appellant carried "every day" which contained a photograph of Carole on the inside cover. (30 RT 8668-8669.) A video of appellant's interview with detectives showed him looking at Carole's photo inside the pocket watch after detectives left the interview room. (30 RT 8668, 8742.) That circumstance, which occurred a few days after Carole's death, was far more probative of any feelings appellant might have had toward Carole than whether he wore a wedding ring two years later. Indeed, defense counsel played the portion of the yideotape at the end of his closing argument in an attempt to show how much appellant loved Carole and thus could not have killed her. (36 RT 10332-10333.) Given that the jury was not persuaded by that argument, it is all but certain that it would have reached the same conclusion if appellant had been allowed to wear his wedding ring at trial. Accordingly, even if the trial court abused its discretion in refusing to allow appellant to wear the wedding ring, the error was harmless.

II. APPELLANT'S CLAIM THAT THE TRIAL COURT VIOLATED HIS CONSTITUTIONAL RIGHTS BY ALLOWING THE PROSECUTION'S CASE AGENTS TO BYPASS COURTHOUSE METAL DETECTORS HAS BEEN FORFEITED AND IS WITHOUT MERIT

Appellant contends that the trial court violated his constitutional rights by allowing the prosecution's two case agents to bypass metal detectors as they entered the courthouse with their weapons. He argues that this special treatment for the two investigators signaled to jurors that the court believed they were more trustworthy than any other witnesses. According to appellant, this lent a "false aura of credibility" to their testimony, which prejudiced him given the "breadth and significance" of their testimony. (AOB 169-181.) These arguments are entirely without merit.

Preliminarily, defense counsel's failure to accept the trial court's offer to admonish the jury against drawing any inferences from the officers' exemption from security screening forfeits appellant's right to challenge the court's ruling. Moreover, contrary to the premise of appellant's arguments, allowing the case agents to bypass metal detectors because they were authorized to carry firearms was not an inherently prejudicial practice, such as the visible shackling of a defendant during trial. Nor did the trial court abuse its discretion in refusing to require the investigators to relinquish their weapons upon entering the courthouse.

A. Background

Midway through trial, defense counsel complained to the trial court that the two case agents for the prosecution—Detectives Mark Von Rader and Steve Grashoff—were not required to pass through the courthouse metal detectors, as were all persons on the defense team.[43] (20 RT 5688-

[43] The complaint arose after the trial court ordered all parties to be present in court the following day at 8:50 a.m. regardless of the weather or (continued...)

5689.) Counsel claimed that this exemption "[s]hows a level of trust on that side of this courtroom that is not being accorded to us," and he requested that the investigators be required to pass through security screening like everyone else. (20 RT 5689.) The prosecutor noted that he was required to pass through security screening, and that all attorneys and law enforcement personnel are allowed to go to the front of the line. (20 RT 5690.) The trial court took the matter under advisement. (*Ibid.*)

The next morning, the trial court returned to the subject:

> Mr. Swartz [defense counsel], here's my sense of it. The purpose of weapons screening is primarily to screen for weapons. When peace officers who are on duty come into the courthouse, the weapons screening staff assumes that they have weapons and they are permitted by law to have weapons and they're permitted by the court weapons screening policy to have weapons, so there's no point in having them go through the weapons screening. What they have to do is identify themselves with proper identification. So, that's the reason there's disparate treatment.
>
> I don't see any prejudice, I don't think it's likely that any jurors take any kind of improper inference from that. But if you're concerned about it, I'm willing to advise the jurors as to the reasons for that treatment so that they don't get the impression which you thought they would get, that somehow these two officers and potential witnesses have some kind of special credibility. [¶] So, what's your druthers?

(20 RT 5683-5694.)

Defense counsel said he was still looking into the courthouse policy for obtaining passes to avoid security screening. (20 RT 5694.) The trial court informed counsel that the policy allows on-duty law enforcement

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(...continued)
the size of the line to enter the courthouse. (20 RT 5688.) When defense counsel asked if the court would consider obtaining special passes for counsel to avoid the screening, the trial court stated, "I have considered it, and I reject that idea." (*Ibid.*)

officers with firearms who are in court on official business to bypass the screening process. (*Ibid.*) Counsel argued that the two investigating officers, who had been authorized to sit at the prosecution table during trial, had no need to bring their weapons into court.[44] He suggested that the investigators leave their weapons outside the screening area and then go through weapons screening like everyone else. (*Ibid.*) The court replied that the detectives "have duties that are different than the rest of us have, and so I disagree." (*Ibid.*)

The court again offered to explain to the jury why the detectives were not subject to the screening process, but counsel declined the offer. (20 RT 5694-5695.) Counsel stated, "You know, this is the type of situation in which it's our position that an admonition would do more harm than good, so we have to live with the lesser of two evils." (20 RT 5695.)

B. The Claim Has Been Forfeited

Generally, a defendant forfeits the ability to raise a claim on appeal where, after raising a timely objection at trial, he declines an offer of an admonition from the trial court to cure the alleged harm. (See *People v. Valdez* (2004) 32 Cal.4th 73, 124 [although defense counsel objected to certain testimony, he forfeited his claim on appeal by rejecting the trial court's offer to admonish the jury to correct the error]; *People v. Silva* (2001) 25 Cal.4th 345, 374 [failure to accept trial court's offer of admonition to cure harm from alleged prosecutorial misconduct stemming from questioning of investigating officer "renders the prosecutorial

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[44] The trial court granted the prosecutor's request to designate both detectives as investigating officers (case agents), allowing either one of them to sit at the prosecution table during the trial. (2 RT 739-741, 884-889, 961-963.) However, the court denied the prosecution's request to allow both detectives to sit at counsel table at the same time, absent a showing of special need. (2 RT 961-963.)

misconduct claim unreviewable"]; see also *People v. Collins* (2010) 49 Cal.4th 175, 198 [defendant's rejection of trial court's offer to admonish jury to cure any prosecutorial misconduct among reasons cited in finding that claim was forfeited on appeal].) Appellant declined to request an admonition to cure the harm of which he complained. (20 RT 5964-5965.) Thus, he has forfeited this claim.

Appellant argues that his claim should not be forfeited because an admonition from the trial court would have been futile. He states: "Informing the jury that the officers were granted extraordinary privileges because they occupied a special place of trust in the court's own weapons-screening policy . . . would have exacerbated, not alleviated, counsel's concern that they would have a false aura of credibility when the testified." (AOB 177.) By suggesting that the court would have worded the admonition this way, appellant stacks the deck. In all likelihood, the court would have advised jurors that detectives were not required to pass through the court's metal detectors because they were authorized to carry weapons and that the jury should not draw any inferences about their credibility as witnesses based on that circumstance. Such an admonition would not have been futile, and would have cured any possible prejudice resulting from jurors observing that the two case agents were not required to pass through metal detectors. In declining the trial court's offer to admonish the jury, defense counsel expressed his view that such an admonition would exacerbate the perceived problem. (20 RT 5695.) While counsel could make a strategic decision on such a belief, that does not mean that an admonition would have had the effect he feared. Because appellant has failed to show that the admonition offered by the trial court would have been futile, he has forfeited the right to bring this claim on appeal.

C. The Weapons Screening Exemption for Law Enforcement Officers was not Inherently Prejudicial

Appellant argues that permitting the two case agents for the prosecution to bypass the courthouse security procedures in the jury's presence was inherently prejudicial, thus requiring a determination of "manifest need." He contends that this exemption for the investigators violated his rights to due process, to a fair trial, and to a reliable guilt and penalty determination under both the United States and California Constitutions. (AOB 171, 175-176.) These arguments are meritless.

Trial court decisions regarding courtroom security are reviewed for abuse of discretion. (*People v. Stevens* (2009) 47 Cal.4th 625, 643.) Further, when the court "imposes a measure that is inherently prejudicial to the defendant's right to assist in his defense, competently present his own testimony, or enjoy the presumption of innocence," the measure must be supported by a particularized showing of "manifest need." (*Id.* at pp. 643-644.) "However, if a practice is not inherently prejudicial, it need not be justified by a compelling case-specific showing of need." (*Id.* at p. 637.)

In *People v. Jenkins* (2000) 22 Cal.4th 900, this Court held that "the use of a metal detector at the entrance to the courtroom in which the case is to be tried is not inherently prejudicial." (*Id.* at p. 996.) It explained: "Unlike shackling and the display of the defendant in jail garb, the use of a metal detector does not identify the defendant as a person apart or as worthy of fear and suspicion." (*Ibid.*) Similarly, in *People v. Ayala* (2000) 23 Cal.4th 225, this Court held that placing a magnetometer (i.e., a metal detector) at the public entrance to the courtroom did not violate the defendant's federal or state constitutional rights because the device did not discriminate against the defendant. (*Id.* at p. 252; see also *Morgan v. Aispuro* (9th Cir. 1991) 946 F.2d 1462, 1464-1465 [use of "security courtroom," featuring a wire-reinforced glass partition and bars separating

the spectator area from the court area, was not inherently prejudicial because there was no reason for the jury to infer that the defendant was the reason for the security measures].)

In appellant's case, the mere fact that two the case agents were not required to pass through the metal detectors did not render the weapons screening process inherently prejudicial. Preliminarily, it must be noted that the officers had a statutory right to carry their weapons into the courthouse. (See § 171b, subd. (b)(2)(A).) To the extent that jurors noticed that the two agents were allowed to bypass the screening process upon entering the courthouse, their observation of that circumstance would not have discriminated against appellant in any way. All of the civilian witnesses in the case, including those for the prosecution, were required to pass through the metal detectors. As the prosecutor pointed out, he himself was not exempt from having to empty his pockets and pass through the metal detectors on his way into the building each day. (20 RT 5690.)

Appellant argues that jurors could have drawn "but one" inference from the fact that Detectives Von Rader and Grashoff were not required to pass through the court's metal detectors: "that they are exempt from the process because the court believes they are entitled to more deference and trust than anyone else who enters the courthouse." (AOB 175.) Of course, it would have been improper for jurors to draw *any* inference from the courthouse screening procedures because that was not evidence in the case. Moreover, the only level of trust that would have been reasonable to infer was that the detectives were trusted not to pose a threat to the security of the courthouse because of their status as law-enforcement officers. Aside from that, there was no reason for jurors to conclude that the trial court believed that they were entitled to more deference or credibility than any other witnesses in the case.

This Court has explained that "[m]any security and decorum procedures are routine and do not run the risk of prejudice." (*People v. Stevens*, *supra*, 47 Cal.4th at p. 643.) The screening for weapons of all persons who enter a courthouse, except for authorized law-enforcement personnel, is one such routine practice. By contrast, inherently prejudicial practices include "visible shackling, stun belts, or other affronts to human dignity, or methods that convey to the jury the defendant must be separated from the community at large because he is especially dangerous or culpable, or is the cause of some official concern or alarm." (*Id.* at p. 644, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) The courthouse security procedures challenged by appellant raise no such concerns because they did not infringe on his constitutional rights. They did not interfere with his ability to assist in his defense, competently present his own testimony or enjoy the presumption of innocence.[45]

Because the weapons screening policy at the Shasta County Courthouse was not inherently prejudicial, the trial court was not required to make a showing of manifest need for any heightened courtroom security. (See *People v. Stevens*, *supra*, 47 Cal.4th at pp. 637-638.) Indeed, for the reasons discussed above, the security measure challenged by appellant was not designed to provide special security in the particular courtroom in

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[45] In arguing that the courthouse security procedures here tended to identify the officers as trustworthy and appellant as a "person apart or as worthy of fear and suspicion," appellant cites *People v. Ayala*, *supra*, 23 Cal.4th 225 and *People v. Jenkins*, *supra*, 22 Cal.4th 900. (AOB 176.) However, as noted above, both of these cases held that the use of a metal detector is not inherently prejudicial because it "does *not* identify the defendant as a person apart or as worth of fear and suspicion." (*People v. Ayala*, *supra*, 23 Cal.4th at p. 252, quoting *People v. Jenkins*, *supra*, 22 Cal.4th at p. 996, italics added.) Neither case suggests that an exemption for authorized law-enforcement personnel would somehow discriminate against the defendant or infringe on the presumption of innocence.

which his case was being tried. Accordingly, the trial court was not required to balance the need for heightened security against appellant's constitutional rights.

D. The Trial Court Did Not Abuse Its Discretion

Apart from an alleged constitutional violation, appellant also contends that the trial court abused its discretion by failing to provide specific reasons why Detectives Von Rader and Grashoff should be exempt from the courthouse weapons screening procedures that applied to jurors and all other parties in the case. (AOB 172-175.) Appellant relies largely on *People v. Hernandez* (2011) 51 Cal.4th 733, in which this Court explained that even if a courtroom security practice is not inherently prejudicial, a trial court "'must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis.'" (*Id.* at p. 742, quoting *People v. Stevens*, *supra*, 47 Cal.4th at p. 642.)

Appellant's argument is fundamentally flawed because the rationale in *Hernandez* and *Stevens* does not apply to general courthouse security measures that do not have the potential to reflect negatively on the defendant. Both of those cases involved the stationing of a courtroom deputy next to a testifying defendant. (See *People v. Hernandez*, *supra*, 51 Cal.4th at pp. 739-740; *People v. Stevens*, *supra*, 47 Cal.4th at pp. 631-632.) In cases involving the use of metal detectors, this Court has never suggested that a trial court is required to provide case-specific reasons for the presence of such a security measure. In *People v. Jenkins*, *supra*, 22 Cal.4th 900, this Court observed that the public has become "inured to the use of metal detectors in public places such as courthouses." (*Id.* at p. 997.) It stated, "Security measures that are not inherently prejudicial need not be justified by compelling evidence of imminent threats to the security of the court." (*Ibid.*) Accordingly, this Court found that the trial court did not

abuse its discretion in using a metal detector outside the courtroom without making any specific findings.[46] (*Ibid.*)

Appellant argues that when the trial court cited the detectives' "duties" as a reason for permitting them to carry their weapons inside the courthouse, it "presumably" was referring to the potential need to have them assist with security in the courthouse and the courtroom. (AOB 172-173.) Thus, he argues, the court's determination "called for a heightened security measure," which required case-specific reasons to support the exemption. (AOB 173.) He is mistaken.

While they were inside the courtroom, neither Detective Von Rader nor Detective Grashoff could be mistaken for court security officers. As detectives, they did not wear sheriff's uniforms. As case agents, they would have been seated at the prosecution table, not stationed near appellant. And when called to testify, they would have been in the witness box. At the start of jury voir dire, the trial court identified Detective Grashoff as "the investigator who will be assisting [the prosecutor] during the trial." (3 RT 1183.) The prosecutor introduced Detective Grashoff to the jury and added that "from time to time also Sergeant Mark Von Rader of the Sheriff's Office may be present in the courtroom." (*Ibid.*) From these introductions, it would have been clear to jurors that the detectives were part of the prosecution team, not courtroom security officers. Thus, their presence inside the courtroom could not fairly be deemed part of any "heightened security measure."

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[46] Both *Jenkins* and *Ayala* involved the use of metal detectors outside the courtroom in which the defendant was being tried. There is even less potential for prejudice in this case because the screening device was at the entrance to the courthouse, meaning that security screening was not limited to persons entering appellant's courtroom.

As on-duty peace officers, Detectives Von Rader and Grashoff were authorized to carry firearms to be able to respond immediately to any contingency, including a nearby crime in progress. (See § 171b, subd. (b)(2)(A).) The exemption that allowed them to bypass the metal detectors resulted not only in their possessing weapons inside the courtroom where appellant was being tried, but anywhere they went in the courthouse. Thus, it cannot fairly be said that the exemption was designed as a security measure for a particular courtroom.

