In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JUAN VILLA RAMIREZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S099844

Kern County Superior Court Case No. SC076259A
Honorable Kenneth C. Twisselman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On February 5, 1999, the Kern County District Attorney filed an information in case number SC076259A charging appellant Juan Villa Ramirez with murder (count 1, Pen. Code, § 187, subd. (a));[1] two counts of kidnapping (count 2, § 209, subd. (b)(1), count 7; § 209, subd. (a)); two counts of carjacking (counts 3, 5, § 215, subd. (a)); two counts of kidnapping during the commission of a carjacking (counts 4, 8, § 209.5); two counts of robbery (counts 6, 9, § 212.5, subd. (c)); possession of methamphetamine while armed (count 10, Health & Saf. Code, § 11370.1, subd. (a)); and possession of a firearm while under the influence of methamphetamine (count 11, Health & Saf. Code, § 11550, subd. (e)). As to the murder charge, the information further alleged two special circumstances: murder during the commission of a kidnapping and murder during the commission of a carjacking within the meaning of section 190.2, subdivision (a)(17). Counts 1 through 9 of the information also contained allegations that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a). (5 CT 1491-1498.)[2]

On February 8, 1999, appellant was arraigned on the information, pleaded not guilty to all counts and denied the special allegations. (6 CT 1500-1501.)

On June 20, 2000, the district attorney filed a notice of aggravation pursuant to section 190.3. (10 CT 2849-2850.)

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[1] Unless otherwise noted, all further statutory references are to the Penal Code.

[2] "CT" refers to the Clerk's Transcripts on Appeal; "RT" refers to the Reporter's Transcripts on Appeal; "JQ" refers to the Jurors' Questionnaires; and "AOB" refers to Appellant's Opening Brief.

On June 26, 2000, counts 10 and 11 were severed and the court ordered that they may be tried separately. (10 CT 2939.) On June 28, 2000, co-defendant, Efrain Garza's trial was severed from appellant's trial. (10 CT 2953-2954.)

On January 17, 2001, a jury was impaneled to try the case. (13 CT 3765.) On March 12, 2001, the jury found appellant guilty of counts 1 through 4 and 6 through 9, and found true the enhancements alleged pursuant to sections 12022.5, subdivision (a) and 190.2, subdivision (a)(17). (17 CT 4811-4839.) The jury found appellant not guilty on count five. (17 CT 4828.)

The penalty-phase trial commenced on March 14, 2001. (17 CT 4983.) On March 28, 2001, the jury returned a verdict of death. (17 CT 5084.)

On May 21, 2001, a jury was impaneled to try counts 10 and 11. (18 CT 5224.) The jury found appellant guilty of count 10 (Health & Saf. § 11370.1, subd. (a)) and not guilty on count 11 (Health & Saf. § 11550, subd. (e)). (18 CT 5229.)

At a hearing on July 20, 2001, the court denied appellant's motion for new trial and denied his motion to reduce his sentence to a sentence of life without the possibility of parole. (19 CT 5529-5530.) On the same date, the court sentenced appellant to death on count 1; life without the possibility of parole on counts 2, 4, 7, and 8; a nine-year sentence was imposed and stayed on count 3; a five-year sentence was imposed and stayed on count 6; a five-year sentence was imposed and stayed on count 9; and a four-year sentence was imposed with all but one year stayed on count 10. (19 CT 5532-5533.) The sentences on counts 2, 4, 7 and 8 were stayed pending the appeal on count 1. (19 CT 5533.)

Appellant's appeal is automatic. (§ 1239, subd (b).)

STATEMENT OF FACTS

GUILT PHASE

I. PEOPLE'S CASE-IN-CHIEF

A. October 4, 1997 Kidnapping of Leonel Paredes

At approximately 11:30 p.m. on October 4, 1997, Leonel Paredes parked his car in a parking lot in front of the apartments he lived in on San Diego Avenue in Lamont, California. Paredes was alone. (30 RT 7117-7118.) Paredes walked towards his apartment when he noticed that his car door was ajar. While walking back to his car three people approached him. (30 RT 7118-7119.) One person had what appeared to be a shotgun and placed it on Paredes's chest, the other person had a revolver pointed at him, and the third person placed a knife below his ear. (30 RT 7120.) Paredes identified appellant as the person with the shotgun.[3] (30 RT 7121-7122.) Appellant told Paredes he wanted his keys and that he would be hurt if he did not cooperate. (30 RT 7121-7123.) Paredes's keys were then taken out of his pocket, duct tape was put over his eyes, and his hands and feet were bound with duct tape. (30 RT 7123-7124.)

Paredes was placed in the back seat of his car and the group drove around with Paredes for 15 minutes. (30 RT 7126-7130.) Paredes was then placed in the trunk of his car. (30 RT 7126-7130.) Eventually, the kidnappers asked Paredes for the telephone number of a relative from whom they could get ransom. Paredes gave them Rosalio Paredes's[4] name and phone number. (30 RT 7130.) Rosalio received a call asking for $500

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[3] This identification took place at trial and with Deputy Robert Contreras.

[4] Rosalio Paredes will be referenced by his first name to avoid confusion. Leonel Paredes will be referenced as "Paredes."

for his cousin, Leonel Paredes. (32 RT 7501-7505.) Rosalio thought it was a prank. (32 RT 7503.)

The kidnappers then asked for an additional phone number telling Paredes he would be killed and burned inside the car if they were not paid. (30 RT 7131.) Paredes called his uncle, Victor Paredes.[5] (30 RT 7131.) Victor spoke to Paredes for a moment and then another person got on the phone and told Victor if he did not give them $500 Paredes would be killed. The person on the phone said he would call back, but he never did. (30 RT 7234-7236.) Paredes was then hit in the face and placed back into the trunk of the car with duct tape over his eyes, mouth, feet and hands. He remained in the trunk of the car in a garage overnight. (30 RT 7132-7133.)

At some point the car started moving again. When Paredes no longer heard voices he was able to escape from the trunk of the vehicle. (30 RT 7136-7138.) Paredes called Victor who subsequently picked him up. (30 RT 7237.)

Kern County Sheriff's Deputies James Ashley and Robert Contreras responded to the call regarding the kidnapping of Paredes. (31 RT 7316.) When they came into contact with Paredes he had duct tape residue on his person and clothes, and he appeared extremely upset. (30 RT 7248-7254; 31 RT 7317, 7325.)

Paredes described the three kidnappers to Deputy Ashley. Paredes stated the one holding the knife to his chest was a Hispanic male, five-feet, eight-inches tall, with brown eyes and a thin mustache, and was the driver of the vehicle. (31 RT 7325-7326.) He described the second kidnapper as a Hispanic male who carried a shotgun. (31 RT 7327.) He stated that the second kidnapper was wearing a nylon stocking over his face when he saw

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[5] Victor Paredes will be referenced by his first name to avoid confusion.

him in the garage later that night. (31 RT 7337-7338.) The third kidnapper was also described as a Hispanic male. (31 RT 7324-7330.) Paredes told Deputy Contreras he thought he may have gone to high school with one of the suspects. (37 RT 8588-8589.)

Paredes's car was located in Bakersfield and Paredes was transported back to his vehicle. (31 RT 7320-7321.) A partial roll of duct tape was located in the trunk of the car. (31 RT 7320.) Used duct tape that formed a circle was also found in the trunk of the car and identified as coming from Paredes's wrists. (31 RT 7320.) Evidence Technician Eric Shwarm lifted one latent print from Paredes's car but it did not match appellant. (30 RT 7261-7262.)

On October 21, 1997, Deputy Justice and Deputy Contreras interviewed Paredes a second time. (37 RT 8597.) Paredes stated that "Little Loco" was one of the men who kidnapped him. (37 RT 8600-8601.) Paredes was shown a six-pack lineup with appellant's picture in it, and he identified appellant as the individual who held the shotgun while the other two men taped him up the night he was kidnapped. (37 RT 8559-8600, 8602-8603.) Paredes told Deputy Contreras he learned appellant's name from another individual whom he did not identify. (37 RT 8604.) Paredes also stated that Efrain Garza who went by the nickname "Baby" had also been there the night he was kidnapped. (37 RT 8603.) Paredes stated a friend had told him Efrain Garza's name but that did not influence him when he identified the suspects in the six-pack photographic lineup. (37 RT 86 30-8631.)

Rosalio testified that he made a connection between the Chad Yarbrough murder and Paredes's kidnapping. (32 RT 7512.) He may have told Paredes appellant's name, but he never told Paredes who to pick out of a line-up and never showed Paredes a photograph of appellant. (32 RT 7513, 7517, 7538.)

B. October 14, 1997 Assault on Juan Carlos Ramirez

On October 14, 1997, Juan Carlos Ramirez drove to Lamont in his pickup truck to buy a transmission from an individual named Shannon. (31 RT 7374, 7395.) When Juan Carlos Ramirez pulled up to Shannon's house, he was approached by Freddy De La Rosa and Hector Valenzuela. Valenzuela had a gun pointed at Juan Carlos Ramirez and told him to give them a ride. (31 RT 7375-7376, 7395.) They drove around and then returned to Shannon's house where appellant, Carlos Rosales, Daniel Quintana and Efrain Garza[6] jumped into the back of the truck. (31 RT 7403, 7425-7426, 32 RT 7573-7575.) Valenzuela told Juan Carlos Ramirez to drive to an apple field. When they arrived at the apple field, everyone jumped out of the truck, and Juan Carlos Ramirez was ordered out of the truck. (31 RT 7377.)

Rosales could see that Valenzuela had a gun in the cab of the truck. (33 RT 7823.) Rosales testified that he and Quintana remained in the bed of the pickup truck. (33 RT 7825.) Rosales witnessed Garza pull out a pistol-grip 12 gauge shotgun and he heard people arguing. (33 RT 7825.)

They asked Juan Carlos Ramirez if he had money, and he told them no. (31 RT 7377, 33 RT 7826.) They searched his wallet, found money in his wallet, and then pointed a shotgun to his head asking why he lied to them. (31 RT 7377-7378.) Three of the men began striking him, and Juan Carlos Ramirez heard one ask for a gun in order to kill him. (31 RT 7378-7379.) Appellant removed Juan Carlos Ramirez's belt, and struck him with it on his back. (31 RT 7380-7381; 32 RT 7579, 7587.) Juan Carlos Ramirez fell to the ground as they continued to beat him. (31 RT 7381.)

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[6] Daniel Quintana testified that appellant's nickname was "Loco;" De La Rosa's nickname was "Shadow;" Valenzuela's nickname was "Gizmo;" Garza's nickname was "Baby;" and his nickname was "Bonkers." (32 RT 7570, 7819.)

After beating him, appellant tied Juan Carlos Ramirez up with rope. (31 RT 7381.) The men took his wallet, beeper, sunglasses, and gold chain. (31 RT 7382-7383.) The group left Juan Carlos Ramirez in the orchard and fled in his truck. (32 RT 7585, 33 RT 7838.)

The six men went to San Diego Park in Lamont. (33 RT 7838.) Valenzuela divided the money they had taken from Juan Carlos Ramirez. (32 RT 7585.) The gold chain had a charm that said "Juan." (33 RT 7828.) Valenzuela gave the charm to appellant. (33 RT 7828.) The six men involved in the kidnapping and beating of Juan Carlos Ramirez "claimed" Lamont. (33 RT 7841.) Quintana was involved in the Lamont Familia Surenos gang at the time, and he believed appellant was also involved with the gang. (32 RT 7570, 7573.)

After the men left in his truck, Juan Carlos Ramirez was able to untie himself and walk through a canal to a friend's house to call the police. (31 RT 7383.) Deputy Raymond Mellon responded to the call and contacted Juan Carlos Ramirez. (32 RT 7719.) Juan Carlos Ramirez had marks on his face and back that were consistent with being beaten. (32 RT 7727.) Juan Carlos Ramirez showed Deputy Mellon the location where he was beaten. (32 RT 7719.) When they reached the orchard where Juan Carlos Ramirez had been beaten, Deputy Mellon located a nylon rope and a gray polo shirt that was torn in two. (32 RT 7726-7727.) Juan Carlos Ramirez identified the shirt as being his and stated the rope had been used to tie him up. (32 RT 7729.)

Deputy Contreras arrested Rosales after the Yarbrough murder. He found a crucifix on Rosales that Juan Carlos Ramirez identified as one that had been taken from him on October 14, 1997. (37 RT 8579-8580.)