Indeed, appellant undermines his own argument when he suggests that the trial court could have taken steps to allow the officers to continue to possess their weapons inside the courthouse, as long as they were not seen bypassing the metal detectors. (AOB 176-177.)[47] Presumably, however, any such measures still would result in the officers' having their service weapons inside the courtroom, possibly visible to jurors. Thus, even these extraordinary measures would not have cured the harm appellant claims arose from "heightened security measures" in the courtroom.

In short, the trial court's refusal to require the two case agents to pass through the courthouse metal detectors did not constitute a heightened security measure that required a case-specific showing of need. The trial court could properly rely on the general courthouse policy of exempting on-duty law enforcement officers from the weapons screening procedures to deny appellant's request. There was no abuse of discretion.

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[47] Appellant suggests that the trial court could have ordered the officers to relinquish their weapons upon entering the courthouse, go through standard security screening, and then "discreetly" reclaim their weapons outside the jurors' presence. (AOB 176.) He also suggests that the court could have ordered them to enter the courthouse "through a different door or when jurors were not present." (*Ibid.*)

E. Any Possible Error Was Harmless

Even assuming for the sake of argument that the trial court abused its discretion in failing to require the case agents to pass through the metal detector or avoid being seen by jurors until they were inside the courtroom, any such error was harmless. Because the trial court's decision did not result in an inherently prejudicial security measure inside the courtroom, any possible error is evaluated for harmlessness under the *Watson* standard. (See *People v. Hernandez*, *supra*, 51 Cal.4th at p. 746.) Appellant cannot show a reasonable probability of a more favorable result if the trial court had prevented the jurors from noticing that Detectives Grashoff and Von Rader were exempt from courthouse security procedures.

For the reasons discussed above, the mere fact that the investigators were exempt from the courthouse's security provisions did not confer upon their testimony as witnesses a "false aura of veracity." Thus, regardless of whether the jurors saw the investigators bypass the security screening provisions, they would have evaluated their credibility according to the criteria in the jury instructions. (See 19 CT 8394; CALJIC No. 2.20 [listing various factors that may be considered in determining the believability of a witness].)

Although the detectives testified about a wide range of evidence—including items found during a search of appellant's residence and statements made by appellant and Lynn—the evidence they collected was introduced at trial and the witnesses they spoke to testified at length. Thus, contrary to appellant's claim, their believability was not "crucial to the prosecutor's case," nor was their testimony necessary to lend credence to the ocean of evidence of the plots to kill Dean and Carole. (AOB 180.) The detectives were among 32 prosecution witnesses who testified during the lengthy trial. Given their largely supporting roles, their credibility was not directly attacked on cross-examination by defense counsel. Those

efforts were aimed instead at Daniels, Gordon and Lynn—percipient witnesses whose testimony formed the heart of the prosecution's case.

Accordingly, even if Detectives Grashoff and Von Rader were required to submit to the regular courthouse screening procedures, it is not reasonably probable that appellant would have obtained a more favorable verdict in any respect. Nor was a better result for appellant reasonably probable if the trial court had required the investigators to enter the courthouse outside the presence of jurors, as appellant suggests could have been done. Thus, any possible trial court error in this regard was harmless.

III. THE TESTIMONY OF A PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY OF CAROLE AND HER FETUS DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends that his constitutional rights were violated when the trial court allowed the prosecution to introduce testimony about the cause of death from Dr. Susan Comfort, a pathologist who did not perform the autopsy on Carole and her fetus. He argues that he had a right under the Sixth Amendment to confront and cross-examine Dr. Harold Harrison, the pathologist who performed the autopsy and whose findings were relied on by Dr. Comfort in offering her opinions. (AOB 182-203.)

Preliminarily, appellant's claim has been forfeited by his failure to object to Dr. Comfort's testimony on Sixth Amendment grounds at the time of trial. It is also without merit because the observations in Dr. Harrison's autopsy report are not testimonial, and Dr. Comfort formed her own independent conclusions on the cause and circumstances of death. Moreover, given that the evidence regarding the cause of death was undisputed, any possible constitutional error was harmless beyond a reasonable doubt.

A. Background

An autopsy on Carole Garton and her fetus was performed on May 18, 1998, by Dr. Harold Harrison, forensic pathologist for the Shasta County Sheriff-Coroner's Office, who wrote a nine-page report on his findings. (2 CT 64-74; 14 RT 4090.) Dr. Harrison retired in February 1999 and thus was not called to testify at appellant's trial, which began in December 2000. (14 RT 4089-4090.) Instead, the prosecution called Dr. Susan Comfort, who replaced Dr. Harrison as the county's forensic pathologist, to testify about the manner and cause of death. (*Ibid.*)

Before testifying, Dr. Comfort reviewed Dr. Harrison's autopsy report, an emergency medical technician's report of the crime scene, and a report by a ballistics expert for the California Department of Justice. (14 RT 4090.) Dr. Comfort also reviewed all of the photographs and X-rays taken during the autopsy. (14 RT 4092, 4100.) Although some of those photographs were introduced into evidence at trial (see 22 CT 6352-6357 [Exhs. 5C-1, 5C-2, 5C-3, 5C-4, 5C-5 and 5C-6]), the autopsy report was not.[48]

In her testimony, Dr. Comfort identified and described five bullet wounds to Carole's buttocks, face, neck and chest, as well as a wound to the fetus. She depicted the location of those wounds and the trajectory of the bullets on diagrams she prepared for trial. (14 RT 4091-4106.)[49]

When the prosecutor moved to publish those diagrams to the jury, defense counsel objected, stating, "As I understand, what this witness is

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[48] The autopsy report was introduced as an exhibit to the preliminary hearing to support a stipulation regarding the cause of death to Carole and her eight-month old fetus. (2 CT 63-73, 112-113, 119-121.)

[49] These diagrams are identified in the Reporter's Transcript as Exhibits 52, 53, and 54. Although they were received into evidence (see 14 RT 4116), they are not included in the Clerk's Transcript.

going to be doing is testifying entirely from hearsay." (14 RT 4091-4092.) The trial court stated that, because expert witnesses are permitted under the Evidence Code to testify based on hearsay, it did not see an issue with the witness using the diagrams. (14 RT 4092.) The prosecutor elicited testimony from Dr. Comfort that she formed her opinions based on her independent review of all the information that was available to her. (14 RT 4092-4093.) The trial court then gave the prosecutor permission to publish the diagrams to the jury. (14 RT 4093.)

Dr. Comfort described Carole's five wounds as follows: (1) a gunshot to the left buttocks area, reflected in Exhibit 5C-6, which perforated Carole's uterus and entered the head of the fetus; (2) a bullet that entered the left side of Carole's chest, reflected in Exhibit 5C-3, and then exited on her right side; (3) a gunshot wound just below Carole's right earlobe, shown in Exhibit 5C-5, which went through all the bones in her face and lodged in her left eye socket; (4) another gunshot wound on the right side of Carole's neck at the hairline, also shown in Exhibit 5C-5, which lodged in the base of the brain (cerebellum); and (5) a gunshot to her left cheek, which lodged in the right petrous bone at the base of the skull. (14 RT 4097-4113.) Dr. Comfort noted that the gunshot wounds to Carole's face and neck were accompanied by "stippling" marks (particles of gunpowder that break the skin), indicating that the gun was fired at close range, probably between six and twelve inches. (14 RT 4107-4109, 4112.)

Dr. Comfort testified that the male fetus was 8 1/2-months old and could have survived outside the womb. (14 RT 4098-4099.) She said the bullet that entered the infant's head perforated his skull and brain, exited through the neck, and then re-entered his body on the rear shoulder blade. (*Ibid.*)

Dr. Comfort opined that Carole died from "multiple gunshot wounds." (14 RT 4114.) She said she based that opinion on the information in Dr.

Harrison's autopsy report "and also the photographs that were taken at the scene and at the autopsy." (*Ibid.*)

On cross-examination, Dr. Comfort estimated that Carole died between five and 20 minutes after she was shot. (14 RT 4115.) She testified that Dr. Harrison's report stated that Carole had blood in both chest cavities, and that the blood loss would have been fatal. (*Ibid.*) She added that Carole would not have died instantly from the bullet in her cerebellum because it did not actually perforate the brain stem. (*Ibid.*) But based on all of the wounds, "I can't imagine she would have survived more than even a half an hour . . . if even that. Probably less." (*Ibid.*)

B. This Claim Has Been Forfeited

As noted above, when the prosecutor sought to display for the jury the diagrams that Dr. Comfort created for purposes of the trial, defense counsel objected on hearsay grounds. (14 RT 4092.) Even if that objection is broadly construed as a hearsay objection covering any testimony of Dr. Comfort based on Dr. Harrison's autopsy report, it was inadequate to preserve a constitutional claim for appeal.

A defendant seeking to preserve a claim of erroneous admission of evidence must make a timely objection at the time of trial on the specific ground raised on appeal. (See *People v. Jennings* (2000) 22 Cal.4th 900, 1000; *People v. Green* (1980) 27 Cal.3d 1, 22; Evid. Code, § 353, subd. (a).) "Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence." (*People v. Mattson* (1990) 50 Cal.3d 826, 854.) This forfeiture rule applies to appellate claims based on alleged constitutional violations as well as alleged violations of state evidentiary law. (See *People v. Dennis* (1998) 17 Cal.4th 468, 529 [because defendant's objection to evidence admitted at trial was based solely on hearsay grounds, he had not preserved his claim that the evidence

also violated his Sixth Amendment right to confrontation]; *People v. Alvarez* (2006) 39 Cal.4th 970, 1028 & fn. 19 [same]; *People v. Mattson*, *supra*, 50 Cal.3d at pp. 853-854 [defendant failed to preserve claim that his statements were admitted in violation of *Miranda* rule where his objections at trial were based entirely on violations of California law].)

In *People v. Partida*, *supra*, 37 Cal.4th 428, this Court carved out an exception to this forfeiture rule which allows a defendant to raise a "very narrow due process argument on appeal" where his only objection at trial was made is based on Evidence Code section 352. (*Id.* at pp. 433-436.) In that circumstance, a defendant is not precluded from asserting that an error in admitting evidence under state law also violates federal due process because it merely allows the court "to draw an alternate legal conclusion . . . from the same information he presented to the trial court." (*Id.* at p. 436.)

The same rationale does not apply to claims that the erroneous admission of hearsay evidence also violated a defendant's confrontation rights. That is because the legal analysis of whether evidence was admitted in violation the confrontation clause "is distinctly different than that of a generalized hearsay problem." (*People v. Chaney* (2007) 148 Cal.App.4th 772, 779.) "The constitutional considerations involved in a confrontation clause issue require far more of a trial court's determination than merely deciding if cross-examination has been met or will be possible." (*Ibid.*)

Confrontation clause claims currently are analyzed under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), which requires a determination of whether a statement is "testimonial," whether a declarant is unavailable to testify, and whether the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at pp. 53-54.) Yet at the time of appellant's trial (pre-*Crawford*), confrontation claims were analyzed under the rule of *Ohio v. Roberts* (1980) 448 U.S. 56, which held that the Sixth Amendment did not bar admission of an unavailable witness's statement against a

defendant if the statement bore "adequate indicia of reliability" by either falling within a "firmly rooted hearsay exception" or containing "particularized guarantees of trustworthiness." (*Id.* at p. 66.)

Thus, if appellant had raised a confrontation objection to Dr. Comfort's testimony at the time of trial, the trial court would have been required to determine if her statements regarding the extent of Carole's injuries bore "adequate indicia of reliability" based on a "firmly rooted hearsay exception" (such as business records), as opposed to determining under Evidence Code section 801 if they were based on materials that experts in her field routinely relied upon in forming opinions. Because the trial court would have been required to analyze a confrontation clause objection differently than a hearsay objection, appellant's failure to object on that specific ground at trial precludes him from raising a confrontation clause objection on appeal. (See *People v. Lewis*, *supra*, 39 Cal.4th at p. 1028, fn. 19; *People v. Dennis*, *supra*, 17 Cal.4th at p. 529; *People v. Chaney*, *supra*, 148 Cal.App.4th at pp. 779-780.)

C. Dr. Comfort's Testimony Did Not Violate Appellant's Right to Confrontation

Even if appellant's constitutional claim has not been forfeited by failure to object on that ground, it must be denied on the merits. This Court recently held that statements in an autopsy report describing the examining pathologist's observations about the conditions of the body are not "testimonial," and thus not subject to the Sixth Amendment's confrontation clause. Because Dr. Comfort did not relate any testimonial statements to the jury, her testimony did not violate appellant's right to confrontation.

The confrontation clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford*, the Supreme Court held that confrontation clause prohibits the

admission of testimonial statements of a witness unless he is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. at pp. 53-54, 59.) Although the Court did not provide a comprehensive definition of "testimonial," it stated that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.) In the case at bar, the Court held that the admission of a witness's out-of-court statement to a police officer while in custody violated the confrontation clause. (*Id.* at pp. 68-69.)

In three cases since 2009, the Supreme Court has applied the principles of *Crawford* to the admission of forensic evidence at trial. In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, the Court held that the defendant's confrontation rights were violated by the admission into evidence of three affidavits from forensic analysts stating that a substance seized by the police and connected to the defendant was cocaine. (*Id.* at p. 311.) In *Bullcoming v. New Mexico* (2011) 564 U.S. ___, 131 S.Ct. 2705, the Court held that testimony of a laboratory analyst regarding the results of a blood alcohol test he did not perform or observe, together with admission of the report, violated the defendant's confrontation rights. (*Id.* at pp. 2717-2719.) In *Williams v. Illinois* (2012) 567 U.S. ___, 132 S. Ct. 2221, the Court held that testimony by an Illinois State Police forensic biologist about a DNA match that relied in part on a DNA profile generated at another laboratory did not violate the confrontation clause. (*Id.* at pp. 2243-2244.) However, no single rationale garnered the support of a majority of the justices in *Williams*, and the Court's four-one-four decision shed little additional light on the meaning of "testimonial" in the forensic context.

In *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), this Court analyzed those decisions in addressing a claim that introduction of statements from an autopsy report through the testimony of a pathologist

who did not prepare the report violated the defendant's confrontation rights. (*Id.* at pp. 616-619.) This Court explained that the Supreme Court had identified two "critical components" in determining whether a statement is testimonial. First, the statement must be made with "some degree of formality or solemnity." (*Id.* at p. 619.) Second, the primary purpose of the statement must pertain in some fashion to a criminal prosecution. (*Ibid.*)

In the specific context of an autopsy report, this Court found that such reports typically contain two types of statements: "(1) statements describing the pathologist's anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death." (*Dungo, supra*, 55 Cal.4th at p. 619.) It noted that statements in the first category are "less formal" than those in the second category, and are comparable to observations made by an examining physician for treatment purpose, statements which the Supreme Court has said are not testimonial. (*Ibid*, citing *Melendez-Diaz, supra*, 557 U.S. at p. 312, fn. 2.) This Court further noted that state law requires autopsy reports in many cases not involving criminal conduct, and that the reports serve purposes other than criminal investigation and prosecution, including helping a decedent's relatives decide whether to file a wrongful death lawsuit. (*Id.* at p. 620.) "In short, criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim]'s body; it was only one of several purposes." (*Ibid.*)

Accordingly, a defendant's confrontation rights are not violated when a pathologist who did not perform an autopsy relates to the jury physical observations made by the examining pathologist as part of the basis for the testifying pathologist's opinion on the cause of death. (*Dungo, supra*, 55 Cal.4th at p. 621.) In light of *Dungo*, which was decided after appellant's

opening brief was filed, appellant cannot possibly prevail on his claim that Dr. Comfort's testimony violated his rights under the confrontation clause.