C. October 14, 1997 Murder of Chad Yarbrough

After carjacking and robbing Juan Carlos Ramirez, appellant, Rosales, Garza, Santiago and Quintana went to Quintana's house in Lamont. (33 RT

7854-7855, 7864.) Everyone was drinking. (33 RT 7870.) While they were at Quintana's house, appellant was cleaning a Tec-9 handgun. The magazine was loaded, and appellant put it in the gun and wrapped it in a shirt. (33 RT 7865-7866.) The others at the house were looking at the gun while appellant did this. (33 RT 7865-7866.)

A few weeks earlier, Rosales saw appellant with a Tec-9 when Rosales, appellant, Garza, and Quintana were driving around. (33 RT 7850-7852.) Garza shot the gun. The gun fired two times and then jammed. (33 RT 7854.)

A few hours after they returned to Quintana's house on October 14, Rosales heard Garza say, "here comes Chad's truck." (33 RT 7867.) Santiago saw appellant flag down a white truck that was driving by on the street. (35 RT 8227.) Chad Yarbrough[7] and Brent Yarbrough[8] were inside the truck. Brent was Yarbrough's younger brother, and was a freshman at Arvin High School . (36 RT 8278.) Yarbrough was a senior at Arvin High School and drove Brent to and from school. (36 RT 8278.) Chad had a 1990 white Chevrolet pick-up with the license plate "CYARBRO." (36 RT 8279, 8297.)

Yarbrough and Brent were on their way home from football practice and from dropping Yarbrough's girlfriend, Carolina Castro, off at her home in Lamont. (36 RT 8279-8280.) It was dark outside. (36 RT 8280.) As they drove away from Castro's house they were waved down by two Hispanic males. (36 RT 8281-8282.) Yarbrough stopped his truck. (36 RT 8284.)

Appellant and Garza went to the driver's side of the truck and Santiago and Rosales heard a gun being cocked. (33 RT 7878-7879; 35 RT

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[7] Chad Yarbrough will be referred to as "Yarbrough."

[8] Brent Yarbrough will be referred to as "Brent" to avoid confusion.

8229.) Garza then went to the passenger side of Yarbrough's truck. (33 RT 7878-7879; 35 RT 8230.) Appellant remained at the driver's side of the truck, and Yarbrough's younger brother, Brent, was told to exit the truck and sit on the curb. (33 RT 7878-7879; 36 RT 8284.) Rosales witnessed the truck leave with Garza in the passenger's seat, Yarbrough in the middle, and appellant as the driver. (33 RT 7878-7879.) Brent sat on the curb and Santiago told him to keep his mouth shut. (35 RT 8234.) Santiago, Quintana, and Rosales then left the scene on foot. (35 RT 8234-8235.)

Brent had never seen either of the Hispanic males who got in Yarbrough's truck before that date. (36 RT 8294.) After the truck left the location with his brother someone approached him and told him not to say anything. He stayed seated on the curb and then after 30 or 45 minutes he ran to Castro's house and told Castro to call the police because Yarbrough had been kidnapped. (36 RT 8295-8296.)

Deputy Martha Adair contacted Brent at Castro's house. (33 RT 7776-7777.) Deputy Adair showed a group of photographs to Brent who identified appellant as one of the males who abducted his brother. (33 RT 7782.)

Samuel Handel was Yarbrough's uncle. (37 RT 8532.) On October 14, 1997, he learned that Yarbrough had been abducted at gunpoint. (37 RT 8536.) The family dispersed in an attempt to locate Yarbrough. (37 RT 8536.) Handel drove around from 9:30 p.m. to 1:30 a.m. (37 RT 8536.) He located Yarbrough's body in an orange orchard one to two miles northeast of Lamont. (37 RT 8536.) Yarbrough was lying on his right side with his head down and his hands bound. Handel checked Yarbrough's vital signs but he found no pulse. (37 RT 8538, 8544-8545.) Handel called 911 from his vehicle and waited by the body until police arrived. (37 RT 8544.)

Kern County Criminalist Greg Laskowski and Technical Investigator Edward Farris responded to the scene of the murder. (39 RT 9064-9067.) They located three spent casings and three live cartridge casings at the scene. (39 RT 9067.) With a semi-automatic weapon the casings are ejected out of the gun after it is fired. (39 RT 9069-9070.) One spent casing was located six feet from Yarbrough's body, another spent casing was 15 to 20 feet southwest of Yarbrough's body, and the final spent casing was located two feet southeast of Yarbrough's feet. (37 RT 8651-8652; 39 RT 9073-9074.) The three spent bullets were all fired from the same gun. (39 RT 9084.) The three live rounds were 9-millimeter Luger or parabellum marked "S&B" which stands for the brand Selier and Bloot. (39 RT 9080-9082.) The three live rounds had extractor marks which indicated they were present inside the chamber of the firearm. (40 RT 9133.) The three live rounds, three casings, and three spent bullets were all chambered by the same firearm. (39 RT 9084.)

Laskowski testified that the pattern of the ejected cartridge casings indicated the shooter was moving when firing the weapon. (40 RT 9143-9144.) The position of the bullets at the scene was inconsistent with a fully automatic firearm. (40 RT 9176.)

Isabel Garcia, appellant's cousin, was home on October 14, 1997. (36 RT 8307.) At trial she denied telling police that she saw appellant driving Yarbrough's truck around 11:00 p.m.. (36 RT 8307-8307.) Officer Richard Ruiz with Kern High School District Police, testified that Isabel Garcia had contacted staff members at the high school on October 16, 1997, to share information regarding the Chad Yarbrough murder. (36 RT 8397.) She would not allow them to tape record her statement because she was fearful family members would be upset with her for providing information. (36 RT 8398-8399.) She told Officer Ruiz that she saw appellant and Gabriel Flores driving Yarbrough's truck on October 14, 1997.

Joamy Garza was at "Chepa's" house in Bakersfield on October 14, 1997. (36 RT 8434.) "Baby" (Garza) and "Loco" (appellant) showed up at the house in a white truck to party with her.[9] (31 RT 7462, 36 RT 8441-8452.) At trial, Joamy Garza said she was doing a lot of drugs at the time and she could not recall what happened that night. (31 RT 7464, 7475-7476.)

Salvador Saldivar was at Chepa's house in Bakersfield on October 14, 1997. The house was a "runaway spot" where various girls stayed. (35 RT 8132-8133.) He recalled going to Chepa's house to get a white truck. (35 RT 8134.) The keys were inside the vehicle and he and his friend, Sam Ramos, drove the truck about 10 blocks to a garage. (35 RT 8135-8136.) Saldivar took the amp out of the truck and took the license plate frame off the truck. (35 RT 8137-8139.) The next morning he learned that the truck was involved in a murder. (35 RT 8141.) Saldivar initially told Deputy Moore that "Loco" and "Baby" were at the house the night he picked up the truck. (36 RT 8451-8452.)

Susan Villa, appellant's aunt, testified appellant was staying with her in October 1997. (39 RT 8905.) Villa was interviewed by Deputy Michael Rascoe. (39 RT 8936.) She told Deputy Rascoe that she saw appellant on October 14, 1997, between 10:00 and 10:30 p.m. (39 RT 8938.) Appellant changed clothes, asked to borrow money, made several telephone calls and then left the residence at 12:30 a.m. in a taxi. (39 RT 8938.) Villa spoke to appellant a few days later on the telephone after she found out he was a suspect in the murder. (39 RT 8916, 8940.) She asked him if he committed the murder but he did not respond. (39 RT 8940.) Appellant asked for

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[9] Deputy Francis Moore testified that he interviewed Joamy Garza on October 21, 1997. (36 RT 8433.) She picked appellant out of a photographic lineup as one of the men in the truck on October 14, 1997, however, she refused to sign the line-up. (36 RT 8443-8445.)

money, when Villa told him she could not loan him money he hung up the telephone. (39 RT 8916-8917.)

Shortly after the murder, Yarbrough's truck was located by Sergeant Glenn Johnson in a garage in Bakersfield. (36 RT 8335, 8339.) The truck had been painted red and the stereo had been removed from the truck. (36 RT 8339.) No one was in the garage when the truck was located. (36 RT 8341.)

On October 15, 1997, Gracelyn Gutierrez and her husband located a wallet containing Yarbrough's social security card, student identification and video card in it on the side of the road while they were taking a walk. She reported it to law enforcement and turned the items over to Deputy Ron Maniord. (35 RT 8197-8200; 36 RT 8274-8276.)

Lieutenant Tom Hodgson went to Arizona to locate a suspect in the Yarbrough murder. (38 RT 8723-8724.) Police conducted a search of Cipriano Ramirez's[10] apartment in Arizona on November 6, 1997. The search revealed a black plastic case for an Intratec handgun and live 9-millimeter ammunition, including S&L brand 9-millimeter Luger rounds in the closet. (38 RT 8723-8730.) Miscellaneous paperwork with appellant's name on it was also found in Cipriano Ramirez's apartment. (39 RT 8950.)

Daniel Montoya purchased four Intratec 9-millimeter semiautomatic pistols in 1995 as an investment. (39 RT 8888, 8897.) He lived in the suburbs of Phoenix, Arizona at the time he purchased the weapons. (39 RT 8893.) He sold one of the weapons on June 26, 1997, to Dustin Blaine Gilmore. (39 RT 8892.) The gun case found at Cipriano Ramirez's apartment had the same serial number as the Intratec Montoya sold on June 26, 1997. (39 RT 8949.)

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[10] Cipriano Ramirez is appellant's brother. (41 RT 9268.)

1. Autopsy

On October 16, 1997, Dr. Donna Lee Brown performed an autopsy on Yarbrough. (39 RT 9027.) Yarbrough's hands were bound behind his back with shoelaces tied at his wrists. (39 RT 9029.) Black electrical tape was around Yarbrough's eyes and part of his nose. (39 RT 9028.)

Dr. Brown determined that the cause of death was gunshot wounds to the head. (39 RT 9030.) There were three entrance and exit wounds to the head. (39 RT 9032, 9037.) There was no metal found in the skull, which indicated the projectile was a full metal jacket. (39 RT 9037.) There was no powder stippling on the wounds which indicated that the gun was over two feet away when Yarbrough was shot. (39 RT 9038.) The wounds from the bullets were evenly spaced apart. (39 RT 9046.) If the weapon had been fully automatic Dr. Brown would have expected to see the bullet holes closer together on one side of the head rather than in three different locations. (39 RT 9045, 9048.)

Yarbrough had small lacerations to his knees and indentations on his chest, right arm, and the lower part of his leg. (39 RT 9038.)

2. Appellant's Arrest and Statement

On July 19, 1998, Sergeant Rosemary Wahl took custody of appellant in El Paso, Texas. (41 RT 9267.) Sergeant Wahl interviewed appellant. During that interview appellant denied killing Yarbrough, and denied using drugs during that time period. He admitted he had been a gang member, but claimed he no longer was in a gang at the time of the interview. (41 RT 9567-9288.)

Appellant was extradited back to California and arrived in Bakersfield on July 24, 1998. (41 RT 9268.) Appellant gave a recorded statement to Sergeant Wahl and Sergeant Glenn Johnson that was played for the jury. (41 RT 9277-9278; 14 CT 4135-4180; Exhibit 81-A.) In that statement

appellant admitted he saw Yarbrough leave Castro's house on the night of the murder. Appellant stopped him and asked him if he knew who he was. (14 CT 4143.) He and Garza continued talking to Yarbrough. Appellant opened the door to the truck, pushed Yarbrough over, threw his brother out of the truck, and appellant, Garza, and Yarbrough drove away in the truck. (14 CT 4143.) Appellant slapped Yarbrough and told him it was not a game to be playing around with gangbangers. (14 CT 4152.)

Appellant drove to a field and exited the car. Garza tied Yarbrough's hands with black tape. (14 CT 4154.) Yarbrough was sitting on the ground. (14 CT 4155.) Appellant had the gun in his hand but did not have the clip in the gun. Garza got the clip to the gun, gave it to appellant, and appellant put the clip in the gun. When he put the clip in the gun, he pushed the trigger and Yarbrough was shot. (14 CT 4143.) Garza was standing next to him when he shot Yarbrough. (14 CT 4143-4144.)

After shooting Yarbrough they left the scene in Yarbrough's truck and gave the truck to "some guys." (14 CT 4144.) They partied for a few hours and then hitchhiked to Santa Clarita. (14 CT 4145, 4175.) While they were driving over the Grapevine, appellant had the gun in a backpack that he threw on the side of the road by an aqueduct. (14 CT 4146.) Appellant then fled to Mexico. (14 CT 4156-4157.)

Appellant claimed that he had purchased the gun on the streets in Arizona. (14 CT 4146.) The gun came in a box that was found by law enforcement in Cipriano Ramirez's apartment. (14 CT 4147.)