As discussed above, Dr. Comfort reached an independent conclusion regarding the cause of death (multiple gunshot wounds) based on a description of the victim's injuries in the autopsy report, as well as photographs and X-rays taken during the autopsy. (14 RT 4092-4093, 4100.)[50] In fact, the only time that Dr. Comfort needed to refer to Dr. Harrison's autopsy report during her testimony was to respond to the prosecutor's question about Carole's height and weight at the time of her death. (14 RT 4096.) Dr. Comfort also offered her own opinion on how far the gun was from Carole when she was shot in the face and neck, and how long she remained alive after being shot.[51] (14 RT 4107-4109, 4114-4115.)

Any information that Dr. Comfort related to the jury from the autopsy report regarding the location of the bullet wounds and the internal injuries associated with them reflected Dr. Harrison's observations of the condition of the victim's body. Because those statements were not testimonial, appellant did not have a constitutional right to confront and cross-examine Dr. Harrison about his observations. (See *Dungo*, *supra*, 55 Cal.4th at p. 619 [observations by examining pathologist about the condition of the victim's body "are not testimonial in nature"].) Moreover, because Dr.

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[50] Although Dr. Harrison also concluded in his report that Carole died from multiple gunshot wounds (2 CT 73), the prosecutor clarified that Dr. Comfort drew her own conclusion in that regard, independent of the conclusion in the report. (14 RT 4093.)

[51] Dr. Harrison's autopsy report indicated that Carole died within "seconds" of sustaining multiple gunshot wounds to the head and thorax. (2 CT 73.) The fact that Dr. Comfort concluded that Carole could have survived for up to a half hour after being shot shows that her opinion was entirely independent of Dr. Harrison's.

Comfort did not relate any testimonial hearsay from the autopsy report, she was not a "surrogate witness" for Dr. Harrison, as appellant contends.

Appellant notes that Dr. Comfort explained that she created the diagrams used to illustrate her testimony from the autopsy photographs. (AOB 189-191.) But appellant does not contend that the photographs are testimonial, nor does case law support such a notion. (See *People v. Thomas* (2012) 53 Cal.4th 771, 802 [photographs and X-rays showing the location and extent of the victim's injuries "clearly did not constitute testimonial hearsay"]; *Herrera v. State* (Tex. App. 2012) 367 S.W.3d 762, 773 ["An autopsy photograph . . . is not a testimonial statement."]; *People v. Myers* (N.Y. 2011) 87 A.D.3d 826, 829 [photographs depicting victim's injuries "are demonstrative rather than testimonial evidence"].)

Appellant also argues that the confrontation clause does not allow the prosecution to call an analyst other than the one who conducted the forensic test at issue, and that even if there were such an exception, it should not apply here. (AOB 193-201.) However, these arguments presume that the observations in Dr. Harrison's report were testimonial and that Dr. Comfort related this "testimonial hearsay" to the jury. For the reasons discussed above, the premise of appellant's arguments is incorrect. Because the information in the autopsy report cited by Dr. Comfort was not testimonial, appellant's right to confrontation was not violated because the prosecutor did not call Dr. Harrison as a witness. The jury heard only Dr. Comfort's expert opinions and conclusions regarding the cause of death, and appellant was fully able to confront and cross-examine Dr. Comfort.

In addition to alleging a violation of his Sixth Amendment right to confrontation, appellant claims that Dr. Comfort's testimony violated his "right to a reliable guilt and penalty determination" in violation of both the United States and California Constitutions. (AOB 183.) However, he fails to elaborate on this claim or cite any legal authority apart from case law on

the confrontation clause. Accordingly, any additional constitutional claim is forfeited on that basis as well. (See *People v. Earp* (1999) 20 Cal.4th 826, 881; *People v. Bonin* (1989) 47 Cal.3d 808, 857, fn. 6.)

D. Any Possible Error Was Harmless

Assuming entirely for the sake of argument that part of Dr. Comfort's testimony violated appellant's Sixth Amendment right to confrontation, any such error was harmless beyond a reasonable doubt.

The cause of death to Carole Garton and her fetus was not at issue in the trial, as defense counsel acknowledged in his closing argument. He stated, "[T]here is no issue in this case about how Carole Garton was shot. Norman did that, not Todd Garton. How he did it, that issue is not relevant here." (36 RT 10226.) That the cause of death was of no significance to the defense is reflected in the very brief cross-examination of Dr. Comfort, spanning less than two pages of the trial transcript. (14 RT 4114-4115.)

Daniels testified that he shot Carole multiple times in the head and torso as she lay on her bed and as she fell to the floor. (15 RT 4497-4498.) An emergency medical technician (Louis Flint) testified that he found Carole lying on the floor of her bedroom, covered in blood from a bullet wound to her head and without a pulse. (13 RT 3802-3804.) She also had bullet holes on both sides of her ribs. (13 RT 3816.) It was stipulated that gunpowder patterns on Carole's body and a blanket covering her showed that the gun was fired from a distance of three inches from her neck, about six to nine inches from her body and 12 inches from her face. (16 RT 4691.) Thus, even apart from Dr. Comfort's testimony, the jury had ample evidence that Carole died of multiple gunshot wounds.

Moreover, Dr. Comfort's opinion that Carole could have remained alive for up to a half hour after she was shot was more favorable to the defense than the statement in Dr. Harrison's autopsy report, which the jury did not hear, that Carole died within "seconds" of the shooting. Dr.

Comfort's opinion provided some factual support for appellant's argument that Carole was still alive when he found her body and tried to resuscitate her (36 RT 10289, 10319).

Appellant highlights one statement in Dr. Comfort's testimony in which she noted a small red spot on Carole's neck in a photograph that was not mentioned Dr. Harrison's autopsy report. (AOB 202, citing 14 RT 4112-4113.) He argues that Dr. Harrison's absence from the trial "prevented appellant from pursuing the significance of these facts to his conclusion." (AOB 202.) However, appellant fails to explain how cross-examining Dr. Harrison regarding the lack of any mention in the autopsy report of an apparently insignificant mark on Carole's neck would have affected the determination of the cause of death or strengthened the defense.

Appellant argues that Dr. Comfort's opinion that Carole's fetus died of a gunshot wound—as opposed to a necessary consequence of Carole's death—was based entirely on Dr. Harrison's autopsy report. He claims that confronting Dr. Harrison with this information was "crucial to the issue of appellant's intent to kill the fetus" and that obtaining clarifying details of how the fetus died could have allowed him to present a "less aggravated view of the crime." (AOB 202-203.)

In her testimony, Dr. Comfort stated that she viewed X-rays showing the position of the fetus. (14 RT 4100.) Thus, her description of the injuries to the fetus was not based entirely on Dr. Harrison's report. More fundamentally, appellant fails to explain how a more precise description of the manner of the fetus's death would have enabled him to argue that he did not possess the requisite intent to kill the fetus. There was ample evidence to show that appellant masterminded the killing of his wife, knowing she was eight months pregnant, and that he recruited Daniels specifically for that purpose with an elaborate ruse featuring a "hit package" including

photographs of Carole. Daniels testified that he shot Carole in the torso, aiming for her heart, and that after she fell to the floor, he shot her a few more times in the head and torso because he wanted her to die quickly. (15 RT 4496-4498.) This evidence was sufficient to establish appellant's intent to kill Carole's fetus, regardless of whether the fetus died directly as a result of a bullet wound, or indirectly through the death of Carole, his life-support system.

Appellant seeks support for his harmless-error argument from *Merolillo v. Yates* (9th Cir. 2011) 663 F.3d 444 (*Merolillo*), but that case is readily distinguishable. In *Merolillo*, a central issue at trial was whether the victim's death from a dissecting aortic aneurysm was caused by head and torso trauma sustained a month earlier during a carjacking committed by the defendant. (*Id.* at p. 447.) The pathologist who performed the autopsy, Dr. Garber, concluded that the head trauma contributed to the victim's death. He testified at the preliminary hearing, but not at trial. (*Id.* at pp. 446-447.) At trial, the prosecutor called two other experts, whose testimony on the proximate cause of death was much more equivocal than that of Dr. Garber. (*Id.* at pp. 448-450.) A defense expert testified that there was no connection between the victim's aneurysm and the injuries from the carjacking. (*Id.* at p. 450.) On cross-examination, the prosecutor elicited testimony from the defense expert regarding Dr. Garber's opinion that the head injuries contributed to the victim's death from an aortic aneurysm; the prosecutor also referred to Dr. Garber's opinion in his closing argument. (*Id.* at pp. 450-452.) The Ninth Circuit held that erroneous admission of Dr. Garber's opinion on the cause of death was not harmless for several reasons, including: the opinion went "straight to the heart of the [prosecution's] case . . . since causation was the issue most argued by both counsel"; the jury's questions indicated it was focused on the issue causation; the prosecutor emphasized Dr. Garber's opinion in his

closing argument; and the evidence of guilt as to murder was not strong "since the chain of medical events causing death was clearly disputed and difficult to verify." (*Id.* at pp. 455-456.)[52]

The instant case has none of those ingredients to show prejudice. As noted above, there was no argument or suggestion at trial that Carole died of anything other than multiple gunshot wounds. Nor was there an issue over the precise mechanism by which Carole or her fetus died. In his closing argument, the prosecutor pointed to autopsy photographs showing stippling marks around the entry wounds, and argued that such marks indicated the gunshots were fired at close range. (35 RT 10170-10171.) Although that argument was based on Dr. Comfort's opinion, appellant does not argue that Dr. Harrison would have offered a different opinion in that regard or contend that a contrary opinion would have affected the jury's verdict. Moreover, unlike in *Merolillo*, the prosecutor in this case did not elicit any testimony from Dr. Comfort regarding Dr. Harrison's opinion on the cause of death; rather Dr. Comfort referred only to observations in Dr. Harrison's autopsy report about the condition of the victim's body.

In addition, the evidence of appellant's guilt was overwhelming. It included credible testimony of three co-conspirators, supported by computer records and other physical evidence, and appellant's own tape-recorded statements to Daniels following Daniels's arrest. Accordingly, even if Dr. Comfort's references to certain findings in Dr. Harrison's

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[52] Because the confrontation claim was contained in a federal habeas petition, the Ninth Circuit evaluated prejudice from the constitutional error under the standard of *Brecht v. Abrahamson* (1993) 507 U.S. 619, which provides for habeas relief only if the error "had a substantial and injurious effect or influence in determining the jury's verdict." (*Merolillo, supra*, 663 F.3d at p. 454, quoting *Brecht, supra*, 507 U.S. at pp. 637-638.)

autopsy report during her testimony violated appellant's right to confront Dr. Harrison, it had no conceivable effect on the jury's verdict. Thus, any possible error was harmless beyond a reasonable doubt.

IV. THE FLAW IN THE CONSPIRACY INSTRUCTION (CALJIC NO. 8.69) DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS; SIMILARLY, THE INSTRUCTIONAL ERROR WAS HARMLESS

Appellant contends that the version of CALJIC No. 8.69 given by the trial court allowed the jury to find him guilty of conspiracy to commit murder in counts 3, 4 and 5 without finding that he entered into the conspiracy with the requisite intent to kill. He argues that the trial court's use of the wrong bracketed language permitted the jury to find appellant guilty of conspiracy to commit murder based entirely on the intent of the other alleged coconspirators, and that this error was not harmless beyond a reasonable doubt. (AOB 204-211.)

Although the trial court used the wrong bracketed language for the instruction, other parts of the instruction made clear that appellant could not be found guilty of conspiracy to commit murder unless he personally had the specific intent to commit murder. Thus, contrary to appellant's claim, the instruction did not reduce the prosecutor's burden of proof or deprive him of due process. Moreover, any error in the instruction was harmless in light of the overwhelming evidence of appellant's intent, the lack of any evidence to support appellant's theory, and the jury's verdicts on the murder charges and the special circumstance allegation.

A. Any Instructional Error Did Not Implicate Appellant's Constitutional Rights

As previously noted, appellant was charged in counts 1 and 2 with murder of Carole Garton and her fetus, respectively. He was charged in count 3 and 4 with conspiracy to kill Carole and her fetus, respectively. And he was charged in count 5 with conspiracy to kill Dean Noyes. In

connection with the three conspiracy counts, the jury was instructed, consistent with CALJIC No. 8.69, as follows:

> Mr. Garton is accused in Counts 3, 4 and 5 of having committed the crime of conspiracy to commit murder in violation of section 182(a)(1)/187 (a) of the Penal Code.
>
> Every person who conspires with any other person or persons to commit the crime of murder is guilty of a violation of Penal Code section 182(a)(1)/187(a), a crime.
>
> Murder is the unlawful killing of a human being with malice aforethought.
>
> A conspiracy to commit murder is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of murder and with the further specific intent to commit that murder, followed by an overt act committed in this state by one or more of the conspirators for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.
>
> The crime of conspiracy to commit murder requires proof that the conspirators harbored express malice aforethought, namely, the specific intent to kill unlawfully another human being or human fetus.
>
> In order to find Mr. Garton guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the information to be an overt act and that the act found to have been committed was an overt act. It is not necessary to the guilt of Mr. Garton that he personally committed an overt act, if he was one of the conspirators when the overt act was committed.
>
> The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.
>
> To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or an unlawful act.

In order to prove this crime, each of the following elements must be proved:

1. Two or more persons entered into an agreement to kill unlawfully another human being;

2. *At least two* of the persons specifically intended to enter into an agreement with one or more other persons for that purpose;

3. *At least two* of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and

4. An overt act was committed in this state by one or more of the persons who agreed and intended to commit murder.

(29 CT 8439-8440; 35 RT 10072-10074; emphasis added.)[53]

Appellant argues that the italicized language above is proper only in cases where one of the conspirators is a "feigned accomplice" (such as a government agent), and that his jury should have been instructed instead that the prosecution had to prove that *each* of the persons in the conspiracy possessed the requisite intent. The Use Note for CALJIC No. 8.69 supports

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[53] Elsewhere in the instructions, four overt acts were alleged in connection with each count.

For counts 3 and 4, the first three overt acts were identical: (1) a conspirator obtained a handgun; (2) a conspirator provided an envelope containing photographs of Carole Garton and written materials to a co-conspirator; and (3) one or more conspirators communicated via computer e-mail. For count 3, the fourth overt act was that a conspirator shot and killed Carole; for count 4, the fourth overt act was that a conspirator shot and killed Carole's fetus. (29 CT 8407-8408; 35 RT 10055-10056.)

For count 5, the four overt acts were as follows: (1) a conspirator possessed a photograph of Dean Noyes and a house key; (2) conspirators drove together in a vehicle from Shasta County, in the State of California, to Multnomah County, in the State of Oregon; (3) a conspirator possessed a silencer; and (4) conspirators met together at the Moose Lodge in Anderson, California. (29 CT 8408; 35 RT 10057.)

this argument. It states that the "at least two" phrase is designed "to accommodate the situation where there is a feigned accomplice." (Use Note to CALJIC No. 8.69, California Jury Instructions, Criminal, 7th ed. at p. 388, citing *People v. Liu* (1996), 46 Cal.App.4th 1119.)

Because none of the members of the alleged conspiracy in this case was a "feigned accomplice," the trial court should have used the phrase "each of the persons" for purposes of elements two and three, rather than the phrase "at least two of the persons." However, this error did not affect other parts of the instruction which made clear that appellant had to be among those who had the requisite intent. Further, considering the entire charge and the record as a whole, there is no reasonable likelihood that the jury misunderstood the charge or the need to find that appellant harbored specific intent.