Appellant stated he was just trying to scare Yarbrough because Yarbrough had tried to run over his cousin on a prior occasion and was "banging with Arvin." (14 CT 4147, 4176.) Appellant stated that prior to the murder Yarbrough and two other boys had gone to his aunt's house knocking on the windows, and telling Rosales to come out of the house. When his aunt went outside and told them to leave, they threw a toy

motorcycle at his aunt. (14 CT 4148.) Appellant did not know when the incident at his aunt's house occurred. (14 CT 4149.)

3. Gang Evidence

Deputy Robert Contreras was a liaison officer for the gang suppression unit for the Kern County Sheriff's Department in the Arvin-Lamont area. (37 RT 8557.) There are two street gangs in the Lamont area: Lamont 13 and Weedpatch 13. (37 RT 8557.) There are two subsets of Lamont 13: Varrio Chico Lamont (VCL) and Lamont Familia Surenos (LFS). (37 RT 8558.) The Mexican mafia identifies with the number 13 and the letter "M." VCL and LFS also identify with the number 13. (37 RT 8558-8559.) LFS and VCL members often congregate and meet together. (37 RT 8565.) LFS and VCL's primary rivals are Arvin and Weedpatch. (37 RT 8626.)

De La Rosa, Quintana, Santiago and Valenzuela claim Lamont 13. Garza is an LFS gang member. (37 RT 8560-8565.) Appellant is affiliated with the LFS subset of Lamont 13. (37 RT 8575.) Appellant has "LFS" tattooed on his shoulder, with "13" next to it, and a tattoo of "Sur" on his chest. (37 RT 8574.)

Deputy Contreras and other deputies came across appellant, Gabriel Flores, Efrain Garza and one or two other people at Myrtle Avenue School prior to the Yarbrough murder. (37 RT 8575-8576.) Deputy Contreras opined Garza was being "initiated" into the gang by being "jumped in" because Garza and appellant appeared to have been in a recent fight. (37 RT 8576.)

II. DEFENSE CASE

A. October 4, 1997 Kidnapping of Leonel Paredes

Ashley Medina's ex-boyfriend was Carlos Rosales. (41 RT 9341.) On October 4, 1997, she and Rosales went to the Kern County Fair. (41 RT

9344-9345.) At approximately 9:00 p.m. that evening appellant came to her house and they all watched television together. Appellant fell asleep on her couch and she and Carlos Rosales subsequently went to sleep around 2:00 or 2:30 a.m. (41 RT 9348.) Appellant never left the house that evening and he was there the next morning. (41 RT 9349; 49 RT 10969.)

Jesus Garza is Efrain Garza's brother. (44 RT 9822.) Jesus Garza knew Rosalio Paredes from high school. (44 RT 9820-9821.) Jesus Garza spoke to Rosalio about the kidnapping of Rosalio's cousin, Leonel Paredes. (44 RT 9821.) He asked Rosalio if Paredes was sure about his identification of his brother, Efrain Garza, as one of the kidnappers. (44 RT 9825-9826.) Rosalio said his cousin was not sure about the identifications. (44 RT 9825-9826.)

B. Chad Yarbrough Murder

1. September 1997 Incident

Jose Luis Gomez had known Yarbrough for eight years. In September of 1997, Carlos Rosales tried to run Jose Gomez off the road while he was driving. (43 RT 9681-9682.) The vehicle blocked him so he was unable to drive, and one guy jumped out of the vehicle Rosales was in and ran towards Jose Gomez with a knife. (43 RT 9682.) He called his brother Freddy Gomez and told him what happened. Yarbrough also heard about the incident. (43 RT 9683-9684.)

Later that same evening, Jose Gomez, Yarbrough and Freddy Gomez went to Carlos Rosales's house around midnight in Yarbrough's truck. (43 RT 9669-9672.) They had been drinking a small amount of alcohol and Yarbrough and Gomez were angry. (43 RT 9672-9673.) Yarbrough was driving his truck with a personalized license plate that read "CYARBRO." (43 RT 9674, 9676.) Before they arrived at Rosales's house Freddy Gomez drove the truck and Jose Gomez and Yarbrough walked. (43 RT 9674.)

Jose Gomez and Yarbrough grabbed sandbags and threw them at a car at Rosales's home. (43 RT 9675.) Rosales's mother came out of the house and Jose Gomez asked her if Carlos Rosales was home. (43 RT 9675.) Jose Gomez never banged on the windows, he never tried to hit Rosales's mother, or threatened to beat up Carlos Rosales. (43 RT 9675.) Freddy Gomez stayed in the truck while they were at the Rosales's house. (43 RT 9713.) Jose Gomez saw Carlos Rosales a few days later at school and they worked things out. (43 RT 9689.)

Jose Gomez testified that Yarbrough did not have a problem with the Rosales family. (43 RT 9688.) Yarbrough was not involved in gangs and he had never seen Yarbrough get into fights with guys from Lamont. (43 RT 9688.)

In September of 1997, Maria Villa was awakened by three young men who were beating on her car with sandbags. (44 RT 9794.) One of the young men told her that her son, Carlos Rosales, had fought with him and had cut his arm. She saw a scratch on his arm. (44 RT 9795.) Yarbrough was one of the young men and was looking for Carlos Rosales. (44 RT 9795.) Yarbrough yelled for Rosales to come out of the house. (44 RT 9796.) One of the three boys shouted that Yarbrough should leave and Yarbrough tried to push her but she stepped back avoiding contact. (44 RT 9796.) At the time of the incident, there were three children, an 11 year old, 12 year old and three to four month old, inside the house. (44 RT 9798.)

Mary Jane Montero was 13-years-old at the time, and she was inside Maria Villa's house when the incident took place. (44 RT 9851-9852.) She was frightened by the incident. (44 RT 9853.) Later that night Montero thought she heard people running around the house, but she did not see anyone. (44 RT 9855-56, 9864.) When Montero later spoke to a private investigator she stated that she believed the person arguing with

Maria Villa was Frank Segura. (44 RT 9858-9859.) Maria Villa called law enforcement and reported the incident. The deputy who responded told her to call if they returned to her house. (42 RT 9797.)

Alex Saenz is appellant's cousin, and a brother of Camilo Rosales and Carlos Rosales. (41 RT 9365.) He lived in Lamont for a few months and was bused into Arvin High School. (41 RT 9365.) While he was attending Arvin High School he was harassed and had fights with the guys from Arvin. (41 RT 9365-9366.) Saenz stated appellant moved to Arizona for approximately a year, but during that time he would come back to Lamont to visit family. (41 RT 9366.)

Saenz testified his mother is Maria Villa. In late 1997, her house was attacked by three men. (41 RT 9368.) Saenz went to his mother's house and saw sandbags that had been thrown on her car, and toys thrown around the yard.[11] (41 RT 9369.) His mother said a "white guy" was driving the truck and stood by the truck the whole time. The two other individuals were Mexican. (41 RT 9392.) His mother and the children who were present were upset by the incident. (41 RT 9370.) There was no damage to any property at his mother's house. (41 RT 9399.) His mother showed him the license plate of the vehicle that had been at the house, and he recalled "CYA" being part of the license plate number. (41 RT 9371.) He told appellant about the incident and the license plate number and asked him to find out who had attacked the house. (41 RT 9372.) He told appellant that people were banging on his mom's window looking for Carlos Rosales, and that one of the guys had pushed his mom. (41 RT 9374.) Saenz told appellant that something had to be done. (41 RT 9375.) Appellant was

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[11] Camilo Rosales testified he saw the broken sandbags the following day. (44 RT 9790.)

close to Saenz's mother and was upset when he was told about the incident. (41 RT 9375.)

Saenz was aware appellant used methamphetamine, marijuana and alcohol during this time period. (41 RT 9377.) Saenz saw appellant a few days prior to the Yarbrough murder and appellant was strung out on drugs. (41 RT 9378.)

C. Appellant's testimony

Appellant went to Arvin High School for a year and a half in 1990 and 1991 and then went to Nueva Continuation High School. During that time period he lived in Lamont. (47 RT 10380.) He admitted that he had gang tattoos and hung around with gang members in high school but denied ever being "jumped into" a gang. (47 RT 10436.) While he attended Arvin High School he got jumped and had problems with the "Arvinas." (47 RT 10389.)

In 1995 he moved out of the area to El Paso, Texas, and then to Phoenix, Arizona. He left the gang lifestyle when he moved to Arizona. He went to college in Arizona and lived with his fiancée and children. (47 RT 10381; 10436.) In May or June of 1995, he and his fiancée broke-up because she was seeing another man. (47 RT 10381.) While he was living in Arizona he worked as a forklift operator, but he lost his job around the same time he and his fiancée broke-up. (47 RT 10381.)

In May or June of 1997, he purchased a Tec-9 for $300 on the streets in Arizona. The gun was "fixed" so that is was fully automatic. However, the gun had a tendency to jam after three-to-four rounds were fired. (47 RT 10382; 10458.)

Appellant came back to Lamont in August of 1997 and was arrested a few weeks later. (47 RT 10463.) When he bailed out of jail his cousin, Alex Saenz, picked him up. (47 RT 10386.) Saenz told him that some guys in a white truck had come to his aunt's house, threw sandbags on the

car, hit his aunt with a plastic motorcycle, and hit the windows of the house. (47 RT 10386.) Appellant was very close to his aunt and was upset about the incident. (47 RT 10387, 10389.) He later found out that Freddy Gomez, Jose Gomez and Yarbrough were responsible for the incident at his aunt's house. (47 RT 10393; 47 RT 10674.)

Appellant denied involvement in the abduction of Leonel Paredes. (47 RT 10393.) On October 4, 1997, appellant had been drinking and called his cousin, Carlos Rosales, to pick him up. Carlos picked him up and they went to Ashley Medina's house. He arrived around 8:30 or 9:00 p.m. and stayed the night there. (47 RT 10394-10395.)

On October 14, 1997, appellant, Carlos Rosales, Quintana, De La Rosa, and Valenzuela were at Efrain Garza's house. (47 RT 10397.) They saw a white truck drive up to a neighbor's house. De La Rosa and Valenzuela left in the truck with Juan Carlos Ramirez. Approximately 15 or 20 minutes later, Juan Carlos Ramirez, De La Rosa and Valenzuela returned in the truck. (47 RT 10397.) They told appellant to get in the truck. He had no idea they were abducting Juan Carlos Ramirez. (47 RT 10399.) The vehicle turned onto a canal bank and eventually stopped. Appellant asked what they were doing and De La Rosa said that Juan Carlos Ramirez had beat up his sister. (47 RT 10401.)

Appellant was upset that De La Rosa's sister had been hit so he hit Juan Carlos two or three times. Appellant obtained rope, and Juan Carlos was tied up and dragged in the field and left there. (47 RT 10403.) They drove back to town and appellant was given $20 and a medallion that said "Juan" on it. (47 RT 10404.)

Appellant went to Quintana's house where, for the remainder of the day, he consumed alcohol and narcotics. (47 RT 10406.) Appellant had his Tec-9 with him because he was planning to go back to Arizona. (47 RT 10408.) The people at the house were playing with the gun. (47 RT

10408.) Appellant heard someone say "there's that guy." Appellant walked outside and saw Yarbrough's truck. He and Garza walked towards the truck. Garza had the Tec-9. Appellant spoke to Yarbrough through the window, then entered the truck and got behind the steering wheel to scare Yarbrough. (47 RT 10410.) Appellant testified he had no intention of hurting Yarbrough but he wanted to scare him so there would be no further incidents at his aunt's house. (47 RT 10410-10411.) Appellant stated he was high and drunk so he was not thinking clearly at the time. (47 RT 10411-10412.) They told Yarbrough's little brother to get out of the truck. (47 RT 10412.)

Appellant, Garza and Yarbrough drove around in Yarbrough's truck for 30 minutes to an hour and a half. (48 RT 10675.) They tried to get Yarbrough to admit what he did at appellant's aunt's house. Appellant told Yarbrough not to hang around with gangbangers. Yarbrough would not admit to assaulting his aunt and appellant was upset because Yarbrough had an "I don't care attitude." (47 RT 10412-10416.)

It was dark outside and they parked Yarbrough's truck in an orchard. Appellant testified he was confused and having problems thinking. (47 RT 10417.) Appellant and Garza were going to leave Yarbrough there. Garza tied Yarbrough's hands and taped his eyes. (47 RT 10420, 10433.) Appellant walked back and forth from the truck trying to decide what to do. Appellant got his Tec-9 to scare Yarbrough, because he would not admit what happened at his aunt's house. Appellant told Garza to get the magazine. When Garza gave appellant the magazine, he inserted it into the gun and the gun accidently went off, and a bullet hit Yarbrough (47 RT 10420-10424.) Appellant did not know that there was a round in the chamber. (47 RT 10423.) Appellant started arguing with Garza and appellant "lost his head." They decided to leave since there was nothing

they could do for Yarbrough. (47 RT 10427.) Appellant knew Yarbrough was dead when they left. (47 RT 10490.)