Before listing the elements of conspiracy, the instruction stated: "A conspiracy to commit murder is an agreement entered into *between two or more persons with the specific intent* to agree to commit the crime of murder *and with the further specific intent* to commit that murder." (Italics added.) The instruction also stated that for the prosecution to prove appellant guilty, it had to establish that "the conspirators harbored express malice aforethought, namely, *the specific intent to kill* unlawfully another human being or human fetus." (Italics added.) Further, it stated that, "In order to find Mr. Garton guilty of conspiracy, *in addition to proof of the unlawful agreement and specific intent*," the jury had to find that one of the alleged overt acts had been committed. (Italics added.) In light of these requirements, the error in the latter part of the instruction did not relieve the prosecution of its burden of proving that appellant intended to kill Carole, her fetus or Dean. If the jury had actually found that appellant did not intend to murder those victims, it would have acquitted him on the

conspiracy counts because he would not have been a member of the conspiracy at all.[54]

Similarly, in order to find appellant guilty of conspiracy to commit murder in each of counts 3, 4 and 5, the jury necessarily had to find that he entered into an agreement to kill another person. It is difficult to see how a jury could find that appellant entered into an agreement to kill Carole, her fetus and Dean, yet lacked the specific intent to kill them.

In determining whether an ambiguous instruction violates a defendant's federal constitutional rights, a reviewing court must inquire "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*People v. Prettyman* (1996) 14 Cal.4th 248, 272, quoting *Estelle v. McGuire* (1991) 501 U.S. 62, 72.) If there is no reasonable likelihood that the jury misapplied the trial court's instructions, then no federal constitutional error has occurred, and the error is evaluated for prejudice under the *Watson* test. (*Id.* at pp. 273-274.) Under that test, a reviewing court asks whether it is "reasonably probable that the trial's outcome would have been different in the absence of the trial court's instructional error." (*Id.* at p. 274.)

For the reasons discussed above, it is not reasonably likely that the jury interpreted the instruction as permitting a finding of guilt on counts 3, 4 and 5 if it concluded that appellant lacked the intent to agree to kill the victims and the intent to kill them. Even if the jury understood the phrase "at least two of the persons" to mean that a conspiracy could exist even if

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[54] The jury was instructed, pursuant to CALJIC No. 6.13: "Evidence that a person was in the company of or associated with one or more other persons alleged or proved to have been members of a conspiracy is not, in itself, sufficient to prove that person was a member of the alleged conspiracy. [¶] Evidence that a person knew of the existence of a conspiracy is not, in itself, sufficient to prove that person was a member of the alleged conspiracy." (29 CT 8443.)

one or two members who entered into the agreement to kill the victims did not actually intend to kill them, the remainder of the instruction made clear that appellant could not be found guilty of conspiracy unless he was among those who entered into the agreement to kill another person or fetus and intended to carry out that plan. Further, the jury was instructed, pursuant to CALJIC Nos. 8.80.1 and 8.80.3, that before considering the alleged special circumstances, it had to find beyond a reasonable doubt that appellant possessed the requisite intent to kill. (29 CT 8432, 8436.)[55] As noted above, the jury found true both alleged special circumstances—that appellant committed the murder for financial gain, and that appellant committed multiple murders. (29 CT 8378-8380.) Given these instructions, it was not reasonably likely that the jury would have convicted appellant of conspiracy to commit murder unless it also found that he had the intent to kill Carole and her fetus. (See *People v. Harrison* (2005) 35 Cal.4th 208, 252; *People v. Osband* (1996) 13 Cal.4th 622, 679; *People v. Cain* (1995) 10 Cal.4th 1, 36.)

Because the error did not relieve the prosecution of its burden of proof on the intent element, as appellant contends, it should be analyzed under the *Watson* standard. (See *People v. Larsen* (2012) 205 Cal.App.4th 810, 828-

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[55] Pursuant to CALJIC No. 8.80.1, the jury was instructed, in relevant part: "If you find that Mr. Garton was not the actual killer of a human being, you cannot find the special circumstance to be true as to Mr. Garton unless you are satisfied beyond a reasonable doubt that Mr. Garton, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree." (29 CT 8432.)

Pursuant to CALJIC No. 8.80.3, the jury was instructed that to find true the multiple-murder special circumstance, it must be proved "[t]hat Mr. Garton in this case has been convicted of at least one crime of intentional murder of the first degree and one or more crimes of murder of the first or second degree." (29 Ct 8434.)

830 [trial court's error in refusing to provide jury with mental disorder instruction (CALCRIM No. 3428) evaluated under *Watson* because it did not remove from jury's consideration or incorrectly define intent element of offenses]; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156-1157 [any possible flaw in CALJIC No. 17.19.5 based on ambiguous description of proximate cause requirement for firearm enhancement not prejudicial where no "reasonable likelihood" that jurors would have interpreted instruction as defendant suggests]; *People v. Hammond* (1986) 181 Cal.App.3d 463, 469 [applying *Watson* standard in evaluating trial court's failure to adequately inform jury of its fact-finding function in determining question of vicarious liability for unplanned related offense].)

Appellant cannot demonstrate prejudice under the *Watson* standard. For the reasons discussed above, it is not reasonably likely that the jury interpreted the instructions as a whole as allowing it to convict appellant of conspiracy if it found he lacked the intent to kill Carole and her fetus. Thus, it is not reasonably probable that appellant would have obtained a more favorable result if the trial court had used the correct phase in the pattern instruction.

Moreover, to convict appellant of conspiracy without finding that he intended to kill Carole and her fetus would have required the jury to ignore the evidence and their common sense. For the jury to have concluded that appellant lacked the requisite intent to kill Carole and her fetus, as alleged in counts 3 and 4, it would have had to find that he never entered into an agreement with Lynn and Daniels to kill his pregnant wife. Likewise, for the jury to have concluded that appellant lacked the requisite intent to kill Dean, as alleged in count 5, it would have had to find that he never entered into an agreement with Lynn, Daniels and Gordon to do so. The defense offered two theories in support of such findings: (1) Lynn was so obsessed with appellant that when she heard Carole was pregnant, she realized the

only way to win him back was to kill her, and she recruited Gordon and Daniels to carry out the dirty work; and (2) Gordon, who hated appellant and was infatuated with Carole, and Daniels, who was desperate for money, agreed with Lynn to kill Dean for insurance money. (36 RT 10320-10325.) Both of those theories were inherently implausible. For if Gordon was madly in love with Carole, as defense counsel claimed, why would he conspire to kill her? Similarly, if Gordon hated appellant, as counsel claimed, why would he secretly enter into a scheme with Lynn to kill Dean, which would benefit appellant? For either of appellant's theories to be accepted, the jury would have had to conclude that all of the prosecution witnesses were lying in every material respect, and that they conspired to frame appellant for no apparent reason.

On the other hand, the prosecution introduced a mountain of evidence—direct and circumstantial, testimonial and physical—to implicate appellant in both conspiracies. As for the conspiracy to kill Dean (count 5), Daniels, Lynn and Gordon all testified, consistently with each other, about the various ways that appellant plotted to kill Dean, including: driving them to Portland in his Jeep; staking out the garage near Dean's workplace; and then seeking to break into the Noyeses' home with a key provided by Lynn. Their testimony was supported by hotel receipts showing that appellant rented a hotel room near the Noyeses' residence in Gresham on the date in question; the discovery of bullet holes in their hotel room's window screen; and the discovery of a home-made silencer in a yard not far from the Noyeses' house after the unsuccessful attempt on Dean's life.

There also was compelling evidence of the conspiracy to kill Carole and her fetus (counts 3 and 4). Daniels testified about how appellant recruited him to be an assassin, provided him with a "hit packet" identifying Carole as a "target of opportunity," and convinced him that if he did not carry out the murder, he and his family would be harmed. Daniels's

testimony was supported by evidence that appellant purchased the gun that was used to kill Carole; charred portions of the "hit package" that were discovered in a fire pit in Daniels's residence; and evidence that the wax seal on the hit package was made with appellant's scuba pin. Both Daniels and Lynn testified about pressuring e-mails sent from an account linked to appellant's home computer. Lynn also testified about steps appellant took to cover up his role in Carole's murder, including discarding an electronic label maker used to help create the hit package. The prosecutor also played for the jury a secretly tape-recorded conversation between appellant and Daniels after Daniels was arrested in which appellant promises Daniels that he will be paid and expresses no anger or surprise over Daniels's statement that he confessed to murdering Carole. In addition, the prosecutor introduced strong evidence of motive—a few months before the murder, appellant signed papers designating himself as the sole beneficiary of Carole's $125,000 life insurance policy.

In short, there was overwhelming evidence to show that appellant not only participated in, but masterminded, the schemes to kill both Carole and Dean. Given the lack of any evidence to support defense counsel's theory that appellant was not involved in either attempt, there is no reasonable likelihood that the jury convicted appellant on counts 3, 4, or 5 without finding that he intended to kill the victims.

B. Any Possible Constitutional Error Was Harmless

Appellant asserts that the instructional error violated his federal constitutional rights because it relieved the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense, violated the province of the jury, and prevented the jury from finding that the prosecution failed to prove a particular element beyond a reasonable doubt. He thus contends that the error must be evaluated for prejudice under the *Chapman* test. (AOB 205-206.) Respondent disagrees.

In arguing that the *Chapman* standard applies to the instructional error, appellant relies on *People v. Petznick* (2003) 114 Cal.App.4th 663 (*Petznick*). In that case, the defendant was charged with conspiracy to commit murder, burglary and robbery, as well as the substantive crimes of murder, burglary and robbery in concert. (*Id.* at p. 668.) The jury was instructed with the same version of CALJIC No. 8.69 that was given in the instant case—containing the phrase "at least two persons"—as well as CALJIC No. 6.11, which states that a member of a conspiracy is liable for the natural and probable consequences of any crime to further the object of the conspiracy. (*Id.* at pp. 678-679.)[56] During deliberations, the jury sent a note asking whether the conspiracy charge required the prosecution to prove that all four conspirators harbored express malice aforethought, saying its question was prompted by CALJIC No. 6.11. (*Id.* at p. 679.) The trial court responded that it did not. (*Ibid.*) The jury returned its verdicts later that day, finding the defendant guilty on all counts, including findings that he conspired to commit all three target crimes alleged. (*Id.* at pp. 668, 680.) The court of appeal found that the instructional error was prejudicial in connection with the jury's finding that the defendant conspired to commit murder, but harmless as to the other conspiracy findings and the convictions on the substantive counts. (*Id.* at pp. 682-683.)

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[56] In *Petznick*, the trial court initially instructed the jury with the version of CALJIC No. 8.69 containing the phrase "at least two persons." After a sidebar conversation with counsel, the court informed the jury that the "at least two" wording was incorrect, and then gave a revised version of the instruction substituting the phrase "each of the persons." However, after the jury asked a question during deliberations, the trial court withdrew that version of the instruction and resubmitted the instruction with the "at least two" phrase the court had used originally. (*Petznick, supra*, 114 Cal.App.4th at pp. 679-680.)

In finding prejudice on the conspiracy to commit murder conviction, the court of appeal noted that the only evidence that the defendant agreed with the three other coconspirators to murder the victim was his presence during conversations at which the murder was discussed. (*Petznick, supra*, 114 Cal.App.4th at p. 682.) Because "the essential point of the defense as it pertained to the conspiracy count was that defendant did not have the requisite intent," and the jury's question "demonstrated it was confused about the very element upon which the defense centered and upon which it was erroneously instructed," the court of appeal concluded that the error was not harmless. (*Ibid.*) It cited *People v. Beeman* (1984) 35 Cal.3d 547, at pages 562-563, in which this Court held that an instruction that did not correctly inform the jury about the specific intent required for aiding and abetting was reversible error even under the *Watson* standard.[57] (*Id.*) However, in finding that the error was harmless as to the other counts, the court of appeal cited the *Chapman* standard. (See *id.* at p. 683.)

To the extent that *Petznick* stands for the proposition that the *Chapman* test for prejudice applies whenever a jury is instructed with the wrong bracketed language in CALJIC No. 8.69, respondent submits that it is incorrect for the reasons discussed previously. Instead, the heightened standard for prejudice was warranted in *Petznick* only because, under the particular circumstances of that case, it was reasonably likely that the jury interpreted the flawed instruction as not requiring the prosecution to establish the defendant's intent to kill. None of those same circumstances

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[57] This Court added, "Because we reverse under *Watson* we do not in this case decide whether failure to correctly instruct on the element of criminal intent should as a general rule be reviewed under a stricter rule of harmless error." (*People v. Beeman, supra*, 35 Cal.3d at p. 563.) This Court subsequently held that *Beeman* error amounts to reversible error per se unless the case falls into one of four exceptions delineated in *People v. Garcia* (1984) 36 Cal.3d 539. (See *People v. Croy* (1985) 41 Cal.3d 1, 13.)

is present in the instant case: the jury was not instructed pursuant to CALJIC No. 6.11; the jury did not express any confusion as to whether the prosecution was required to prove that appellant had the intent to commit murder; there was no evidence to suggest that appellant was present during conversations about the planned murders and sought to prevent any killing; and the defense did not center on the issue of appellant's intent, but rather on whether appellant was involved at all. Thus, respondent maintains that the instructional error in this case should not be analyzed under *Chapman*.

But even assuming for the sake of argument that the *Chapman* standard applies to the instructional error here, reversal is not warranted because it is beyond a reasonable doubt that the error did not affect the jury's convictions on any of the counts. First, for the reasons discussed in section A, *ante*, the evidence of appellant's involvement in the murder of Carole and the attempted murder of Dean was overwhelming, whereas the defense theory was based entirely on speculation. Thus, it is inconceivable that the jury would have found appellant guilty of conspiracy based entirely on the intent of the coconspirators.

Second, a trial court's failure to instruct on the intent element can be rendered harmless if the verdict shows that the jury necessarily resolved that issue against a defendant under other proper instructions. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1172 [failure to instruct on requisite intent to establish aider and abettor liability harmless "when the factual question of intent was necessarily resolved adversely to defendant under other, properly given instructions"]; *People v. Allison* (1989) 48 Cal.3d 879, 896-897 [failure to instruct on intent to kill in connection with felony-murder special circumstance harmless where the requisite intent was determined in jury's finding that defendant personally used a firearm in commission of robbery and murder]; *People v. Garcia, supra*, 36 Cal.3d at pp. 554-556 [instructional error that completely eliminated issue of intent to

kill from jury's consideration harmless in limited circumstances, including if issue of intent was resolved adversely to defendant under other properly given instructions].) In this case, the jury's finding appellant guilty of the substantive crime of murder in counts 1 and 2 means that it necessarily found that he intended to commit that crime.

Contrary to appellant's contention (AOB 207-208), the prosecutor urged a guilty verdict on those counts based on a single theory—that appellant aided and abetted Daniels in the shooting of Carole. (35 RT 10102-10105.)[58] The jury was instructed on aider and abettor liability pursuant to CALJIC No. 3.01. (29 CT 8412.) Under that instruction, for a defendant to be guilty as an aider and abettor, he must have both the knowledge of the unlawful purpose of the perpetrator and intend to commit or encourage or facilitate the commission of the crime. (*Ibid.*) Thus, in finding appellant guilty on counts 1 and 2, the jury necessarily found that appellant intended to kill Carole and her fetus.

Moreover, as previously discussed, the jury found in connection with counts 1 and 2 that appellant committed the murders for financial gain. (29 CT 8378-8379.) The jury was instructed that in order to find those special circumstances true, it had to find that appellant specifically intended to commit the murders, and that they were carried out for financial gain. (29 CT 8432-8433, 8436 [CALJIC Nos. 8.80.1, 8.81.1 and 8.83.1].) Accordingly, the jury's findings on those special circumstances shows that it necessarily found that appellant had the requisite intent to kill required for the conspiracy charged in counts 3 and 4.

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[58] Although the prosecutor also discussed evidence of the conspiracy, he did so expressly in the context of counts 3, 4 and 5, and not as an alternate theory of murder. (35 RT 10105-10106.) That the prosecutor was not relying on conspiracy as a theory of liability for murder is reflected in the lack of any jury instructions in that regard.

Although none of the verdicts apart from count 5 required a finding that appellant intended to kill Dean, there was no reasonable possibility that the jury could have concluded that appellant was guilty on that count without finding that he had the specific intent to kill Dean. Of the three coconspirators, the only other person with a possible motive to kill Dean was Lynn. But nothing in Lynn's testimony supported the notion that she conspired with Daniels and Gordon behind appellant's back to kill her husband. To the contrary, she testified that she discussed plans to kill Dean only with appellant, and she had not even known that Daniels and Gordon were going to accompany appellant to Portland until she saw them at the hotel. (18 RT 5140-5144, 5170-5179.) Appellant attempted to explain his presence in Portland that weekend by testifying that he drove there with Daniels and Gordon to sell some of his wares to sporting goods stores in the area. He also testified that Daniels and Gordon left him at the hotel at about 10 p.m. to go to a nearby topless club and they returned at 2:30 a.m. (29 RT 8300-8304, 8330-8332.)

For the jurors to conclude that appellant was guilty of conspiring to kill Dean without intending to kill him, they would have had to believe the following: Daniels and Gordon secretly conspired with Lynn to kill Dean; they hitched ride with appellant to Portland to carry out the attempt; they brought along a cache of weapons without appellant's knowledge; and they then left appellant alone at their hotel while they carried out the attempt—all without any conceivable motive or apparent benefit to themselves. With absolutely no evidentiary foundation, such a scenario is so implausible that the jury must have found that appellant himself intended to kill Dean when it convicted him of conspiracy in count 5.

In sum, given the entirety of the instructions and the evidence in the case, it is not reasonably possible that jurors would have found appellant guilty of any of the three conspiracy charges unless it also concluded that

he intended to Carole, her fetus, and Dean. Accordingly, the trial court's error in wording of the intent element of CALJIC 8.69 was harmless beyond a reasonable doubt as to all three conspiracy counts.

V. THE TESTIMONY OF ACCOMPLICES WAS SUFFICIENTLY CORROBORATED

Appellant contends that there was insufficient evidence to corroborate the testimony of his accomplices in connection with his conviction on both the murder and conspiracy counts. He argues that the independent evidence offered by the prosecution only further connected the accomplices—not him—to the crimes. Appellant further argues that this independent evidence actually undermined the accomplices' testimony in several respects. (AOB 212-222.)

Appellant is mistaken. Through the testimony of several witnesses who were not accomplices, as well as physical evidence linking appellant to the crimes and appellant's own incriminating statements, the prosecution introduced sufficient evidence to corroborate the accomplices' testimony and support appellant's conviction on all counts.

A. Legal Principles

In reviewing the sufficiency of evidence, the critical question is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) In reviewing a conviction for sufficient evidence, the an appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329, citations omitted, italics in original.) The relevant question is whether "*any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia*, *supra*, 443 U.S. at p 319, original italics.)

Conspiracy generally can be established only through circumstantial evidence. (*People v. Osslo* (1958) 50 Cal.2d 75, 94.) "It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design." (*Ibid*, quoting *People v. Robinson* (1954) 43 Cal.2d 132, 136.)

Section 1111 provides that the testimony of an accomplice may support a conviction only if it is "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§ 1111.) "The requisite corroboration may be established entirely by circumstantial evidence." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1128.) In addition:

> The corroborating evidence may be slight and entitled to little consideration when standing alone. However, it must tend to implicate the defendant by relating to an act that is an element of the crime. It need not by itself establish every element, but must, without aid from the accomplice's testimony, tend to connect the defendant with the offense. The trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.

(*People v. Nelson* (2011) 51 Cal.4th 198, 218.)

If a witness provides the necessary corroboration of an accomplice's testimony, that witness must not be an accomplice himself. (*People v. Davis* (2005) 36 Cal.4th 510, 543; *People v. Fauber* (1992) 2 Cal.2d 792, 834; *People v. Price* (1991) 1 Cal.4th 324, 444.) But the "necessary corroborative evidence for accomplice testimony can be a defendant's own admissions." (*People v. Williams* (1997) 16 Cal.4th 635, 680.) The independent evidence "need not corroborate the accomplice as to every fact

to which he testifies but is sufficient if it *does not require interpretation and direction from the testimony of the accomplice* yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth." (*People v. Davis*, *supra*, 36 Cal.4th at p. 543, quoting *People v. Perry* (1972) 7 Cal.3d 756, 769, italics added by *Davis*.) Further, corroboration of an accomplice's testimony may be provided by independent evidence of a motive to commit the crime. (See *People v. McDermott* (2002) 28 Cal.4th 946, 985.)

"The existence of a conspiracy may be proved by uncorroborated accomplice testimony; corroboration of accomplice testimony is needed only to connect the defendant to the conspiracy." (*People v. Price*, *supra*, 1 Cal.4th at p. 444.) As with substantive crimes, "only slight corroborative evidence is necessary to connect the defendant with the alleged conspiracy." (*People v. Crooks* (1983) 141 Cal.App.3d 224, 312.)

In accordance with these principles, the trial court instructed the jury on accomplice testimony pursuant to CALJIC Nos. 3.11, 3.12, 3.13 and 3.18. (29 CT 8414-8416, 8418.) It also instructed the jury that Norman Daniels and Lynn Noyes were accomplices as a matter of law in connection with counts 1, 2, 3, and 4 (murder and conspiracy to murder Carole and her fetus); and that Daniels, Dale Gordon, and Lynn were accomplices as a matter of law in connection with count 5 (conspiracy to murder Dean). (29 CT 8417; CALJIC No. 3.16.)

B. Sufficient Corroboration on Counts 1-4

At the conclusion of the prosecution's case-in-chief, the defense made a motion for direct acquittal on all counts for insufficient evidence under section 1118.1 based on the alleged lack of sufficient corroboration of the testimony of the accomplices. (27 RT 7875-7876.) The trial court denied the motion, finding "more than adequate corroboration" of the accomplices'

testimony on each of the five counts. (28 RT 7893.) Appellant renews that same challenge on appeal.

With regard to the charges of murder of Carole and her fetus, and conspiracy to commit the murders (counts 1-4), the prosecution introduced independent evidence to corroborate several key aspects of Daniels's testimony that appellant recruited and encouraged him to kill Carole.

Daniels's testimony that he received a "hit package" from appellant with instructions on killing Carole was supported by evidence that the design on the package's wax seal, which Daniels kept, was made from the imprint of a Marine "scuba bubble" pin in appellant's living room. (13 RT 3922; 14 RT 4009 [testimony of Shasta County Sheriff's Sgt. David Compomizzo]; 17 RT 5021-5022 [testimony of Shasta County District Attorney's investigator Fred Carelli] 26 RT 7482-7483 [stipulations based on FBI expert opinions].) In addition, Sara Mann, who appellant and Carole employed as a housekeeper, testified that, less than a month before Carole's death, she was cleaning some glass candles in their living room when appellant asked her if she would like to get a letter with a wax seal. (24 RT 6955.) After Mann replied, "I guess," appellant and said, "Well, Norman got one." (*Ibid.*)

The prosecution introduced receipts from Office Max showing that, one day before appellant handed the "hit package" to Daniels, he purchased an electronic label maker and a manila envelope, which were consistent with the materials Daniels described as used in making the package. (28 CT 8154-8157 [Exhs. 272, 273]; 34 RT 9667-9669.) Lynn's testimony that she saw appellant toss the label maker into the Sacramento River when she traveled to Shasta County in late May 1998 for Carole's funeral was corroborated by evidence that an electronic label maker was retrieved from the spot in the river identified by Lynn. (26 CT 7425 [Exh. 5D-10]; 27 RT 7656-7658.) Detectives testified that the same type of label maker was on a

bookshelf in appellant's bedroom when crime-scene photographs were taken right after Carole's murder, but that the label maker was gone when appellant's residence was searched a week later. (13 RT 3943-3944; 26 RT 7489-7507; 27 RT 7652, 7654-7655.) The prosecution also demonstrated that the machine salvaged from the river had been used to make an "I Love You Baby" label on a framed photograph in appellant's home. (25 CT 7348-7349 [Exhs. 188, 189], 7352[Exh. 210]; 26 RT 7489, 7496-7497, 7509-7510.)

Daniels's testimony that appellant paid for the Rossi .44-caliber semiautomatic gun that he used to kill Carole was corroborated by Marshall Jones, owner of Jones' Fort in Redding, the store where Daniels purchased the gun. Jones testified that appellant and Daniels came into the store together on April 17, 1998, and Daniels gave him a $20 deposit for a Rossi Model 720, .44 Special. (24 RT 7013-7014.) Appellant and Daniels returned ten days later (after the required waiting period), and appellant handed Daniels some money, which Daniels used to pay the balance due. (24 RT 7014.) A receipt introduced into evidence showed that the balance paid was $252. (22 CT 6426 [Exh. 59].)[59]

To help establish that appellant was the mastermind of the conspiracy to murder Carole and her fetus, the prosecution introduced numerous e-mail messages between "companyt" (some bearing the name "Colonel Sean") and Daniels and Lynn. (See, e.g., 25 CT 7170-7176 [Exhs. 137F-H], 7180 [Exh. 137P], 7183 [Exh. 137S], 7184 [Exh. 137T], 7197 [Exh. 140A], 7214-7215 [Exh. 142J-K], 7234 [Exh. 160], 7247 [Exh. 173], 7248 [Exh.

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[59] Appellant cites some minor discrepancies between Daniels's and Jones's testimony regarding the purchase of the gun. (AOB 220-221.) None of those discrepancies undermines the crucial fact that Jones confirmed appellant was with Daniels when Daniels entered the store and gave Daniels money before the purchase was made.

174].) Detective James Arnold, a computer expert for the Redding Police Department, testified that the e-mails, which were retrieved from USA.net for a subscriber named "Company T," corresponded exactly with data stored on the hard drive of appellant's home computer. (25 RT 7100-7166, 7260-7264; see also 20 RT 5922-6038 [testimony of Kathleen Flannes, postmaster for USA.net Inc.].) In addition, the prosecution introduced a message from appellant's personal e-mail address (PATR555@aol.com) to the "companyt" account, stating that Daniels and Lynn are "good to go," and requesting that he be given "command of [a] new team." (25 CT 7178 [Exh. 137-N], 7229 [Exh. 155].[60]) This computer forensic evidence not only corroborated the testimony of Daniels and Lynn regarding their belief that they had been recruited by appellant to join an assassination network, but it also provided strong independent evidence that appellant was calling the shots by posing as "Colonel Sean."

Daniels's testimony that, after killing Carole he sent a pager message to appellant stating "All done, going home," was independently confirmed by pager company records showing that appellant received such a message on the same date and time. (25 CT 7343 [Exh. 124]; 16 RT 4546.) This evidence also supported Daniels's testimony that appellant was aware of the plans to kill Carole, and wanted to be notified when the job was done.

Daniels's and Lynn's testimony that appellant was fully aware of the plot to kill Carole was further corroborated by appellant himself in a tape-recorded conversation with Daniels after Daniels was arrested. When

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[60] Daniels and Lynn were referred to by their code names of Devlin and Jozaphine, respectively. Appellant referred to himself in e-mails as "PATRIOT." (25 CT 7178.) It was stipulated that Daniels's on-line account listed one of his screen names as "Devlin666" and that one of the screen names for Dean Noyes's computer account was "Jozaphine." (26 RT 7553-7556.) It was further stipulated that the primary screen name on appellant's AOL account was "PATR553." (26 RT 7553.)

Daniels informed appellant that he had confessed to killing Carole, appellant expressed no anger or surprise. Instead, he replied, "So you said you did it?" (22 CT 6375a.) Appellant then told Daniels he would try to provide some assistance for him, saying, "I'm gonna get on the phone to the big boys and see what we can pull here." (22 CT 6376.) He also told Daniels to have Daniels's lawyer contact him: "I'll talk with him and see what we can do for you." (22 CT 6377.) When Daniels expressed concern that appellant's parents would be upset with him, appellant told Daniels not to worry because "obviously at this point man you just need help." (22 CT 6378.) Appellant also assured Daniels that he would be paid, saying, "I'll see whatever monies you had coming goes to your ah, goes to your kid or our family or something." (22 CT 6379.) Appellants' own words thus provided powerful independent evidence of his involvement in the plot to kill Carole, and it corroborated Daniels's testimony that appellant had promised to pay Daniels $25,000 if he killed Carole.

Appellant argues that nothing in that tape-recorded conversation, without aid from the testimony of the accomplices, "tends to connect [him] with the crime as opposed to its perpetrators." (AOB 219.) To the contrary, appellant's efforts to reassure Daniels and offer him financial assistance after Daniels said he had just confessed to killing Carole was evidence, apart from the testimony of any accomplice, that appellant was involved in the murders. Indeed, the mere fact that appellant expressed no surprise or anger toward Daniels during the phone call suggested that he played a major role in the conspiracy, apart from Daniels's own testimony.

Moreover, there was independent evidence to support the prosecutor's theory that appellant had a motive to murder Carole. The prosecution introduced testimony from an insurance agent as well as documents to show that, on March 25, 1998, a $125,000 insurance policy on Carole's life was issued listing appellant as the primary beneficiary. (26 CT 7516-7518

[Exh. 31A-6]; 7547-7548 [Exh. 78C-1]; 17 RT 4797, 4801-4803 [testimony of Angie Williams]; 27 RT 7853-7854 [stipulation].) Lynn's testimony that appellant told him that he did not want to have a child (19 RT 5524) was corroborated by appellant's friend Scott McMillan, who testified that appellant told him that he did not want children because they were "little pains." (26 RT 7375.) The prosecution also introduced evidence that appellant tried to help Lynn find a rental house in Shasta County shortly after Carole's death. (26 CT 7528-7529 [Exh. 73]; [24 RT 6906-6908 [testimony of Tracie Jones]; 27 RT 7760 [stipulations].) Finally, witnesses testified that appellant and Lynn were intimate with each other around the time of Carole's funeral. (21 RT 6161-6162 [testimony of Collin Colebank]; 24 RT 7017-7018 [testimony of Marshall Jones].) This independent evidence provided further support for the prosecution's theory that appellant killed Carole to make a fresh start with his former girlfriend, while expecting the proceeds of Carole's life insurance policy.

In short, the prosecution introduced independent evidence corroborating every major facet of Daniels's and Lynn's testimony regarding appellant's involvement in the conspiracy to kill Carole and her fetus, and in carrying out that plan. Sufficient evidence supports his conviction on those four counts.

C. Sufficient Corroboration on Count 5

Appellant also contends that there was insufficient corroboration of the testimony of Lynn, Gordon and Daniels regarding the conspiracy to kill Dean Noyes. He argues: "Nothing in the record but the accomplices' testimony establishes that there ever was a plan to kill Dean or an attempt to take his life. The entire story easily could have been made up by an accomplice with self-serving motives." (AOB 214.) To the contrary, the prosecution introduced sufficient independent evidence, both documentary

and testimonial, to corroborate the truth of the accomplices' testimony that appellant conspired with them to kill Dean.