Appellant drove Yarbrough's truck to an area near his aunt's house and Garza left in the truck. Appellant walked to his aunt's house and asked her for money. He was feeling low. Appellant was not present when Garza disposed of the truck. (47 RT 10427, 10429.) He then went to East Bakersfield and smoked some "dope." Appellant was paranoid and hallucinating. He and Garza left Bakersfield that afternoon and hitchhiked to Los Angeles. Appellant threw the gun out of the vehicle while they were driving over the Grapevine. (47 RT 10430-10431.)

Appellant has a tumor on his tongue that caused severe headaches. (47 RT 10382.) He did not go to the doctor for treatment for his tongue in 1997. (47 RT 10462.)

D. Expert testimony

1. Eyewitness Identification Expert

Scott Fraser testified as an eyewitness identification expert for the defense. (43 RT 9591.) He testified that race can affect identification. The identification of a person of a different race has a higher error rate. (43 RT 9591-9593.) The number of people at the scene can also affect accuracy of an identification because the larger the number of people present, the less accurate the identification. (43 RT 9594.) If a weapon is involved the accuracy of an identification is reduced. (43 RT 9596.) Back lighting can wash out features and if a suspect is walking in the dark with light behind him this could affect identification. (43 RT 9593-9594.)

The confidence of an individual's identification does not always correlate to the accuracy of the identification. The more a person sees an individual the more likely a person can identify him. (43 RT 9608-9609.) The first selection a person makes is usually the most accurate. (43 RT

9625.) Information that a person receives after an event can affect identification. Leading questions can also affect identification. (43 RT 9627, 9632.)

2. Psychiatric Expert

Dr. Stephen Estner testified as an expert in forensic psychiatry. (45 RT 9932-9935.) He opined that appellant did not suffer from a mental illness. (45 RT 9937.) He was concerned that appellant may have mental manifestations from a medical condition. (45 RT 9937.)

Prior to Dr. Estner's involvement in the case, appellant had swelling in his neck and underwent two surgeries to biopsy a mass. The surgeries were on February 17, 1999 and December 8, 1999. (45 RT 9938-9939.)

Dr. Estner received medical records from Kern Medical Center (KMC). (45 RT 9940.) After reviewing the records from KMC, Dr. Estner diagnosed appellant as having multiple hemangiomas of the head and neck. Hemangiomas are vascular tumors that can change in size and go into the arteries and veins. He described it as a "rare condition." (45 RT 9941.)

Dr. Estner also saw masses on appellant's neck and a large tumor on his tongue. (45 RT 9942-9943.) Dr. Estner was concerned the tumor could affect the blood flow to appellant's brain and impair his right brain functioning. (45 RT 9948.) Appellant had these tumors since childhood and by the age of 14, he had seen doctors regarding the tumors. (45 RT 9973.)

3. Forensic Pathologist

Dr. Barry Silverman, a pathologist, agreed with Dr. Brown that there were three entry and exit wounds on Yarbrough's body. (46 RT 10193, 10197.) However, Dr. Silverman opined that it was an automatic weapon with rapid fire, and that Yarbrough's head was above the ground when he was shot. (46 RT 10198, 10203-10204.) He based this opinion on the

position of the body, the gunshot wounds, and the location where the bullets were found. (46 RT 10204.)

4. Criminalist

Ronald Helson, a criminalist, testified that an Intratec 9 is a semi-automatic weapon that can be modified to fire automatically. (48 RT 10800-10801.) He testified that the injuries to Yarbrough were consistent with a fully automatic weapon. (48 RT 10812.) He based this opinion on the fact the entry wounds were equal distance apart. (48 RT 10813.) He opined that if it was a single shot the person shooting would have to be an excellent marksman. (48 RT 10814.)

5. Clinical Psychologist

Dr. Francisco Gomez, a licensed clinical psychologist, met with appellant three times for a total of seven hours after he was arrested and in custody. (46 RT 10234, 10237.) Dr. Gomez reviewed appellant's school records, court transcripts, and arrest reports. (46 RT 10237.)

Dr. Gomez testified that on the Thematic Perception Test appellant had a high level of depression, sadness, hopelessness, feeling trapped, feelings of guilt and low self-esteem. (46 RT 10239-10240.) Dr. Gomez opined that appellant had a dual diagnosis of poly-substance dependence and dysthymic disorder (low level of depression). (46 RT 10241-10242.) Dr. Gomez believed that appellant used substances and drugs to cope with his low level depression. (46 RT 10242.)

Dr. Gomez stated that from June 1997 to November 1997 there were significant stressors in appellant's life. Appellant had a falling out with the mother of his child, he was not doing well in school, he lost his job and his apartment, and had recently been arrested for methamphetamine. All of these stressors increased his depression which in turn increased his drug use

and compromised his ability to make decisions. (46 RT 10244, 10301-10302.)

6. Substance Abuse Expert

Dr. David Bearman testified that appellant had a hemangioma on the back of the tongue that extended down to his right carotid sheath which caused decreased blood flow to the brain. (48 RT 10851.) Appellant had pain when the masses were touched and pain in his neck and chin. (48 RT 10851.)

Dr. Bearman opined appellant suffered from depression, polysubstance abuse, and sleep deprivation due to methamphetamine use, post traumatic stress disorder, and acute stress disorder. (48 RT 10852.) This opinion was based on his interview with appellant, discussions with other experts, reviewing a letter written by Dr. Estner and a review of an MRI. (48 RT 10852.) The drugs appellant consumed and the sleep deprivation affected appellant's judgment and coordination. (48 RT 10861.)

7. Criminal Street Gang Expert

Dr. Jose Lopez, a professor at California State Long Beach, testified regarding criminal street gangs. (49 RT 10978-10980.) He opined that there were gangs in Arvin and Lamont. (49 RT 10961.) Lamont had several small gangs, the main one being Lamont 13. (49 RT 10961.) Conflicts between Lamont and Arvin gangs dated back to 1958 and continued in 1997. (49 RT 10988-10990.)

Dr. Lopez was of the opinion that appellant was not an active gang member in 1997. Appellant was hanging around younger kids and in 1994 or 1995 Lamont Familia Surenos, the gang appellant had been a member of, disbanded. (49 RT 10989.) Dr. Lopez did not believe the murder of Yarbrough was gang related but instead was caused by the "machismo"

cultural characteristics that are present in a male dominated family. (49 RT 10989-10990, 10995.)

III. PEOPLE'S REBUTTAL

Dr. Matthew Lotysch, a board certified diagnostic radiologist, disagreed with Dr. Estner's opinion that appellant's hemangiomas would have an effect on the arterial structure or the venous structure of appellant's neck. (49 RT 11008, 11018.) Dr. Lotysch opined that the hemangiomas would not compromise appellant's air flow or his ability to breathe. (49 RT 11023.) There was no evidence that the hemangiomas interfered with the blood flow to appellant's brain, or that they contributed to his headaches. (49 RT 11028, 11031-11032.)

Criminalist Greg Laskowski read Dr. Silverman's testimony and listened to Helson's testimony. Laskowski opined that Dr. Silverman lacked knowledge in ballistics and firearm trajectories. (50 RT 11088-11089.) Laskowski testified that the location of the three live cartridges found at the scene indicated that the shooter was moving when shots were fired from the weapon. (50 RT 11115.) Laskowski opined that an expert could not give a valid opinion regarding whether the weapon was an automatic weapon if the expert was unaware of the location of the spent bullets. (50 RT 11093.)

Sergeant Wahl testified that she interviewed Maria Villa on October 30, 1997. Villa stated that the incident at her home in September 1997 involved three Hispanic males. (50 RT 11158.) She never mentioned a white male being involved and she never stated that a white male hit or pushed her that evening. (50 RT 11159.)

IV. PENALTY PHASE

A. Prosecution's Case

1. August 22, 1997 – Methamphetamine Case

On August 22, 1997, Bakersfield Police Officer Michael Coronado was dispatched to 3701 Q Street. (57 RT 12718.) The address was a one bedroom loft. (57 RT 12721.) Officer Coronado contacted Kerry Hernandez. (57 RT 12719.) He walked upstairs and saw appellant kneeling down with his hands concealed beneath the bed. (57 RT 12724.) Officer Coronado ordered appellant to put his hands on his head. (57 RT 12725.) He observed what he believed to be narcotics on the dresser next to appellant. (57 RT 12725.) He seized the narcotics, which were later tested and found to be methamphetamine. (57 RT 12728.)

A black purse was found on the floor in the area where appellant was kneeling down. (57 RT 12728.) The top of the purse was open and Officer Coronado saw a pistol inside of it. (57 RT 12730.) A magazine was in the pistol and one round was chambered. (57 RT 12731.)

Appellant submitted to a urine test which detected the presence of methamphetamine and THC. (57 RT 12733.)

Officer Coronado *Mirandized*[12] appellant and appellant stated that the narcotics and weapon were his. (57 RT 12734.) Appellant stated he placed the gun in the purse when police arrived so that it would not be discovered. (57 RT 12735.)

2. March 15, 1995 – Ibarra Murder

Alma Yadira Mosqueda testified that she lived in an apartment on 12360 Main Street in Lamont on March 15, 1995. (57 RT 12771.)

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[12] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Christina Isabel Ramirez was one of her friends. (57 RT 12772.) Javier Ibarra was Christina Ramirez's boyfriend. (57 RT 12774.)

Mosqueda went to Arvin High School and was familiar with appellant, Cipriano Ramirez and Gabriel Flores. (57 RT 12774.) On March 15, 1997, Cipriano Ramirez called her and asked who was at her apartment because he wanted to come over and "take care of business." (57 RT 12781.)

After the phone call, Mosqueda became concerned for Ibarra's safety. She told Christina Ramirez to get Ibarra out of the apartment. (57 RT 12782-12783.) After approximately five to ten minutes they left and Ibarra walked towards his car in the parking lot. (57 RT 12783.) It was dark outside but the lighting in the parking lot was good. (57 RT 12783, 12826.) While Ibarra was walking to his car, Mosqueda observed appellant, Cipriano Ramirez, and Flores arrive in a gray Nissan Sentra. They parked directly behind Ibarra's vehicle. (57 RT 12784.) She recalled Flores wearing a white hat and Cipriano Ramirez wearing blue "mechanical overalls. " (57 RT 12807, 12814.) Cipriano Ramirez told Mosqueda to go inside. (57 RT 12791.) She saw Ibarra spread his hands out like he was going to fight. (57 RT 12794-12795.) She then heard four to five gunshots. (57 RT 12785, 12791.) She ran outside and saw Ibarra on the grass face down with blood coming from a gunshot wound to his head. (57 RT 12791.) She saw the Nissan leaving and she no longer saw the three men. (57 RT 12801.) The parties stipulated that the cause of death to Ibarra was a gunshot wound that perforated the brain. (57 RT 12828.)

Deputy Anthony Contreras was called to the scene of the shooting. He spoke to Mosqueda, who named appellant and Cipriano Ramirez as possible suspects. (57 RT 12829, 12831.) Deputy Contreras was aware that Cipriano Ramirez drove a Nissan because of prior contacts he had with him. (57 RT 12836.) He later spoke to Cipriano Ramirez, who claimed his

vehicle had been stolen that evening and denied he had been at the apartment complex where the shooting occurred. (57 RT 12839.)

Sergeant Daniel Fuqua was dispatched to the scene of the murder. He was advised that appellant was one of the suspects. He made contact with appellant at 7608 Burger Way in Lamont. Appellant was taken into custody and Sergeant Fuqua seized a white baseball cap. (58 RT 12918-12921.)

Gerardo Soto lived with appellant's aunt in March of 1995. (58 RT 12939.) He recalled seeing appellant and Cipriano that evening. They walked over and he gave them a ride to a relative's house. He stated that appellant was wearing a dark Pendleton and a baseball cap but that the baseball cap was not white. (58 RT 12940-12942.)

Jesse Ibarra was Javier Ibarra's brother. He spoke to Mosqueda the day after the shooting. She told him that appellant was involved in the shooting of his brother and that appellant had been wearing a white cap. Mosqueda was fearful because she was receiving calls from Cipriano Ramirez saying they would take care of her. (58 RT 12975-12978.)

3. Victim Impact Evidence

Carolina Castro went to Arvin High School and was Yarbrough's girlfriend at the time of the murder. (58 RT 12986.) Prior to the murder she would talk to Yarbrough about his hopes and plans for the future. He wanted to go to college, play football and become a physical education teacher and football coach. (58 RT 12987.) Yarbrough wanted to marry Castro and have a family. Castro and Yarbrough had picked out names for their future children. (58 RT 12987.)