The information alleged that the conspiracy to kill Dean occurred between October 1, 1997, and May 30, 1998. (2 CT 89.) The prosecution introduced evidence of several plans to kill Dean between those dates, all involving Lynn, and some including Gordon or Daniels or both.

Gordon's testimony that he and appellant traveled to Portland in October 1997 to explore opportunities to kill Dean was corroborated by a hotel receipt showing that appellant rented two rooms at a Hampton Inn there from October 10-11 of 1997. (25 CT 7299 [Exh. 62]; 27 RT 7752 [stipulation on appellant's handwriting].) Gordon's testimony that he and appellant again traveled to Oregon a few months later to meet with Lynn and further discuss plans to kill Dean was corroborated by a receipt from the Courtyard Marriott Hotel in Eugene/Springfield for January 3-4 of 1998. (25 CT 7350-7351 [Exhs. 195-196]; 27 RT 7750-7751 [stipulation on method of payment].) Similarly, Gordon's and Daniels's testimony that they traveled with appellant to Portland in February 1998 to help him carry out plans to kill Dean was corroborated by a receipt from the Hampton Inn for February 7-8 of 1998. (25 CT 7300 [Exh. 63]; 27 RT 7753 [stipulation].) And Lynn's and Daniels's testimony that appellant returned to Gresham the weekend of May 8-10 of 1998 and stole several items from Dean as part of another plot to kill him was corroborated by a receipt showing that appellant stayed at the Hampton Inn on those dates, and that he called Daniels twice from his hotel room. (25 CT 7303 [Exh. 64]; 27 RT 7753-7754 [stipulation].) While none of these hotel receipts establishes the purpose of appellant's trips to Oregon, they corroborate accomplices' testimony that appellant conspired to kill Dean by showing he was with them when they traveled to Oregon to discuss and carry out those plans.

Regarding the February 1998 trip, Daniels's and Gordon's testimony that appellant practiced firing his Ruger rifle through a window of the hotel room was corroborated by admission into evidence of the room's window screen, as well as testimony from a Department of Justice expert. That expert, Frances Evans, testified that the presence of lead residue near the holes in the screen showed that they were made by bullets, and that some polyethylene foam particles also were on the screen. (23 RT 6700-6713.) The presence of foam on the screen also corroborated Gordon's testimony that appellant made silencers from some plastic pipe material he kept in his home and stuffed them with foam from archery targets. (22 RT 6229-6234.) Furthermore, forensic tests on the rifle showed that the interior threads at the end of the barrel were embedded with polyvinyl chloride (PVC), which is used to make plastic pipe. (16 RT 4695-4707 [testimony of James Weigand, Department of Justice criminalist].) Detectives later discovered pieces of PVC irrigation tubing in a spare room of appellant's house. (24 CT 6825-6826 [Exh. 105]; 14 RT 4038-4039.)

Daniels and Gordon testified that, as they and appellant were fleeing from the Noyeses' house after the unsuccessful break-in attempt, appellant threw the silencer over a brick wall to get rid of it. (15 RT 4350-4351; 22 RT 6275-6277.) Those statements were corroborated by testimony from Jan Cousins, who found an object fitting that description in a nearby yard. Cousins testified that she found an eight-inch long piece of plastic pipe, taped off at one end with threading on the other end, and stuffed with paper-like materials. (16 RT 4518-4519, 4527-4530.) In addition, Daniels's and Gordon's testimony that appellant communicated with them using walkie-talkies during the trip was corroborated by the discovery of two Motorola walkie-talkies among appellant's belongings stored at Jones' Fort. (27 RT 7703-7709.)

Lynn testified that she mailed a key to her house to appellant as part of the plan to kill Dean. (18 RT 5144, 5170.) Gordon testified that appellant had difficulty opening the door with the key, and thus "aborted" the mission. (22 RT 6274-6275.) Gordon's testimony in this regard was corroborated by Dean, who testified that lock on his front door did not work properly, and that the key had to first be turned counter-clockwise to open it. (23 RT 6762.)

Lynn also testified that because she feared appellant would break into her house that night and kill Dean, she asked Dean to drive her to the hospital in the middle of the night. (20 RT 5771-5774.) Dean confirmed that he drove Lynn to the hospital that night because she was complaining of cramps and vaginal bleeding. (24 RT 6785.) Dean also confirmed that he was having an affair with another woman for several months in 1997. (23 RT 6758.) This corroborated Lynn's testimony that she told appellant she wanted him to kill Dean because she had discovered that he was having an affair. (18 RT 5110-5111.)

Appellant himself alluded to the unsuccessful attempt on Dean's life in a conversation with a fence customer a few months later. Glenn Renfree testified that, in late April or early May of 1998, appellant told him that when appellant, Daniels and a third person were in Oregon to sell camouflage gear, they went by the house of someone he knew, rattled the windows and fired a couple shots to scare the resident. (24 RT 6895-6896.) Renfree said that appellant did not identify the third person who accompanied him on the trip, and did not mention the name of the resident the shots were intended to scare. (24 RT 6896.) As the prosecutor argued to the jury, this was compelling evidence that appellant had gone to the Portland area in February 1998 with Daniels and Gordon to carry out plans to kill Dean.

Appellant argues that Renfree's testimony does not sufficiently corroborate the accomplices' testimony regarding the February 1998 trip to Portland because they did not testify that the windows of the Noyeses' house were rattled or that shots were fired. (AOB 218.) However, the mere fact that appellant admitted going with Daniels and another man to the residence of someone he knew in Oregon and firing a couple of rounds to scare that person supported Daniels's and Gordon's testimony that the three of them went to the Noyeses' residence in February 1998 armed with guns and intending to kidnap and kill Dean. (See *People v. Davis, supra*, 36 Cal.4th at p. 543 [independent evidence need not corroborate every fact to which an accomplice testifies; it need only connect the defendant to the commission of the crime "in such a way as reasonably may satisfy a jury that the accomplice is telling the truth"].) The jury could have reasonably concluded that appellant was referring to this incident when he spoke to Renfree, but changed some of the details to suggest that he never intended to kill anyone, thereby turning a failure into a boast. (That tactic would have been consistent with many of the lies appellant told about other matters.) Appellant also argues that because there was testimony about other trips to Oregon that he made with his friends, his statement to Renfree could have been referring to one of those trips. (AOB 218.) However, the only trip that included Daniels was on the weekend of February 8-9.

Also in connection with count 5, Lynn testified that appellant came to her house on May 9, 1998 (one week before Carole was killed) and took several items belonging to Dean, including computer disks, a daily planner/organizer, a copy machine and a printer. (18 RT 5258-5259.) Daniels testified that on the same date, appellant spoke with him from a hotel room in Oregon and told him that he was planning to assassinate Dean. (16 RT 4580-4581.) Appellant then provided Daniels with Dean's AOL screen name and five possible passwords, along with Dean's social

security and bank account numbers. (16 RT 4582-4583.) Daniels testified that, on appellant's instructions, he set up a "fake" e-mail account under the name of "John Carson" with the screen name "Bladerunner3." He then sent an accusatory e-mail to Dean that appellant had dictated. (16 RT 4584-4593.) According to Daniels, the purpose of the e-mail was to threaten to expose Dean's involvement in an alleged embezzlement scheme in order to "lure" Dean to a remote location where appellant would be waiting to kill him. (16 RT 4588.) Daniels also testified that appellant later gave him a personal organizer, a stack of computer floppy disks and other items that appellant said belonged to Dean. (16 RT 4595-4596.)

Daniels's testimony was corroborated by hand-written notes he took while speaking on the phone with appellant, as well as notes of his attempt to set up a new e-mail account. (22 CT 6474-6475 [Exh. 39], 6476-6477 [Exh. 44].) The prosecution also introduced the e-mail that Daniels sent to Dean under the subject line: "Bad Boy." (25 CT 7117-71188 [Exh. 109].) It accused Dean of stealing money, offered him an opportunity to "make a deal," and warned that if he contacted the police his children would be in danger.[61] (*Ibid.*) Because Daniels had no other source for obtaining Dean's e-mail address and other personal information, these documents provided independent corroboration that appellant had provided this information to Daniels in connection with his latest plot to kill Dean.

As further corroboration of the May 9 conversation between appellant and Daniels, Dean testified that he received the e-mail that Daniels said he

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[61] The e-mail stated: "[S]omeone has not been playing well with others. [¶] Taking money that does not belong to you is a crime, and blaming it on John is worse. [¶] Allison and others would be intrested [sic] in this. [¶] Want to make a deal, contact imediatly [sic]. [¶] Any involvement with police will threaten Jordan and Amandas [sic] future." (25 CT 7118.)

wrote on that date. (23 RT 6802.) He explained that "Bad Boy" refers to a nickname for a group of Marines he served with in Operation Desert Storm in 1991; he displayed a tattoo bearing that name. (23 RT 6803.) Dean also testified that, in addition to referring to his children by name, the e-mail contained a reference to his former boss (whose name was misspelled), and an apparent reference to a cousin. (23 RT 6804-6805.) This testimony further implicated appellant in the plot to kill Dean because Daniels had no other way of knowing the name of Dean's wartime moniker, or the name of Dean's former boss and cousin.[62]

Dean testified that when he returned home on May 9, he discovered that some items were missing, including a burgundy day planner, a folder, and several computer disks. (23 RT 6797-6800.) He identified the missing computer disks as those found in Daniels's possession and the missing day planner as the one found inside appellant's Isuzu Trooper. (22 CT 6472-6473 [Exhs. 113, 114]; 13 RT 3824-3826; 24 RT 6798-6801.) Evidence that these stolen items ended up in Daniels's and appellant's possession supported Daniels's testimony that appellant took those items as part of his plan to kill Dean.

In sum, contrary to appellant's contentions, there was ample independent evidence to corroborate the testimony of Lynn, Daniels and Gordon that appellant conspired with them to murder Dean during the period between October 1997 and May 1998. Accordingly, sufficient evidence supports appellant's conviction on count 5.

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[62] Although Lynn theoretically could have provided that information directly to Daniels, there was no evidence to support such a theory. Indeed, given Lynn's close relationship with appellant and her bare acquaintance with Daniels, it defies all credibility that Lynn would have conspired behind appellant's back with Daniels to threaten her husband.

VI. THE TRIAL COURT HAD TERRITORIAL JURISDICTION OVER THE CONSPIRACY CHARGE IN COUNT 5

As he did in the trial court, appellant contends that the Shasta County Superior Court lacked territorial jurisdiction to try him for conspiracy to murder Dean Noyes because, under the law at the time of the offense, conspiracy to commit murder required acts constituting an attempt to be committed in California. He argues that the prosecution failed to satisfy this requirement because the evidence showed that all the acts committed in California were "clearly preparatory." (AOB 223-232.)

Contrary to appellant's contention, the evidence showed that the conspirators not only solidified plans to kill Dean in California, but also took substantial steps toward achieving that goal while still in this state. Because the evidence showed that the conspirators began their attempt to commit murder while in California, the trial court had jurisdiction over the conspiracy charge in count 5.

A. Procedural Background

Before trial, appellant filed a motion to dismiss count 5 for lack of jurisdiction. He argued that none of the alleged overt acts in California constituted an attempt to kill Dean, and thus no court in this state had jurisdiction for that conspiracy charge. (5 CT 749-757; 6 CT 1172-1180.) The prosecutor opposed the motion, arguing (among other things) that evidence adduced at the preliminary hearing showed that the attempt to kill Dean began in California. (5 CT 843-862.)[63]

At a hearing on appellant's motion, both parties and the trial court agreed that the issue was governed by the rule established in *People v.*

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[63] As a fall-back position, the prosecutor stated that if the trial court agreed with appellant's contention, it should be allowed to amend the information to charge appellant with attempted murder as an aider and abettor. (5 CT 852-853 [fn. 7 of People's brief]; 2 RT 849-851.)

Buffum (1953) 40 Cal.2d 709. (2 RT 853-854.) Under that rule, when a defendant is charged with conspiring to commit a crime in another state, California has jurisdiction only if the acts done in this state are sufficient to amount to an attempt to commit the crime. (*Id.* at pp. 716-718.)[64]

Defense counsel argued that testimony at the preliminary hearing showed that the defendants performed several additional tasks in Oregon before setting out to kill Dean, including checking into a hotel, wiping off their weapons and surveying the garage where they planned to return the next morning. (2 RT 858.) The prosecutor argued that appellant had made prior trips to Oregon to plan the murder but never before brought all of the equipment he loaded into his Jeep on February 7, 1998, nor did he have a photo of Dean and keys to the Noyeses' house. (2 RT 864-865.) He also argued that the murder of Dean was thwarted only by the unexpected circumstances of Dean driving a Ford Bronco to work on February 8 (rather than the Pontiac Fiero he normally drove) and appellant being unable to open the lock to the front door of the Noyeses' house. (2 RT 866-868.)

The trial court drew an analogy to a hypothetical in which law-enforcement officers set out to serve a warrant, arrive at the subject's location when it is very late, and decide to get a night's sleep before arresting him. When they return to his location, they discuss logistics before moving in to make the arrest. (2 RT 874-875.) The court found the

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[64] This rule later was abrogated in *People v. Morante* (1999) 20 Cal.4th 403, which held that conspiracy to commit a crime in another state can be sustained based on an in-state agreement and in-state acts in furtherance of the commission of the underlying offense, not necessarily amounting to an attempt to commit the offense. (*Id.* at pp. 423-428.) However, *Morante* also held that this new rule was to apply prospectively only. (*Id.* at pp. 431-432.) Because the information in this case was filed before the *Morante* decision was issued, the trial court noted that the former rule of *Buffum* applied to the case at bar. (2 RT 853-854.)

instant case to be similar because when the conspirators began their road trip to Oregon they had the clear intent to commit murder and had all the items necessary to accomplish that purpose. (2 RT 876.) The fact that they worked out some additional logistics after arriving in Oregon does not mean that the attempt had not already begun, the court reasoned. (*Ibid.*)

> An attempt is not something that happens, and there is a magical finish line, like in a race. An attempt is a progressive event. But there is a point at which somebody has attempted the crime, and the attempt continues. And the attempt continues past the time they failed on the first effort. And then they went and made the second effort at the residence. And, in my view, they—the Defendant and his crime partners—engaged in sufficient California acts to go beyond mere preparation, considering, and in light of, the unequivocal, clear, expressed intent to commit the murder.
>
> I think the design to commit the murder was clearly shown, and there was sufficient California acts in furtherance of that design to constitute an attempt. And, in effect, these co-conspirators, based on the evidence [the prosecutor] says he has, put their plan—their criminal, murderous design—into action. They did that. They started that here in California. So, in my view, there was sufficient acts to constitute an attempt such that the *Buffum* test is met, and the conspiracy to commit the murder of Dean Noyes alleged in Count 5 and the related enhancement should not be dismissed.

(2 RT 876-877.)

At trial, before Daniels testified, defense counsel requested an evidentiary hearing about the events in Oregon to determine if there was sufficient evidence that the attempt to murder Dean began in California. (14 RT 4121-4122.) The trial court denied the request as untimely, saying that Daniels already had been brought to court to testify and the jury was waiting outside for the trial to continue. (14 RT 4122-4123.) The court invited counsel to renew the request at the next proceeding after jurors were dismissed. (*Ibid.*)

Later, as the prosecutor moved to admit certain photographs taken in Oregon, defense counsel requested a standing objection to any evidence regarding events in Oregon based on lack of jurisdiction on count 5. (15 RT 4305-4306.) The trial court noted the objection, but stated that if counsel wished to preclude the testimony of other witnesses on that basis, he would have to renew his objection. (15 RT 4306.) Counsel never did.

B. Applicable Law

A conviction for conspiracy requires proof that the defendant agreed with at least one other person to commit a crime, intended to commit the offense, and that one or more of the parties undertook an overt act in furtherance of the conspiracy. (*People v. Morante*, *supra*, 20 Cal.4th at p. 403; *People v. Swain* (1996) 12 Cal.4th 593, 600; § 182, subd. (a)(1).) As previously noted, under current law, when a defendant is charged with conspiracy to commit a crime in another state, a California court has jurisdiction as long as the agreement to commit the crime and at least one overt act occurred in this state. (*People v. Morante*, *supra*, at pp. 423-428.) However, that rule applies only to conspiracies charged after *Morante* was decided in May 1999. (*Id.* at pp. 431-432.)

The information in this case was filed on October 8, 1998. (2 CT 86-91.) Thus, as the parties below recognized, appellant's claim is governed by the prior rule of *People v. Buffum*, *supra*, 40 Cal.2d 709, which held that a California court has jurisdiction to adjudicate a criminal conspiracy the object of which is in another state only if the acts done within California are sufficient to amount to an attempt to commit a crime. (*Id.* at pp. 716-717.) Accordingly, the trial court lacked territorial jurisdiction for the charge of conspiracy to kill Dean only if none of conspirator's acts in California amounted to an attempt to commit the crime.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the

intended killing." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 4 (hereafter *Decker*).) The overt act required for attempted murder "must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward the commission of the crime or crimes . . . nor need it satisfy any element of the crime." (*Id.* at p. 8, internal citations omitted; see also *People v. Medina* (2007) 41 Cal.4th 685, 693 ["Other than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense."].)

This Court has explained the distinction between preparation and attempt as follows: "The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." (*Decker*, *supra*, 41 Cal.4th at p. 8.) The action that constitutes attempt may be "the first or some subsequent act directed towards that end after the preparations are made." (*Ibid.*, quoting *People v. Memro* (1985) 38 Cal.3d 658, 698.) It "must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." (*People v. Miller* (1935) 2 Cal.2d 527, 530.) The act also must be unequivocal because "so long as the equivocal quality remains no one can say with certainty what the intent of the defendant is." (*Id.* at pp. 531-532.)

This Court has further explained that "whenever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constituted an attempt." (*Decker*, *supra*, 41 Cal.4th at p. 8, quoting *People v. Anderson* (1934) 1 Cal.2d 687, 690.) The rationale for the "slight-acts" rule is that where the intent is clear, there is a greater likelihood that the criminal objective will be accomplished and thus "there

is a *greater* urgency for intervention by the state at an *earlier* stage in the course of that conduct." (*Id.* at pp. 10-11, italics in original.)

In *Buffum*, this Court stated that, to constitute attempt, "there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature." (*People v. Buffum, supra*, 40 Cal.2d at p. 718, quoted in AOB 226.) This Court subsequently elaborated on that statement:

> We did not mean by this language . . . to depart from the generally accepted definition of attempt. Our reference to an "appreciable fragment of the crime" is simply a restatement of the requirement of an overt act directed towards immediate consummation; it does not establish the novel requirement that an actual element of the offense be proved in every case. Furthermore, properly understood, our reference to interruption by independent circumstances rather than the will of the offender merely clarifies the requirement that the act be unequivocal. It is obviously impossible to be certain that a person will not lose his resolve to commit the crime until he completes the last act necessary for its accomplishment. But the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized. If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him.

(*People v. Dillon* (1983) 34 Cal.3d 441, 454-455.)

C. Evidence Shows the Attempt Began in California

Based on the above principles, territorial jurisdiction existed in California for the attempted murder charge. Indeed, the trial court's ruling,

which was based on evidence adduced during the preliminary hearing, was only strengthened by the testimony of appellant's co-conspirators at trial.[65]

First, as the trial court recognized, there was overwhelming evidence of appellant's intent to kill Dean before he set out for Portland on February 7, 1998. Gordon testified that appellant began discussing plans to kill Dean as early as January 1997, telling Gordon that he was a paid assassin and that killing Dean would be a "freelance hit." (21 RT 6108-6111, 6116, 6188.) Appellant also told Gordon that he expected to collect $25,000 in life insurance proceeds if Dean were killed and he offered Gordon a share of those proceeds to assist him. (21 RT 6116-6117, 6188, 6195.) Gordon also testified that he and appellant traveled to Portland in October 1997 to "scope out" opportunities to kill Dean, including meeting with Lynn to discuss possible entry points to her house and driving by Dean's office in downtown Portland. (21 RT 6197; 22 RT 6205, 6211-6211.) Gordon also accompanied appellant on a trip to the Eugene/Springfield area in January 1998, where, according to Gordon, appellant met with Lynn and further discussed plans to kill Dean. (21 RT 6214-6216, 6218.)

Lynn testified that in the fall of 1997, appellant offered to have Dean killed if she wanted. (18 RT 5111.) She testified that she later provided appellant with keys to her house and vehicles and a photograph of Dean to help accomplish that goal. (18 RT 5144.)

Daniels testified that in October 1997, appellant told him that there were several contracts out on Dean's life and appellant was planning to kill Dean to collect on them. (14 RT 4180, 4201-4202.) Daniels also testified that about week or two before driving to Portland with appellant and

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[65] By the same token, the accomplices' testimony undermined the arguments of trial counsel regarding territorial jurisdiction, which perhaps explains why counsel did not renew his motion to dismiss on that basis.

Gordon, they met at the Moose Lodge in Anderson during which appellant provided additional details of the murder plot. (14 RT 4217-4218.)

In the weeks leading up to the weekend of February 8-9, 1998, appellant finalized the preparations for going to Portland to kill Dean. Appellant and Daniels went to factory outlet stores to purchase shoes, rain gear and wool caps to help them look like Oregon residents. (14 RT 4213.) They also test-fired some of the long-barreled weapons they planned to take, and appellant calibrated the scope on his rifle. (14 RT 4213-4216, 4220-4223.) Appellant also showed Daniels a photo of Dean and the keys to Lynn's house, which she had mailed to appellant. (14 RT 4231-4232; 18 RT 5144, 5170.) During that same period, appellant showed Gordon and Daniels movies about professional assassins to inspire them to kill. (18 RT 5208; 23 RT 6635.) The three men discussed a primary plan to kill Dean in the downtown Portland garage where he parked his car and a back-up plan to break into his home and kidnap him. (14 RT 4233-4234, 4235-4237; 15 RT 4258-4260; 22 RT 6250.) Appellant also described to Daniels and Gordon the streets and rail lines in Gresham. (14 RT 4218.)

On Friday, February 7, 1998, appellant and his accomplices put the plan into action by loading into appellant's Jeep an assortment of firearms along with extra ammunition and magazines, knives, plastic handcuffs, latex gloves, and walkie-talkies. (14 RT 4219-4228; 17 RT 4927; 22 RT 6221-6222, 6243-6244.) Appellant gave Daniels a ride to his house and called Gordon's workplace and told a lie about Gordon's mother to give Gordon an excuse to leave work early so that the three men could get to Portland as soon as possible that night. (14 RT 4219, 4237-4238; 22 RT 6249-6250.) When appellant left his home in Cottonwood with his two accomplices, a small arsenal of weapons and two plans for ambushing Dean, he had made a "direct movement toward the commission" of the intended act, and thus the attempt was underway. (See *Decker*, *supra*, 41

Cal.4th at p. 8.) Likewise, the act of driving north from Shasta County to Portland, Oregon was the "commencement of the consummation" of the plans to kill Dean.[66] (See *People v. Miller*, *supra*, 2 Cal.2d at p. 530.) Moreover, the act was unequivocal, as demonstrated by evidence that when Lynn begged appellant to abandon his plans after the first attempt failed, appellant told her that that it was too late to call off the killing because "so many other people were involved." (18 RT 5179, 5181-5182.)

Appellant argues that his intent to kill Dean was a "hotly-disputed issue" at trial because the testimony of the accomplices was "wholly uncorroborated" and because he offered an innocent explanation for his prior trips to Oregon. (AOB 228.) He argues that his design to commit murder was "far from clearly shown" because there was no evidence of that intent apart from the testimony of his accomplices. (*Ibid.*)

For the reasons discussed in Argument V-C, *ante*, there was sufficient independent evidence to corroborate the accomplices' testimony regarding appellant's involvement in the conspiracy to kill Dean. That corroborating evidence demonstrated that the accomplices' testimony was credible. (See *People v. Davis*, *supra*, 36 Cal.4th at p. 543; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1128; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1206-1207.) By contrast, appellant's veracity as a witness was undermined by evidence that he frequently lied about matters both small and large—everything from his rank in the Marines to his claims of being a paid assassin. If that weren't enough, appellant's credibility was left in tatters after the prosecutor cross-examined him about his reassuring statements to Daniels in a tape-recorded telephone conversation after the murder of Carole. (See

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[66] The first two hours of the trip would have been in California. According to MapQuest, the estimated driving distance between Anderson, California (just north of Cottonwood) and Hilt, California (just south of the Oregon border) along Interstate 5 is 128.24 miles.

30 RT 8567-8585.) Thus, notwithstanding appellant's denials of having the intent to kill Dean, the testimony of the other conspirators provided clear and overwhelming evidence of that intent during the weekend of February 8-9 of 1998. As one court put it nearly 90 years ago, borrowing phrases from Shakespeare and the Bible: "'Murther most foul' he had committed 'already in his heart.'" (*People v. Lanzit* (1924) 70 Cal.App. 498, 506.)

Appellant does not dispute that the agreement between himself and at least one other conspirator to kill Dean occurred in California. Instead, he argues that the evidence failed to establish that any direct, ineffectual acts to murder Dean were committed in California, but rather showed that all of his conduct in California was "preparatory." (AOB 228.)

Given the clear, if not overwhelming, evidence of appellant's intent to kill Dean, the prosecution was required to demonstrate only "slight acts" in furtherance of that design in California to show that an attempt was made in this state. (See *Decker*, *supra*, 41 Cal.4th at p. 8; *People v. Anderson*, *supra*, 1 Cal.2d 687, 690.) The evidence at trial clearly showed that appellant, Daniels and Gordon took actions in California in furtherance of their design, which amounted to the "commencement of the consummation" of the plans to kill Dean.

Furthermore, as the prosecutor pointed out, the murder likely would have been committed but for two unforeseen circumstances: Dean's taking the family's Ford Bronco to work on Saturday while appellant and his accomplices were on the lookout for a Pontiac Fiero; and a glitch in the lock on the Noyeses' front door that prevented appellant from opening it.

Appellant asserts that he and his fellow conspirators continued to prepare for the killing of Dean after they entered Oregon. He cites evidence that they purchased a third walkie-talkie after they crossed the border, that they checked into a motel in Portland, cleaned their weapons, tested their radios, and went by the garage where they planned to kill

Dean—all before they set out the next morning to shoot Dean as he exited his car in the garage. (AOB 229-230.) However, an act may constitute an attempt even if subsequent acts are undertaken before a crime is committed. (See *People v. Kipp* (1998) 18 Cal.4th 349, 376 [act needed to constitute an attempt "need not be the last proximate or ultimate step toward commission of the substantive crime"]; see also *People v. Memro, supra*, 38 Cal.3d at p. 698 [act constituting attempt may be "the first or some subsequent act directed towards that end after the preparations are made"].) Although some additional steps had to be taken before appellant could be in a position to actually kill Dean, he had, for all intents and purposes, completed preparations for the murder before February 7. He had already worked out the logistics of shooting Dean and making an escape, recruited a "hit team" with promises of large payments, test-fired the weapons he intended to use, and bought items of clothing to look like an Oregon resident. Loading the equipment into his Jeep and heading north on I-5 were the first steps toward putting his plan into action.

Appellant argues that there was nothing to distinguish his actions in California on February 7 from his behavior during his trip to the Eugene/Springfield area the previous month with Gordon. (AOB 230-231.) Appellant contends that "up to the moment he left the motel to wait for Dean to arrive at the parking garage no one could say with certainty whether he left California to kill Dean or, as he did during the trip to Eugene/Springfield, merely to impress Lynn with the fact that he could kill him." (AOB 231.) This argument is flawed for at least three reasons.

First, at the time appellant left California to meet Lynn at a hotel in Eugene/Springfield on January 3, 1998, he had not devised any specific plans to kill Dean, as he had when he left California on February 7. He had not obtained keys to the Noyeses' house or a photograph of Dean until after he returned to California from the trip to the Eugene/Springfield area. He

had not test-fired any of the weapons and had not yet purchased clothing to blend in with local residents. Second, because Dean did not accompany Lynn to Eugene/Springfield on January 3, appellant was not planning to kill Dean on that trip. Thus, while appellant might have been thinking about killing Dean before leaving California for Oregon in January, he could not have intended to kill Dean at that time. Third, because Dean was not expected to be in Eugene/Springfield on January 3, driving to that area with Gordon would not have constituted a "direct but ineffectual act" toward killing Dean. Rather, as subsequent events showed, it was part of the continuing preparations to kill Dean that were completed by the time appellant, Gordon and Daniels headed for Portland on February 7.

Appellant argues that the "considerable period of time and distance between leaving California on February 7 and leaving for the parking lot in Oregon the following morning precludes a finding that there was an attempt to kill Dean in California." (AOB 231.) Although more than 12 hours elapsed and about 400 miles were driven between appellant's departure from Shasta County on February 7 and the first attempt to kill Dean on February 8, those circumstances do not preclude a finding that acts in California constituted an attempt.

"In considering whether a particular act done amounts to an attempt in a criminal sense, the proximity or remoteness of the person or thing intended to be injured is generally an important element . . ." (*People v. Stites* (1888) 75 Cal. 570, 576.) However, this Court has emphasized that, because the determination of where preparation ends and attempt begins is highly case-specific, any bright-line test is inappropriate. (See *Decker*, *supra*, 41 Cal.4th at p. 8, quoting *People v. Memro*, *supra*, 38 Cal.3d at p. 699 ["none of the various 'tests' used by the courts can possible distinguish all preparations from all attempts"]; see also *People v. Miller*, supra, 2 Cal.2d at 549 ["The authorities agree that it is impossible to formulate a

general rule or definition of what constitutes an attempt which may be applied as a test in all cases, and that each case must be determined on its own facts with the assistance of general guiding principles."].) As the trial court below observed, "An attempt is a progressive event." (2 RT 876.) Because of the great distance between appellant's home in Shasta County, California, and the intended victim's location in Portland, Oregon, the attempt in this case spanned hundreds of miles and many hours. But that attempt began in California.

In sum, the evidence at trial showed that appellant clearly had the intent to kill Dean before he departed from his house on February 7, 1998, to drive to Portland. The evidence also showed that, by the time appellant set out with Daniels and Gordon in his Jeep, he had completed his preparations for the mission. Thus, his actions of loading up his Jeep with weapons and other equipment and driving north on Interstate 5 toward Oregon—after months of planning—were acts that constituted the beginning of the attempt to kill Dean. Because that act was sufficiently unequivocal to constitute an attempt that began in California, the trial court had territorial jurisdiction over the conspiracy charge in count 5.

VII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant raises an array of familiar arguments challenging the constitutionality of California's death-penalty statute and the jury instructions implementing it. (AOB 233-248.) As appellant acknowledges, all of these claims have been rejected by this Court in prior cases. In asking this Court to reconsider those decisions, appellant states that he wishes to preserve them for federal habeas review. (AOB 233.) In light of those circumstances, respondent will address appellant's claims only briefly.