Brent testified that he was 14 years old at the time of the murder. (59 RT 13032.) He had nightmares about the incident and did not go back to school for several months. (59 RT 13032.) His grades dropped. He was fearful to go to Lamont and called his mom to tell her everywhere he went.

(59 RT 13033.) Brent blamed himself for the murder because he felt he could have done something to prevent his brother's murder. (59 RT 13034.) To remember Yarbrough he made videos of him. (59 RT 13034.)

Cheryl Yarbrough was Yarbrough's mother. (59 RT 13037.) She had three children in 1997, one daughter who had graduated from high school, Yarbrough and Brent. (59 RT 13037.) The family was very close before Yarbrough's death. (59 RT 13038.) They used to go camping, water skiing, and jet skiing. However, since the murder they do not do those activities as much. (59 RT 13039-13040.) Cheryl Yarbrough testified Yarbrough liked to work on his truck. He was caring, compassionate, fun-loving, and a joker. (59 RT 13046-13047.)

Since Yarbrough's death her husband keeps to himself, her daughter moved out of the house, and the family attended counseling. (59 RT 13040-13041.)

B. Defense Case

1. Ibarra Murder

On March 15, 1995 Ysela Nunez lived in an apartment on Weedpatch. (60 RT 13187.) On that date she saw a vehicle drive up to the apartment. Three men exited the vehicle and approached a man who was walking with two girls. (60 RT 13189.) The two girls walked away and the three men began making hand movements, as did the man who was by himself. (60 RT 13190.) Two of the three men began fighting with the man who had been with the two girls. (60 RT 13190.) One man was wearing gray coveralls, one had blue jeans and a long-sleeve shirt. (60 RT 13191.) The man who was not fighting was wearing black pants, a white hat, and a black, white and gray checkered Pendleton. (60 RT 13191-13192.) After the fight, the man with the white hat shot the other man, firing five to six times. (60 RT 13192, 13194.) After shots were fired the three men ran

back to their car and left the scene. (60 RT 13197.) The victim had a gunshot wound to the back of his head and another wound to the lower part of his chest. Nunez tried to stop the bleeding. (59 RT 13197.) Nunez did not recognize appellant in court, and did not think she could identify the three men. (60 RT 13193, 13197-13198.)

2. Family Testimony

Esperanza Rodriguez Villa is appellant's grandmother.[13] (60 RT 13204-13205.) Appellant's family was very poor and food was scarce when he was a baby in Mexico. Appellant's father drank a lot. (60 RT 13206.) Esperanza moved to Bakersfield and asked appellant's mother to move to the United States because she was separated from appellant's father who was a "drinker." (60 RT 13207.) Appellant was one year old when they moved to the United States. (60 RT 13208.)

When they arrived in the United States appellant was sick. He was thin and had bulges in his stomach. (60 RT 13208.) Appellant's father stayed in Mexico and died of alcoholism. (60 RT 13213-13214.) Appellant's mother worked in the fields, they did not have money and at times lacked food. (60 RT 13215-13216.) When appellant was young they had problems in the Bakersfield house. Esperanza's son, Thomas, was shot and killed in the house. (60 RT 13209.)

Appellant's aunt, Rosa Maria Vasquez, testified that appellant's father drank all of the time and that the family did not have enough food. (61 RT 13453-13455.) When the family came from Mexico, they stayed with her in El Paso, Texas. (61 RT 13455.) When they arrived from Mexico, they were sick and malnourished. (61 RT 13455.)

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[13] Esparanza Rodriguez Villa will be referenced by her first name to avoid confusion.

Appellant's mother, Angelita Villa Ramirez, testified that appellant's father was an alcoholic and was violent towards her and the children. (60 RT 13225-13227.) Appellant was the youngest of five children, and the family moved to Bakersfield when he was young. (60 RT 13227.) Once in Bakersfield, she worked in the fields eight to nine hours a day, making $2.25 an hour. (60 RT 13228-13229.) She worked in the fields Monday through Saturday for 11 years. (60 RT 13229.) Her son Lorenzo was seven at the time and he was in charge when she was gone. Lorenzo would beat the children, including appellant, on a regular basis, as would appellant's uncle Benito.[14] (60 RT 13229-13230, 13239-13240.)

Their house had been shot at twice, and a person from Arvin threw a bottle through the window. (60 RT 13238-13239.) Appellant had two daughters with his ex-girlfriend. He was sixteen when he had his first child. (60 RT 13254.)

Appellant's aunt, Maria Villa, worked in the fields with Esperanza. (60 RT 13267.) Maria Villa testified that Lorenzo was violent with appellant. He would hit him and tell him off. (60 RT 13267.) Maria Villa stated that appellant loved his children. (60 RT 13268.)

Appellant's uncle, Benito Villa, testified he played with appellant and hit him but he never left bruises on him. (60 RT 13284-13285.) Benito's brother was shot in 1974 prior to appellant's birth. (60 RT 13285-13286.)

Olivia Soto, appellant's aunt, is the youngest of the siblings. She went to Arvin High School from 1984 to 1988 and lived in Lamont. There were difficulties for people who lived in Lamont and attended Arvin High School. (60 RT 13299.) Boys from Arvin would sometimes attack girls from Lamont. (60 RT 13300.) Soto kept in touch with the mother of

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[14] She previously told investigators that the other boys were not abusive, that they only hit appellant to straighten him out. (60 RT 13242.)

appellant's children and took appellant's daughters to visit him in custody. (60 RT 13306-13307.)

Appellant's cousin, Tony Montero, went to Arvin High School from 1996 to 1997. (60 RT 13314-13315.) Appellant told him to stay out of trouble and graduate. Appellant never mentioned gangs to him. (60 RT 13315-13316.)

Appellant's brother, Jesus Villa Ramirez, an inmate at Terminal Island, and aunt, Amelia Villa Espinoza, testified that Lorenzo would hit the younger children. (61 RT 13405, 13443-13444.)

3. Expert Testimony

Dr. Estner reviewed Dr. Lotysch's testimony. He agreed that appellant had hemangiomas that extended from his tongue to the back of his throat and neck. (61 RT 13379-13380.) Dr. Estner opined that the pressure of the mass can affect appellant's heart, respiratory system and mental processes, including decision making. (61 RT 13380-13383.)

In 1990, appellant's teacher recommended him for the gifted and talented education program (GATE) at Fairfax School District. (61 RT 13651-13654.) Appellant's test scores were not high enough to qualify for the program. (61 RT 13654.)

Dr. Jose Lopez testified that there are gangs in Arvin and that gangs often act as a surrogate parent when parents are either non-existent in a child's life or busy due to work. He noted that mothers are generally the head of the household in gang infested areas. (62 RT 13662-13663.)

Dr. Lopez opined that in the gang culture and Latino culture respect is important. (62 RT 13668.) If a female relative is disrespected it would be expected that a male family member would respond in an aggressive manner. (62 RT 13671.)

Francisco Gomez Jr. testified that risk factors for depression are poverty, physical abuse, cultural stress for Latinos, severe neglect, low socioeconomic status, and violence. (62 RT 13682-13684.)

C. Stipulations

If Castro was recalled to testify she would state that she and Yarbrough drove by Carlos Rosales's house and that Yarbrough pointed to Carlos Rosales's car and told her that he, Freddy Gomez, and Luis Gomez dented the car and attempted to break the windows. (60 RT 13323-13324.)

It was stipulated that appellant had not received drug or gang counseling while out of custody. (61 RT 13494.)

It was stipulated that since appellant's incarceration he had not been involved in gangs. (62 RT 13679-13680.)

V. BIFURCATED TRIAL ON COUNTS 10 AND 11

A. August 22, 1997

On August 22, 1997, Bakersfield Police Officer Michael Coronado was dispatched to an apartment on Q Street. (65 RT 14193.) Officer Coronado contacted Denise Suarez who gave him permission to walk upstairs. (65 RT 14193-14194.) He walked upstairs and saw appellant kneeling down with his hands concealed beneath the bed. (65 RT 14196.) He observed what he believed to be narcotics and tin foil on the dresser next to appellant. (65 RT 14198-14199.)

A black purse was found on the floor in the area where appellant was kneeling down. (65 RT 14202.) Officer Coronado saw a pistol inside of the purse and seized it. (65 RT 14202.) A magazine was in the pistol and it appeared operable. (65 RT 14203.)

Appellant waived his *Miranda* rights and stated that the drugs found were "crank." (65 RT 14205.) He stated he last used crank at 9:00 a.m. It was approximately 9:30 p.m. when officers arrived at the apartment. (65

RT 14206.) He testified that he had the firearm on him when police arrived and he placed it in the purse so it would not be on his person. (65 RT 14212.)

B. Stipulations

If called to testify Criminalist David Diosi would testify that the white powder seized by Officer Coronado tested positive for a usable amount of methamphetamine. (65 RT 14209-14210.)

If called to testify Vertice Honeycutt would testify that an analysis of appellant's urine sample detected the presence of amphetamine, which is consistent with methamphetamine use. (65 RT 14211.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S CHANGE OF VENUE MOTIONS

Appellant claims the trial court prejudicially erred in denying his change of venue motion. (AOB 57-126.) Appellant fails to show that the trial court erred or that he suffered prejudice, and the claim is without merit.

A. Record

1. Change of Venue Hearings

a. May-June 2000 Motion

Professor Edward Bronson testified as a change of venue expert for the defense. (2 RT 745.) Professor Bronson testified there were 225 articles published in relation to this case. (2 RT 801.) The Bakersfield Californian had published 141 of those articles and the Lamont Reporter and Arvin Tiller had published 42 articles each. However, Professor Bronson acknowledged that the articles in the Lamont Reporter and Arvin Tiller were duplicative of each other. (3 RT 1022.) Of the 225 articles published, 133 articles were from 1997, 72 were from 1998, 19 were from 1999, and one was from 2000. (2 RT 810.)

Professor Bronson testified that Kern County had a population of 648,400, ranking it 14th in size in California. (2 RT 875.) Based on his review of the media coverage of this case, Professor Bronson designed a public survey to assess the impact of pretrial publicity on the community. (2 RT 891.) The survey was conducted in January 2000. (6 CT 1779.) The results of the public survey demonstrated that 82 percent of the 403 participants recognized the case. (3 RT 920-921.) Professor Bronson also concluded, based on the survey, that 53.6 percent of the participants thought one of the defendants (appellant or Efrain Garza) was guilty based on what they knew of the case. (3 RT 930.) On cross-examination, Professor Bronson admitted that the survey did not ask participants if they could set aside their beliefs in appellant's guilt or their knowledge of the case. (3 RT 935.) Based on these results, Professor Bronson opined that there was a reasonable likelihood that appellant could not get a jury panel in Kern County who was unaffected by pretrial publicity. (3 RT 973.)

Rejecting Professor Bronson's ultimate conclusion, the trial court denied appellant's motion on June 16, 2000, finding that appellant had failed to demonstrate that it was reasonably likely that appellant could not receive a fair trial in Kern County. The trial court cited *People v. Hayes* (1999) 21 Cal.4th 1211, 1250, to conclude that there was no evidence that people in the survey had fixed opinions that could not be set aside. (4 RT 1279.) The trial court stated it had considered all the factors in the case (the seriousness of the case, the media coverage, the notoriety of the victim and the defendant, and the size of the community) in ruling on the issue. (4 RT 1278-1279.)

b. December 2000- January 2001 Change of Venue Motion

Appellant's second change of venue motion was heard in January 2001, during jury selection. (12 CT 3317, 3590.)

Professor Bronson testified again. (26 RT 6169.) He testified that there were 19 additional articles published on the case in the Bakersfield Californian since the last change of venue hearing. At least two articles were published during jury selection, and he assumed jurors did not read those. (26 RT 6200-6201, 6203, 6215, 6217.)

Professor Bronson examined the juror questionnaires. He opined that the best way to determine community prejudice arising from pretrial publicity is through a survey. (26 RT 6223.) He did not think that community prejudice could be assessed as well during voir dire because there are "social desirability factors" that cause jurors not to be as candid with their answers. (26 RT 6225-6226.) Professor Bronson did admit that with *Hovey*[15] voir dire there is less of a problem with the "social desirability" factors. (26 RT 6242.)

Professor Bronson also examined the voir dire transcripts. He concluded that there was a 79 percent recognition rate among the questioned jurors. (26 RT 6266.) Professor Bronson opined that appellant could not get a fair trial in Kern County due to pretrial publicity. (26 RT 6304-6306.)

On January 16, 2001, the trial court denied appellant's motion, finding that appellant had failed to demonstrate that it was reasonably likely that he could not receive a fair trial in Kern County. (27 RT 6527.)

2. Jury Voir Dire

Jury selection began December 4, 2000 (10 RT 2414) and 12 jurors and 5 alternates were sworn to try the case on January 17, 2001. (28 RT 6703, 6731.)

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[15] *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81 (requiring individual questioning of prospective jurors regarding death-qualifying issues.)

Juror 200029216 (Juror No. 12)[16] had heard about the case, but knew very little about the facts. She stated the only thing she knew was that a high school "kid" was killed and he was in a truck. (14 RT 3345.) She did not receive the paper at home and had not followed the case so she had never heard of the people involved. (14 RT 3345.) She had read about the incident in the newspaper when it first occurred, but she was not that interested in the story because she did not know the victim. (14 RT 3346.) She stated she could keep an open mind and be fair at trial. (14 RT 3345-3346.)

Juror 200239389 (Juror No. 11) had read about the case in the newspaper three years prior to jury selection but could not remember the details. She only recalled that a teenager was killed in Arvin. (15 RT 3569-3570.) Juror 200239389 understood that what she read in the newspaper was not evidence and that she would only decide the case based upon the evidence presented. (15 RT 3570.)

Juror 200316311 (Juror No. 9) knew very little about the case. She had not heard about the case for the past several months. (15 RT 3634-3635.) She did not know any of the specifics about the case other that what was said in court. (15 RT 3635.) She assured the court that she would be able to set aside whatever she had heard about the case and would not consider it at trial. (15 RT 3635-3635.)

Juror 20061224 (Juror No. 8) heard about the case when it first happened. He read one article in the newspaper but had not heard or read anything factually about the case since October 1997. (16 RT 3851-3852.) He saw one additional article regarding jury selection and quit reading it because he realized it was referring to this case. (16 RT 3852.) He assured

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[16] Juror No 12 subsequently became ill and was replaced by alternate No. 3. (30 RT 7113-7114.)

the court that he could set aside what he read about the case and not consider it at trial. (16 RT 3855.)

Juror 200343496 (Juror No. 10) checked on her juror questionnaire that she had read about the case but that it would not affect her ability to be fair and impartial. (23 CT 6815.) On voir dire she stated she did not read the newspaper much and did not watch local television. Instead, she watched CNN. (16 RT 3884.) She had not formed any opinions as to appellant's guilt. (16 RT 3884.)

Juror 200199345 (Juror No. 7) had read newspaper articles and watched television reports of the case. She recalled that the crime occurred in Arvin and that a young man was found dead in an orchard by a family member. (17 RT 4192-4195.) What she had heard about the case would not influence her if she were a juror. (17 RT 4201-4202.) She would have no difficulty setting aside the things she heard and would not consider it as evidence. She had not formed any opinions about the case. (17 RT 4198-4199.)

Juror 200118551 (Juror No. 4) heard about the case on the news once. The only other time she heard about the case was when the memorial was planned at Arvin High School because she is an administrator for Kern High School District with a different high school. However, she did not know the details of the case and she was not personally involved in the memorial. She had never read newspaper articles about the case, she did not know the names of the people involved in the case, and she was unaware of the manner in which the victim died. (19 RT 4410-4415.) She would be able to set aside anything she knew about the case and keep an open mind to the evidence presented in court. (19 RT 44136-4414.)

Juror 200316337 (Juror No. 3) had heard about the case from his wife and the news. He did not recall specifics but his wife had told him that the victim was young and was shot. (21 RT 5041-5043.) He recalled reading

in the newspaper that two people were being investigated and one had been "picked up." (21 RT 5043-5044.) He did not form any opinions about the death of Chad Yarbrough and he could set aside anything he had heard or read about the case and decide the case based on the evidence presented in court. (21 RT 5044-5045.)

Juror 200151234 (Juror No. 1) had heard about the case from the news "a long time ago." (22 RT 5161.) She recalled hearing on the news that someone was shot and that they caught the person who shot him in another state. (22 RT 5163.) She did not know much about the case because she did not watch the news or read the newspaper very often. (22 RT 5164.) Juror No. 1 would be able to set aside what she knew about the case and decide the case only on the evidence presented in court. (22 RT 5165.)

After jury selection, outside the presence of the other jurors, Juror No. 1 stated that she had some concern that she may be "putting [herself] in some sort of situation" because she had two rental properties in Lamont and she generally went to Lamont once a month to collect rent. (30 RT 7063.) She explained that she did not know anyone connected to the case or in Lamont. (30 RT 7084.) She was not familiar with Lamont. (30 RT 7074.) The trial court asked her if someone else could collect the rent so she did not have to go to Lamont during the trial. Juror No. 1 said she could do that. (30 RT 7080.) She stated any fear she may have had would not influence her ability to be fair and impartial to both sides. (30 RT 7079.) The court told Juror No. 1 to notify the court if any issues resurfaced. (30 RT 7085.)

Juror 200336734 (Juror No. 2) had heard about the case through television coverage and an article in the newspaper. She recalled that the victim was a football player who was found murdered. She thought the news said there was possibly a gang influence. (23 RT 5549-5550.) She

did not recall hearing appellant's name or what his involvement was, if any, in the murder. (23 RT 5551.) Juror No. 2 would be able to set aside what she had heard about the case and decide the case on the evidence presented in court. (23 RT 5552-5553.)

Juror 200301163 (Juror No. 6) heard of the case through television coverage. (24 RT 5718.) She recalled hearing that the victim was kidnapped and killed, and that his body had been found, but she could not recall details of the crime. (24 RT 5718-5720.) She did not read the newspaper and has no other source of information regarding the case. (24 RT 5717-5718.) She had not formed any opinions as to appellant's guilt or innocence and she could set aside any information she heard about the case. (24 RT 5722-5723.)

Juror 200315873 (Juror No. 5) had never heard of the case prior to coming in for jury service. (24 RT 5743.) When he came in for jury service, another prospective juror spoke to him wondering if they were there for the Ramirez case. Juror No. 5 told the other prospective juror he had not heard of the case, and he was told it was a capital case. (24 RT 5742.) Juror No. 5 could set aside the statement he heard from the prospective juror and decide the case based upon the evidence presented in court. (24 RT 5743-5744.)

Juror 200322141 (Alternate No. 3/Juror No. 12)[17] had heard about the case in the news. (14 RT 3436.) She stated she heard that Chad had been bound and shot "execution style" in an orchard. (14 RT 3439.) She understood what she heard through the news was not evidence and could not be considered at trial. (14 RT 3436-3437). She had no concern that she

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[17] On January 22, 2001, Juror No. 12 was excused for good cause due to a medical condition and replaced by Alternate No. 3 (Juror 20322141), all further references to Juror No. 12 are to Alternate No. 3. (30 RT 7113-7114.)

could put aside what she heard about the case and remain fair and impartial. (14 RT 3439-3440.)

Appellant used the 26 peremptory challenges allotted to him, as well as the five additional peremptory challenges given for the alternate jurors. His requests for additional peremptory challenges were denied. (28 RT 6603-6731.)

3. Change of Venue Motions During Trial

a. February 5, 2001

On February 5, 2001, Juror 200239389 (Juror No. 11) informed the court that she had lunch with her father at Bill Lee's restaurant. During lunch her father asked her if she was bored being on the jury and asked why it was taking so long since "they know he did it." (39 RT 8978-8979.) She explained to her father that she could not talk about the case. She stated this was the first time her father had expressed an opinion about the case. (39 RT 8979) Nothing her father said would affect her ability to be fair to both sides in the case. (39 RT 8981-8982.) She wanted to let the court know because she thought other people may have heard her father because he speaks loudly. She did not see any other jurors in the vicinity when her father made the comment. (39 RT 8981, 8984.) Juror No. 11 explained that when she returned from lunch she told her fellow jurors that her father had said something. She could not recall whether she told the other jurors what her father said or not. She specifically recalled mentioning it to Jurors 6, 9, and one alternate. (39 RT 8996.)

Appellant's counsel, Mr. Bryan, stated that he felt Juror No. 11 was hostile towards him when she was answering questions he asked. He argued for a mistrial and renewed his change of venue motion. (39 RT 8986.)

The court noted that Juror No. 11 did not appear hostile towards Mr. Bryan, but instead seemed surprised that he would ask her if she recognized her fellow jurors after she had been sitting with them for three to four weeks. (39 RT 8986, 8991.)

The prosecutor echoed the court's observation that Juror No. 11 did not appear hostile towards Mr. Bryan. (39 RT 8987.) The prosecutor argued that Juror No. 11 stated she could remain fair and impartial and as a result, appellant's motions for mistrial and change of venue should be denied. (39 RT 8989.) The court denied appellant's motions for mistrial and change of venue. (39 RT 8992-8993.)

The court then brought in the entire jury and asked if any of the jurors had heard Juror No. 11 discussing an incident that occurred during lunch. (39 RT 8999.) Jurors Nos. 2, 4, 6, 9 and Alternate No. 2 replied in the affirmative. (39 RT 8999.) Each juror was questioned individually. Juror Nos. 2, 6, 9 and Alternate No. 2 stated that Juror No. 11 had said that she had lunch with her father and that the conversation was inappropriate. She did not tell Juror Nos. 2, 6, 9 or Alternate No. 2 the specifics. (39 RT 8999-9000, 9005, 9007-9008, 9011-9012.) Juror No. 4 stated that he overheard Juror No. 11 say she would probably get kicked off the jury. Juror No. 4 did not hear anything else. (39 RT 9002-9003.)

After the individual jurors had been questioned the court denied the motion to excuse Juror No. 11. (39 RT 9023.)

b. February 9, 2001

On February 9, 2001, appellant's counsel stated that Diana Yarbrough, Chad Yarbrough's aunt and a clerk in the Kern County Courthouse, had been in Department 2 on February 8, 2001, when

appellant's counsel appeared ex parte before Judge Westra in this case.[18] (43 RT 9661-9662.) Appellant's counsel claimed that Diana Yarbrough was supervising the clerk assigned to Department 2 and this was "inappropriate." (43 RT 9663-9664.) Based on this conduct, appellant's counsel moved for a change of venue, mistrial, and to dismiss the case. (43 RT 9666.)

The trial court conducted an evidentiary hearing. Diana Yarbrough testified that she was a clerk with the Kern County Superior Court. (43 RT 9732.) She was a supervisor to the clerk in Department 2, and prior arrangements had been made so that any issues arising from appellant's case that took place in Department 2 were to be handled by Pat Chandler. (43 RT 9732.) When Diana Yarbrough entered Department 2, Judge Westra was not on the bench and she did not think that the court was in session. (43 RT 9733.) Diana Yarbrough had a conversation with the clerk in Department 2 about a juvenile matter unrelated to this case. (43 RT 9733.) When she entered the courtroom she saw appellant's counsel in the courtroom but she did not hear anything they were saying and court was not in session. She never looked at the records in this case nor had she received any information about this case in her capacity as a clerk. (43 RT 9733-9734.) She remained in Department 2 for approximately one minute and left before Judge Westra returned. (43 RT 9734.) Other than being a spectator at trial, Diana Yarbrough had no contact with this case. (43 RT 9734.)

The trial court denied the change of venue motion, motion for mistrial, and motion to dismiss. (43 RT 9767.) The trial court stated there

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[18] It appears from appellant's counsels rendition of the facts to the trial court that Diana Yarbrough walked in when Judge Westra had taken a break. (RT 9666-9667.)

was no evidence that Diana Yarbrough heard, saw or discussed any information regarding this case, nor did she attempt to influence the court or the courtroom clerk. (43 RT 9766-9767.) The trial court noted that he never had any contact with Diana Yarbrough and that she had no supervisorial duties over his clerk.[19] (43 RT 9767.)

B. Law and Analysis

A change of venue must be granted when the defendant demonstrates a reasonable likelihood that a fair trial cannot be held in the county. (§ 1033, subd. (a); *People v. Vieira* (2005) 35 Cal.4th 264, 278-279; *People v. Williams* (1997) 16 Cal.4th 635, 655.) In ruling on the motion, the trial court considers: (1) the nature and gravity of the offense; (2) the nature and extent of the news coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the popularity and prominence of the victim. (*People v. Vieira,* at p. 279.) On appeal, it is the defendant's burden to show: (1) that denial of the venue motion was error (i.e., a reasonable likelihood that a fair trial could not be had at the time the motion was made); and (2) that the error was prejudicial (i.e., a reasonable likelihood that a fair trial was not in fact had). (*People v. Prince* (2007) 40 Cal.4th 1179, 1213.) Reasonable likelihood means something less than "more probable than not" and something more than merely "possible." (*People v. Dennis* (1998) 17 Cal.4th 468, 523.) The reviewing court sustains any factual determinations supported by substantial evidence, and

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[19] The last two change of venue motions made during trial do not change the information presented at the first two change of venue motions. As such, respondent's analysis of the court's denial of these two motions made during trial is the same as its analysis of the first two motions. (*People v. Harris* (2013) 57 Cal.4th 804, 825 ["Although defendant moved for change of venue three times, the last two motions did not significantly alter the information presented to the trial court with the first motion. Therefore, our analysis of the court's rulings is the same for all three motions.".)

independently reviews the trial court's determination as to the reasonable likelihood of a fair trial. (*People v. Rountree* (2013) 56 Cal.4th 823, 837.)