A. Challenge to Section 190.3, Subdivision (a)

Appellant contends that section 190.3, subdivision (a), improperly allows the jury to consider the "circumstances of the crime" as an aggravating factor in its decision to impose the death penalty. He argues that this provision violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to narrow the class of murderers eligible for the death penalty because the circumstances of nearly every murder can be characterized by prosecutors as aggravating. (AOB 233-234.)

Both the United States Supreme Court and this Court have rejected this argument. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 976; *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Blair* (2005) 36 Cal.4th 686, 752-753; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Jenkins* (2000) 22 Cal.4th 900, 1052-1053.) Because appellant fails to present any new legal arguments or authority to support his claim, there is no reason for this Court to reconsider its prior rulings.

B. Burden of Proof Claims

Appellant contends that California's death penalty statute and the accompanying jury instructions are unconstitutional because they do not require the jury's findings in support of imposition of the death penalty to be made beyond a reasonable doubt. (AOB 235-236.) He acknowledges that his arguments, which are based on a line of United States Supreme Court cases beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, have been rejected by this Court. (See *People v. Bramit* (2009) 46 Cal.4th 1221, 1250 & fn. 22; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Griffin* (2004) 33 Cal.4th 536, 593-594; *People v. Prieto* (2003) 30 Cal.4th 226, 263.) Because appellant fails to present any new legal

arguments or authority to support his claim, there is no basis for this Court to reconsider its prior rulings.

In a related argument, appellant contends that his constitutional rights were violated by the failure of the jury instructions to specify any burden of proof regarding its implied findings to justify imposition of the death penalty. (AOB 237-238.) This Court has repeatedly held that the prosecution bears no burden of proof or burden of persuasion during the penalty phase. (See *People v. Bennett* (2009) 45 Cal.4th 577, 631; *People v. Elliott* (2005) 37 Cal.4th 453, 487-488; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Appellant offers no new legal arguments or authority to warrant revisiting those decisions.

Appellant also contends that the failure of the jury instructions to set forth any burden of proof violated his constitutional rights by leaving the jury with the impression that he bore some type of burden in proving facts in mitigation. (AOB 242.) Yet he fails to point to any language in any instruction to support this argument and he offers no other reason for jurors to have reached such a conclusion, particularly since jurors were instructed in the guilt phase that the prosecution had the burden of proof there. Because there is no reasonable likelihood that jurors interpreted the penalty phase instructions as placing the burden of proof on appellant, the instructions were not unconstitutional in that regard. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

C. Unanimity Claims

Appellant contends that California's death penalty violates the Sixth, Eighth, and Fourteenth Amendments because it does not require that jury findings to support the death penalty be unanimous. (AOB 238-239.) This Court has repeatedly rejected that argument. (See, e.g., *People v. Bacon* (2010) 50 Cal.4th 1082, 1129; *People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Taylor* (1990)

52 Cal.3d 719, 749; *People v. Miranda* (1987) 44 Cal.3d 57, 99.) Appellant asserts that *Prieto* was wrongly decided, but he fails to point to any subsequent decisions of this Court or any other court to support this contention.

In a related claim, appellant argues that the failure to require unanimity for jury findings to support imposition of the death penalty violates his equal protection rights because juries in non-capital cases must unanimously agree on findings to support a sentence enhancement. (AOB 238-239.) This argument fails to recognize that jurors who decide whether to impose the death penalty must first unanimously find the existence of one or more special circumstances. In this case, the jury unanimously found that appellant killed Carole and her fetus for financial gain (§ 190.2, subd. (a)(1)) and that he committed multiple murders (§ 190.2, subd. (a)(3)). (See 30 CT 8586 [CALJIC No. 8.80.1[67]], 8678-8680 [verdict forms for special circumstances].) At any rate, this Court has held that the death penalty statute does not violate the equal protection clause of the Fourteenth Amendment simply because "certain noncapital sentencing proceedings may require jury unanimity or proof beyond a reasonable doubt." (*People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Appellant provides no basis for this Court to reconsider those decisions.

In a similar argument, appellant contends that, in the absence of an instruction on unanimity, there is a substantial likelihood that jurors believed unanimity was required for finding the existence of mitigating factors, in violation of his rights under the Eighth Amendment. (AOB

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[67] CALJIC No. 8.80.1 states, in part, "In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously." (30 CT 8586.)

242-243.) Appellant fails to explain why, absent any such suggestion in the instructions, jurors would have concluded that unanimity was required for mitigating factors but not aggravating factors. In any event, this Court has found that, even where the trial court instructed the jury that it was not required to unanimously find other-crimes evidence beyond a reasonable doubt, there was no reasonable likelihood that they jury misunderstood the court's instruction to mean that the jury was required to be unanimous regarding mitigating factors. (*People v. Moore* (2011) 51 Cal.4th 1104, 1140.) Once again, appellant fails to provide any basis for this Court to revisit its prior decision.

D. CALJIC No. 8.88 Claims

Appellant takes issue with CALJIC No. 8.88 for telling jurors that they must be persuaded that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances before imposing the death penalty. (30 CT 8808.) He argues that the phrase "so substantial" violates the Eighth and Fourteenth Amendments of the Constitution because it fails to "minimize the risk of arbitrary and capricious sentencing." (AOB 239-240.) This and similar arguments have been repeatedly rejected by this Court. (See *People v. Page* (2008) 44 Cal.4th 1, 55-56; *People v. Bolin* (1998) 18 Cal.4th 297, 342-343; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316; *People v. Sully* (1991) 53 Cal.3d 1195, 1244-1245.) Appellant provides no basis for this Court to reconsider those decisions.

In a related argument, appellant contends that CALJIC No. 8.88 fails to make clear to the jury that the ultimate question in the penalty phase is whether the death penalty is appropriate. He argues that language instructing jurors that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole is insufficient. (AOB 240-241.) As appellant acknowledges, this argument previously has

been rejected. (See *People v. Arias* (1996) 13 Cal.4th 92, 171; *People v. Bolin*, *supra*, 18 Cal.4th at p.342; *People v. Breaux*, *supra*, 1 Cal.4th at pp. 315-316; *People v. Sully*, *supra*, 53 Cal.3d at pp. 1244-1245.) Appellant provides no basis for this Court to reconsider those decisions.

Appellant next argues that CALJIC No. 8.88 is inconsistent with section 190.3 and violates due process because it fails to direct the jury to impose a sentence of life in prison without parole if it finds that the mitigating circumstances outweigh the aggravating circumstances. (AOB 241-242.) This Court has repeatedly rejected that argument. (See *People v. Page*, *supra*, 44 Cal.4th at p. 57; *People v. Wader* (1993) 5 Cal.4th 610, 662; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that the holding of these cases conflicts with "numerous" California cases disapproving of other instructions during the guilt phase. (AOB 241.) Yet the most recent case he cites is a 32-year-old lower court case, *People v. Kelly* (1980) 113 Cal.App.3d 1005. Because appellant has failed to show that this Court's rejection of his argument is inconsistent with any recent precedent of this Court or the United States Supreme Court, there is no basis for this Court to revisit its holding.

E. Presumption of Life

Appellant contends that his federal constitutional rights were violated by the trial court's failure to instruct the jury that the law presumes life imprisonment without parole to be the appropriate sentence for first-degree premeditated murder. (AOB 243-244.) This Court has rejected the same argument in prior cases. (See, e.g., *People v. Gonzales* (2011) 51 Cal.4th 894, 958; *People v. Lomax* (2010) 49 Cal.4th 530, 594-595; *People v. McWhorter* (2009) 47 Cal.4th 318, 379; *People v. Arias*, *supra*, 13 Cal.4th at p. 190.) Appellant offers no new arguments or authority to support his claim that these cases were wrongly decided.

F. Lack of Written Findings

Appellant also argues that the failure to require the jury to make any written findings during the penalty phase violated his federal constitutional rights. (AOB 244.) He acknowledges that this argument has been rejected by this Court in *People v. Cook* (2006) 39 Cal.4th 566, 619. (See also *People v. Valdez* (2012) 55 Cal.4th 82, 180; *People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Morgan* (2007) 42 Cal.4th 593, 627.) He urges this Court to reconsider its holding, but he provides no basis for doing so.

G. CALJIC No. 8.85 Claims

Appellant argues that the use of certain adjectives, such as "extreme" and "substantial," in the list of potential mitigating factors in CALJIC No. 8.85 acted as "barriers to the consideration of mitigation" in violation of his constitutional rights. (AOB 245.) As he acknowledges, this Court has rejected that argument in *People v. Avila* (2006) 38 Cal.4th 491, 614-615. (See also *People v. Valdez*, *supra*, 55 Cal.4th at p. 180; *People v. Valencia* (2008) 43 Cal.4th 268, 311; *People v. Kelly* (2007) 42 Cal.4th 763, 801.) Appellant provides no basis for this Court to reconsider its position.

Next, appellant argues that CALJIC No. 8.85 was deficient because it failed to label the various sentencing factors it listed as either aggravating or mitigating. He claims this alleged deficiency violated his constitutional rights because jurors could have considered the absence of evidence to support a mitigating factor to be an aggravating factor. (AOB 245-246.) Appellant notes that this argument has been rejected in *People v. Hillhouse* (2002) 27 Cal.4th 469, 509. (See also *People v. Bramit*, *supra*, 46 Cal.4th at p. 1249; *People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Williams* (1997) 16 Cal.4th 153, 268-269.) He asks this Court to reconsider its holding, but again provides no basis for doing so.

H. Intercase Proportionality Review

Appellant contends that California's capital sentencing scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments because it does not require the trial court or this Court to compare the facts of cases in which the death sentence is imposed. (AOB 246.) The United States Supreme Court has held that such "intercase proportionality review" is not required by the federal Constitution." (See *Pulley v. Harris* (1984) 465 U.S. 37, 44-51.) Similarly, this Court has repeatedly held that neither the federal constitution nor the state constitution requires such review. (See, e.g., *People v. Gonzalez* (2011) 51 Cal.4th 894, 957; *People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Bacon* (2010) 50 Cal.4th 1082, 1129.) Appellant urges this Court to reconsider that holding and require intercase proportionality review in capital cases. But he provides no basis for this Court to do so.

I. Equal Protection Claim

Appellant claims that California provides fewer procedural protections for persons facing the death penalty than for persons charged with non-capital crimes, violating his equal protection rights. He cites the lack of requirements of juror unanimity, the prosecution's burden of proof, and written findings during the penalty phase. (AOB 247.) As appellant acknowledges, this Court has repeatedly held that the death-penalty law does not deny equal protection because a different method of determining penalty is used than in non-capital cases. (See, e.g., *People v. Scott* (2011) 52 Cal.4th 452, 497; *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Williams* (2008) 43 Cal.4th 584, 650; *People v. Hoyos, supra*, 41 Cal.4th 872, 926; *People v. Elliot* (2005) 37 Cal.4th 453, 488.) Appellant urges this Court to reconsider that holding, but again he provides no basis for doing so.

J. International Norms

Finally, appellant claims that use of the death penalty as a "regular form of punishment falls short of international norms." He points to *Roper v. Simmons* (2005) 543 U.S. 551, 554, in which the United States Supreme Court, citing international law and "evolving standards of decency," found that imposing the death penalty on defendants who committed their crimes as juveniles violates the Eighth Amendment. (AOB 247-248.) This Court has repeatedly rejected this argument—both before and after *Roper*. (See, e.g, *People v. Gonzales*, *supra*, 51 Cal.4th at p. 958; *People v. Nelson*, *supra*, 51 Cal.4th at p. 227; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.)

Moreover, outside of the context of juveniles and mentally retarded defendants, the United States Supreme Court has never suggested that "evolving standards of decency" have rendered the death penalty cruel and unusual punishment. Indeed, in *Roper*, the Supreme Court reaffirmed that the constitutionality of the death penalty, provided that it is "reserved for a narrow category of crimes and offenders." (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 568-569.) Appellant has not offered any reason for this Court to interpret *Roper* any differently. His claim thus must be rejected.

VIII. THERE WAS NO CUMULATIVE PREJUDICE WARRANTING REVERSAL

In his last claim, appellant contends that the cumulative effect of the alleged errors in his case warrants reversal of his judgment and sentence, even if the alleged errors were harmless individually. (AOB 249-250.) This claim is without merit.

In a close case, the cumulative effect of multiple errors may constitute reversible error. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Bunyard*, *supra*, 45 Cal.3d at p. 1236; *People v. Hill* (1998) 17 Cal.4th 800, 844.) The "litmus test" is whether a defendant received due

process and a fair trial. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 319.) An appellate court reviews each allegation and "assesses the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence." (*Ibid.*) The guiding principle is that a defendant is "entitled to a fair trial but not a perfect one." (*People v. Cunningham*, *supra*, 25 Cal.4th at 1009.) Under these principles, appellant cannot show that reversal is warranted even if multiple errors were committed.

First, as demonstrated above, this was not a close case. There was overwhelming evidence that appellant masterminded the plots to kill Dean and Carole, and appellant's claim that those plots were formulated and carried out behind his back by his closest friends strained all credibility. Because the case was not close, it was not reasonably probable that appellant would have obtained a more favorable result even if the trial had been flawless. (See *People v. Bunyard*, *supra*, 45 Cal.4th at pp. 1236-1237.)

Second, to the extent that there were any errors in this case, they were not substantial. As discussed in Argument IV, *ante*, the trial court's error in using the wrong bracketed language for CALJIC No. 8.69 did not mislead the jury given the other language in the instruction, and thus did not violate appellant's constitutional rights. It clearly was harmless. Neither this error, nor any of the other alleged errors, involved the admission of highly probative or prejudicial evidence. Thus, any possible errors would not have aggregated to result in cumulative error. (See *People v. Bunyard*, *supra* 45 Cal.3d at p. 1236 [because errors at trial were not substantial, the cumulative impact of those errors did not prejudice the defendant].)

Third, because appellant's claims of error were separate and distinct from one another, even if multiple errors occurred, their cumulative effect would not have resulted in an unfair trial. (See *People v. Loy* (2011) 52

Cal.4th 46, 77 [no cumulative prejudice when two evidentiary errors found by reviewing court were "directed primarily at different trial issues"]; see also *People v. Moore* (2011) 51 Cal.4th 386, 417-418 [no cumulative prejudice from three errors found or assumed by reviewing court because they "related to distinct procedural or evidentiary issues not closely related to one another"].)

In sum, there was a single instructional error in this case that clearly was harmless. Even if other errors occurred, they were not substantial and thus could not have combined to render appellant's trial fundamentally unfair. Accordingly, even if there were multiple errors at trial, there would be no cumulative prejudice to warrant reversal.

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CONCLUSION

For all the above reasons, the judgment should be affirmed.

Dated: April 23, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
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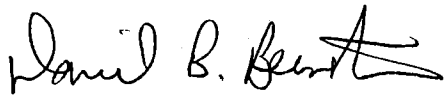

DANIEL B. BERNSTEIN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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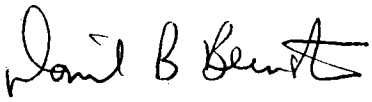
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 44,793 words.

Dated: April 23, 2013

KAMALA D. HARRIS
Attorney General of California



DANIEL B. BERNSTEIN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Garton**
No.: **S097558**

I declare:

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

On April 26, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Shasta County, Main Courthouse
1500 Court Street
Department 10
Redding, CA 96001

California Appellate Program
101 Second Street, Suite 600
San Francisco, CA 94105-3672

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 April 26, 2013, at Sacramento, California.

_____
Signature

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