1. Nature and Gravity Of The Offense

Appellant contends the offenses charged were "inherently sensational," and involved multiple carjackings, weighing in favor of a change of venue. (AOB 101-102.) Appellant further contends that the media reported that appellant was involved in a separate murder. (AOB 101-102.)

There is no question that this case is serious in that it is a capital murder. It has long been recognized, however, that the nature and gravity of the offense are not dispositive. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 523, quoting *People v. Pride* (1992) 3 Cal.4th 195, 224.)

In *People v. Williams, supra*, 16 Cal.4th 635, this Court concluded that while the case was a capital murder involving the murder of four people, including two children, those factors were not dispositive in favor of a change of venue. (*Id.* at p. 655.) This Court has frequently upheld the denial of change of venue motions where there were multiple murders. (*People v. Ramirez* (2006) 39 Cal.4th 398, 407, 435 [12 counts of first degree murder, one count of second degree murder, five counts of attempted murder, four counts of rape, three counts of forcible oral copulation, four counts of forcible sodomy]; *People v. Welch* (1999) 20 Cal.4th 701 [six counts of first degree murder, including two young children]; *People v. Bonin* (1988) 46 Cal.3d 659, 668, 678 [four counts of first degree murder and four counts of robbery].)

Here, the murder of Yarbrough and multiple carjackings, while serious, are not dispositive factors, and did not compel the trial court to grant the change of venue motion in the absence of other circumstances that demonstrated a fair trial could not be had in Kern County.

2. Nature And Extent Of News Coverage

Appellant claims the news coverage in this case weighs in favor of a change of venue because of the nature and quantity of coverage. (AOB 111-116.) The media coverage immediately following the murder of Yarbrough was extensive, however, the passage of time negated the impact of the early publicity and many of the articles were duplicative.

This Court has found no error in the denial of a motion for a change of venue where "almost all of the media reports were more than three years old when the case came to trial." (*People v. Dennis, supra*, 17 Cal.4th at p. 523; see *People v. Hernandez* (1988) 47 Cal.3d 315, 334-335 [venue change not mandated where the bulk of the media's coverage of gruesome facts was two years old].) The passage of time weighs heavily against a change of venue as "[t]ime dims all memory and its passage serves to attenuate the likelihood that early extensive publicity will have significant impact at the time of trial." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 943.) Even the passage of several months can dispel the prejudicial effect of pretrial publicity. (*People v. Proctor* (1992) 4 Cal.4th 499, 525 [three months]; *People v. Jennings* (1991) 53 Cal.3d 334, 361 [eleven months].)

Here, a majority of the publicity was in 1997 and 1998. (2 RT 810; 26 RT 6200-6201, 6203 [of the 225 articles published, 133 were in 1997 and 72 in 1998; and additional 19 articles were published after the June 2000 change of venue hearing, 2 of those articles were during jury selection].) Although Professor Bronson stated that, after jury voir dire, the recognition rate was 79 percent among prospective jurors, most of the seated jurors and prospective jurors heard about the case long before jury selection began and had limited knowledge of the facts.

Juror No. 1 had heard about the case "a long time ago." (22 RT 5161.) Juror No. 3 heard about the case from his wife and the news but did not recall specifics except that the victim was young and had been shot.

(21 RT 5041-5043.) Juror No. 4 had heard about the case on a news broadcast once, and knew about the high school memorial because of her job. She had not read articles about the case in the newspaper, she did not know the names of the people involved in the case, and she did not have any personal involvement in the memorial. (19 RT 4410-4415.) Juror No. 5 had not heard of the case prior to jury selection. (24 RT 5742-5743.) Juror No. 6 had heard of the crime through television coverage but only remembered that the victim was kidnapped and killed. She could not recall the details of the crime. (24 RT 5718-5720.) Juror No. 8 read one article in October 1997 but had not heard or read about it since. He stated that he saw one additional article regarding jury selection but did not read it because he realized it was about this case. (16 RT 3851-3852.) Juror No. 9 knew very little about the case and had not heard about it for several months. The only details she knew about the case were those stated in court during jury selection. (15 RT 3634-3635.) Juror No. 10 did not read the newspaper very much and did not watch the local news. (16 RT 3884.) Juror No. 11 had read about the case in the newspaper three years ago but could not recall the details. (15 RT 3569-3570.)

Prospective jurors O'Neill, Haller, Diaz, Torres, Fierro, Pomeroy, Mapp, Julian, McKee, Wilson and Adams each recalled hearing news of the case but could not recall details. (14 RT 3367; 15 RT 3528, 3585, 3665-3666, 16 RT 3782-3783, 3983-3984; 17 RT 4086, 4155, 4212, 4269; 19 RT 4461-4462.) Prospective juror Bell was unsure if he had heard about the case, but if he had it was a long time ago. (14 RT 3406.) Prospective juror Ordiway stated the names in the case seemed familiar but he did not believe he had heard about the case previously. (14 RT 3488.)

Prospective Juror Floyd had not heard about the case prior to jury selection but heard on the radio that they were selecting a jury. (15 RT 3763-3764.) Prospective Juror Rosenthal was from Ridgecrest and had not

heard about the case. (17 RT 4149-4140.) Prospective Juror Rodriguez did not recall any details of the case from the media and prospective Juror Nicholson had never heard of the case. (19 RT 4433, 4452.)

Prospective Jurors Smart, Kostopoulos, Murphy, Franklin, Caudill, Cera, Des Lauriers, Kirby, and DelCid, all stated that they had heard of the case a long time ago, and most did not know any details about the case. (21 RT 5018, 5027; 22 RT 5242; 23 RT 5573-5574, 5595-5596; 24 RT 5631; 25 RT 5838-5839, 6011, 6110.) Even prospective Juror Wiltrout (200245294) who worked at a television station could not recall the details of the crime. (14 RT 3306-3307.)

Despite the fact that there was media coverage of the case from its inception, it was clear during jury voir dire that most seated and prospective jurors who had heard about the case had heard so long before jury selection began and could not recall details of the case. Thus, any impact from the publicity in this case was mitigated due to the passage of time.

In *Odle v. Superior Court* (1982) 32 Cal.3d 932, the defendant submitted over 150 newspaper articles to support his change of venue motion. He noted his name appeared in the headlines over 70 times. (*Id.* at p. 939.) This Court noted that "Because of the number of papers involved, the articles are necessarily repetitive." (*Ibid.*) That is also the case here. Professor Bronson testified that there were a total of 225 newspaper articles between the date of the crime and June 2000. (2 RT 801.) The Bakersfield Californian published 141 articles, 42 were from the Lamont Reporter, and 42 were from the Arvin Tiller. (2 RT 810.) Professor Bronson himself acknowledged that the articles in the Lamont Reporter and Arvin Tiller were identical. (3 RT 1022-1023.)

In *People v. Ramirez, supra*, 39 Cal.4th 398, 433, the trial court stated that the news coverage of the case had been extensive. Despite the extensive news coverage this Court upheld the denial of the change of

venue motion noting that the media coverage was not "unfair or slanted" and the facts that were introduced in the media were also introduced at trial. (*Id.* at p. 434.) The same is true here. Most, if not all, of the facts reported in the media were introduced at trial, including facts that were beneficial to appellant concerning his medical condition and his defense that the shooting was an accident. (8 CT 2101-2341; 7 CT 2082; 8 CT 2329 [appellant stated the shooting was an accident]; Exhibit A to renewed change of venue motion dated January 11, 1001, article dated July 6, 2000 [appellant seeks delay in trial because of tumors in his neck and head]articles dated July 7, 11, 2000, August 3, 14, 2000, December 23, 2000 [appellant stated shooting was accidental and trial delayed because of appellant's deteriorating health].)

Indeed, the publicity in this case pales in comparison with that found insufficient to compel a change of venue in a serial murder case tried in Orange County. There, reports that the defendant was the "Freeway Killer," had a history of mental illness, had prior convictions for sexual offenses against young men and boys, had been linked to as many as 44 killings, had admitted 21 killings, and had already been convicted of 10 murders in Los Angeles and sentenced to death, were insufficient to require a change of venue. (See *People v. Bonin, supra*, 46 Cal.3d 659, 677.)

Appellant relies on the public opinion survey conducted by Professor Bronson to support his position that the media coverage was pervasive. The exposure and recognition of the case was no higher here than in cases where the denial of a change of venue was upheld. (*People v. Rountree, supra*, 56 Cal.4th at p. 836 [85 percent of the public had heard of the case]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1396 [85 percent of the public had heard of the case]; *People v. Ramirez, supra*, 39 Cal.4th at p. 433 [94.3 percent of the public had heard of the case].)

As noted above, although there had been a substantial amount of pretrial publicity, most of the media attention occurred three years prior to jury selection. While many jurors had heard of the case, most jurors could not recall the details of the crime. More importantly, all of the seated jurors who had heard about the case said they could set aside what they had heard and only consider the evidence presented at trial. (*People v. Rountree*, *supra*, 56 Cal.4th at p. 840 ["The relevant question is not whether the community remembered the case, but whether the jurors at [the defendant's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant. (Citation.)"].)

The trial court found there was no indication that the pretrial publicity affected appellant's right to a fair trial in Kern County. (4 RT 1277-1280; 27 RT 6526.) The record supports this conclusion.

3. Size Of The Community

The size of Kern County weighs against a change of venue. In 2000, Kern County had a population of 648,400 people, ranking 14 out of 58 counties in California in population size. (2 RT 875.) Writing about Kern County, this Court has noted, "Cases in which venue changes were granted or ordered on review have usually involved counties with much smaller populations." (*People v. Balderas* (1985) 41 Cal.3d 144, 178-179, citing *Williams v. Superior Court* (1983) 34 Cal.3d 584, 592 [Placer County, 117,000 population]; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 [same, 106,500 population]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293, fn. 5 [Santa Cruz County, 123,800 population]; *People v. Tidwell* (1970) 3 Cal.3d 62, 64 [Lassen County, 17,500 population]; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 52, fn. 1 [Stanislaus County, 184,600 population]; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385, fn. 10 [Mendocino County, 51,200 population].)

In fact, this Court has upheld denials of requests for change of venue in cases involving counties with significantly smaller populations than Kern County's was at the time of appellant's trial. (See *People v. Vieira, supra,* 35 Cal.4th at pp. 280-283 [Stanislaus County, population 370,000]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1251 [Santa Cruz County, under 200,000 population] *People v. Coleman* (1989) 48 Cal.3d 112, 134 [Sonoma County, 299,681 population].) The population of Kern County supported the trial court's denial of the change of venue motion. (*People v. Rountree, supra*, 56 Cal.4th at p. 839 ["The size of [Kern] county supported the conclusion than an unbiased jury could likely be found."])

Appellant argues that although Kern County's population was 648,000, it responded like a small town. (AOB 107-108.) Appellant states that "an extraordinary number of people" knew Yarbrough, his family or had attended a memorial service. (AOB 108.) To support this assertion he cites data from the 251 juror questionnaires. (AOB 108 citing Def. Exh. E; 26 RT 6262-6263.) Dr. Bronson testified that the data from the juror questionnaires indicated that 11 percent of the prospective jurors knew the victim or his family and that two percent knew the defendant or his family. (26 RT 6267.) However, of that 11 percent, only one of those prospective jurors remained after the trial court had excused jurors for hardships or for cause. The one prospective juror who remained on the jury panel did not know the victim or his family directly. Mr. Haller (Juror No. 200074069), knew of the Yarbrough family but did not know them personally. (14 RT 3425-3426.) Mr. Haller only knew the name of the family and that Yarbrough played football for Arvin. (14 RT 3426.)

Dr. Bronson reviewed voir dire transcripts for 75 of the prospective jurors and noted that 9.3 percent of the 75 prospective jurors were excused on the basis of knowing the family. (28 RT 6276, 6279-6280.) Most of the excused jurors did not know the victim or the family directly. For example,

Dennis Herbert's (Juror No. 20079487) daughter's fiancé knew the victim. (14 RT 3320-332.) Ms. Epperson's (Juror No. 200184436) sister-in-law was teacher at Arvin High School and had the victim as a student. (14 RT 3418.) Mr. Callaway (Juror No. 200145876) had met the victim's parents on the street and through his son. (15 RT 3596.) Mr. Dilbeck (Juror No. 20080030) knew of the victim's uncle from plastering jobs. (15 RT 3609.) Mr. Tucker (Juror No. 200315088) taught math at Arvin High School and knew what Brent Yarbrough looked like. (15 RT 3627.) Mr. Wright's son's girlfriend was friends with the Yarbrough family. (17 RT 4100-4101.) The community connection to the Yarbrough family was attenuated and did not resemble that of a much smaller town. Dr. Bronson acknowledged that the "long lasting effects" of the Yarbrough murder on the town that were referenced in newspaper articles were referring to Lamont, not Kern County as a whole. (26 RT 6236-6237.) Thus, appellant's contention that Bakersfield should be treated like a small town is without merit.

4. Status Of Appellant

Appellant was not an outsider to Kern County. Although appellant was born in Mexico, he moved to Kern County when he was young and remained there most of his life. (60 RT 13207, 13227.) Thus, this was not a case where a local person was killed by an outsider.

Although appellant complains of the potential prejudice caused by appellant being a "Mexican national" and member of a "disfavored racial minority" (AOB 118-119), "[t]his element of possible prejudice presumably would follow the case to any other venue." (*People v. Prince, supra,* 40 Cal.4th at p. 1214.) The publicity in this case did not emphasize that appellant was Hispanic nor did it use inflammatory racial terms. (7 CT 1892-2100; 8 CT 2101-2341.) Appellant complains that he was portrayed in the media as a gang member. (AOB 119.) While evidence of appellant's

association with the LFS gang did come in at trial, and some articles discussed the problems with gangs in Lamont, appellant's gang membership certainly was not the focus of the publicity in this case. (See *People v. Vieira, supra,*. 35 Cal.4th at p. 282 [denial of change of venue upheld despite articles referring to the defendant as "part of a Nazi or White supremacist organization."].) Gang problems certainly were not unique to Lamont or Kern County, and the gang in this case was from a small outlying community in Kern County.

Any potential prejudice because of appellant's association with LFS would likely stem from people who knew of the gang and lived in Lamont, not those who lived in other areas of Kern County. Moreover, much like race, any element of prejudice regarding gangs would likely follow to another county. Thus, this factor did not support a change of venue.

5. Prominence Of Victim

The victim was a high school student who was a native of Arvin. (36 RT 8278.) Although he was popular among students at his high school, he was not well known in Kern County. He did not come from a prominent family. (*People v. Harris* (1981) 28 Cal.3d 935, 949.) Few people in the jury pool knew him or his family personally.

Appellant claims the elevated status given to the victim by the publicity following the murder is determinative of the issue. (AOB 120-121.) This Court, however, has found,

> [a]ny uniquely heightened features of the case that gave the victim[] and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried.

(*People v. Prince, supra,* 40 Cal.4th at p. 1214, quoting *People v. Dennis, supra,* 17 Cal.4th at p. 523.) It is the victim's status prior to the crime that is relevant to this particular issue (see *People v. Prince, supra,* 40 Cal.4th at

p. 1214; *People v. Ramirez, supra,* 39 Cal.4th at p. 434), and post-crime publicity is more appropriately addressed under the category of nature and extent of media coverage. Thus, the trial court did not error in denying appellant's change of venue motions.

6. Appellant Has Failed to Show A Reasonable Likelihood That He Did Not Receive A Fair Trial

Assuming arguendo that the trial court erred in denying appellant's change of venue motion, appellant fails to show that he suffered prejudice. In determining whether a reasonable probability exists that appellant did not receive a fair trial, this Court considers the voir dire "to determine whether the jurors may have been prejudiced by the pretrial publicity surrounding the case. . . ." (*People v. Proctor, supra,* 4 Cal.4th at pp. 526-527.) Exposure to publicity does not automatically translate into prejudice. (*Ibid.;* see *People v. Panah* (2005) 35 Cal.4th 395, 448.) There is no prejudice if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. (*People v. Daniels* (1991) 52 Cal.3d 815, 853.)

Here, each of the 12 seated jurors and 5 alternates stated that they could set aside what they had heard about the case and base their verdicts only on the evidence presented in court. (*People v. Bonin, supra,* 46 Cal.3d at p. 678 [change of venue motion denied where 10 of 12 jurors and 3 of 4 alternates had heard of the case]; *People v. Roundtree, supra,* 56 Cal.4th at p. 840 [eight of twelve jurors had heard of the case];14 RT 3345-3346, 3439-3440; 15 RT 3570, 3635; 16 RT 3855, 3884; 17 RT 4198-4199; 19 RT 4413-4414, 4460; 21 RT 5044-5045, 5091-5092; 22 RT 5165, 5294-5295; 23 RT 5525-5526, 5552-5553; 24 RT 5722-5723, 5743-5744.)

Appellant claims that jurors' statements that they could be fair and impartial should not automatically qualify them for jury service. (AOB 121-126.) He states that the trial court believed that a juror's statement that

he could be fair and impartial "insulated that juror from all challenges." Respondent disagrees with appellant's interpretation of the record. Nothing in the record suggests that the court disregarded other factors when determining whether a juror could be fair and impartial. Certainly the court considered the jurors' demeanor when they answered questions, as well as their knowledge of the case, including the parties involved.

Appellant cites nothing in the record to rebut the presumption of impartiality. (*Murphy v. Florida* (1975) 421 U.S. 794, 800 [rebuttable presumption that a juror is impartial if the juror can assure the court that he can set aside his opinions and base a verdict on the evidence presented].) He has not shown that any seated juror was actually biased, that the courtroom or community atmosphere was inflammatory, or that most of the jury admitted to being prejudiced. This remained true during trial. Appellant brought a change of venue motion after Juror No. 11 informed the court that her father had made an improper comment to her during lunch. Juror No. 11 was candid with the court regarding her conversation with her father, and she assured the court that nothing her father said would affect her ability to remain fair and impartial. (39 RT 8981-8982.)

Appellant argues that this case is similar to *Irvin v. Dowd* (1961) 366 U.S. 717. (AOB 123-124.) This case is unlike *Irvin*, where the awaited trial of the defendant was a "cause celebre of this small community." In *Irvin*, 95 percent of the community received the local newspaper which publicized the defendant's confession to six murders, his prior criminal history, and his offer to plead guilty in exchange for a 99-year sentence. (*Id.* at pp. 725-726.) Moreover, in *Irvin v. Dowd*, the adverse publicity continued through jury selection and eight of the twelve seated jurors thought the defendant was guilty prior to the commencement of trial. (*Id.* at p. 727.) One went so far as to say he "could not . . . give the defendant the benefit of the doubt that he is innocent." (*Id.* at p. 728.)

Other important distinctions separate this case from *Irvin v. Dowd*. First, the size of Kern County at the time of appellant's trial was 640,800. Second, most of the publicity in this case occurred in 1997 and 1998, two to three years before the jury was impaneled. Although there was media attention following 1998, it had greatly diminished. Most of the jury panel could not recall details of the crime and did not recognize appellant or his name. (*Odle v. Superior Court, supra*, 32 Cal.3d at p. 944 [consideration of prospective jurors responses is appropriate in change of venue motion].) Third, the jury found appellant not guilty of count five. (17 CT 4828.) "It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." (*Skilling v. United States* (2010)130 S.Ct. 2896, 2902.) Appellant's speculation that his trial might have been unfair because of pretrial publicity is unsupported by the record and is merely conjecture.

Appellant further argues that his use of all his peremptory challenges bolsters his claim that there was a reasonable likelihood of an unfair trial, because "he did everything in his power to object to this jury." (AOB 124-125.) While it is true appellant used all of his peremptory challenges and requested more, this does not demonstrate that the jury that was ultimately seated was biased. (See *People v. Bonin, supra*, 46 Cal.3d at p. 679 ["the exhaustion of peremptory challenges establishes only defendant's dissatisfaction with 26 prospective jurors and not the reasonable likelihood of bias on the part of any of the jurors or alternates actually selected."])

In sum, the trial court properly denied appellant's change of venue motion, because examination of the relevant factors did not show a reasonable likelihood that a fair trial could not be had in Kern County. Moreover, even if the trial court erred in denying his change of venue motions, appellant has failed to show a reasonable likelihood that he did not receive a fair trial.

II. THE TRIAL COURT ACTED WITHIN ITS BROAD DISCRETION IN DENYING APPELLANT'S CHALLENGES FOR CAUSE; ASSUMING THERE WAS ERROR IT WAS HARMLESS

Appellant contends that the trial court abused its discretion and prevented appellant from receiving a fair trial when it failed to excuse 48 prospective and seated jurors for cause. (AOB 128-231.) Appellant did not preserve this issue for appeal as he did not express dissatisfaction with the panel of jurors ultimately sworn. Further, the trial court was in the best position to evaluate the prospective and seated jurors' responses in voir and did not abuse its discretion when it denied appellant's request to excuse the 48 jurors for cause.

A. Appellant's Claim is Forfeited

To preserve a claim of error based on the denial of a challenge for cause, appellant must show: (1) he used a peremptory challenge to remove the juror in question; (2) he exhausted his peremptory challenges or can justify failure to do so; and (3) he objected to the jury as finally constituted. (*People v. Mills* (2010) 48 Cal.4th 158, 186.) Appellant did not object to the jury as finally constituted. Although appellant asked for additional peremptory challenges throughout voir dire, and made complaints regarding the make-up of the jury prior to using all of his peremptory challenges, he did not expressly object to the jury as finally constituted. (28 RT 6686 [objects to jury with two peremptory challenges remaining], 6703[jury sworn]; 6731[alternates sworn].) As such, his claim is not preserved.

B. The Trial Court Acted Within Its Discretion In Denying Appellant's Challenges For Cause

Assuming the claim is not forfeited, it lacks merit. The trial court retains wide discretion to determine the qualification of a juror who is challenged for cause.

> To find a juror is actually biased, the court must find "the existence of a state of mind" regarding the case or the parties that would prevent the prospective "juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

(*People v. Rountree, supra*, 56 Cal.4th at p. 842 citing Code Civ. Proc., § 225, subd. (b)(1)(C).) The state and federal constitutional standards for determining a capital juror's ability to serve are the same: the trial court may excuse a prospective juror who has expressed views that would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* standard].) The trial court's decision is "seldom disturbed on appeal." (*People v. Rountree, supra*, 56 Cal.4th at p. 842.) In order for a defendant to prevail on a claim that a challenge for cause was denied erroneously, the defendant must show that the court's rulings affected his right to a fair and impartial jury. (*People v. Yeoman* (2003) 31 Cal.4th 93, 114.)

Where a juror gives conflicting or equivocal responses to questions regarding his views on the death penalty, the trial court is in the best position to evaluate the juror's responses, and its determination as to his true state of mind is binding on appeal. (*Wainwright v. Witt, supra*, 469 U.S. at pp. 428-430; *People v. Harris* (2005) 37 Cal.4th 310, 329.) If the prospective juror's statements are consistent, then the trial court's ruling will be upheld if supported by substantial evidence. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262; *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

In *People v. McKinzie* (2012) 54 Cal.4th 1302, 1343, a juror expressed favoritism towards the death penalty in both his jury questionnaire and on voir dire. He indicated that first degree murder was a

type of crime warranting the death penalty and he did not think that the death penalty was imposed enough. "On a scale of 1 to 10, [the juror] marked '10' regarding whether he believed there should be a death penalty law." (*Ibid.*) On his questionnaire he marked that he was not open-minded about the penalty. (*Ibid.*) On voir dire, the juror stated that he could keep an open mind and that the death penalty should not be "automatic" but continued to state that someone would have to convince him not to vote for death if it was first degree murder. (*Id.* at pp. 1344-1345.)

In *McKinzie*, this Court upheld the trial court's denial of the defendant's challenge for cause. (*McKinzie, supra*, 54 Cal.4th at p. 1346.) This Court noted that although the juror had a preference for the death penalty, he stated multiple times that he would not automatically vote for death and that he would consider both penalties. (*Ibid* ["On this record, Juror No. 3 did not hold 'an unalterable preference in favor of the death penalty.' (Citation.)"])

In *People v. Rountree, supra*, 56 Cal. at page 843, a juror initially stated that if the case went to the penalty phase of the trial he would listen to the "whole thing" and vote for death if he thought it was warranted. When asked by defense counsel what he would do if defendant deliberately planned to kidnap, rob and kill a victim, the juror said he would "lean towards death, but it would not be automatic." (*Ibid.*) Defense counsel then asked "if the leaning would be 95 percent" and the juror responded "Yeah, about there . . . ." (*Ibid.*) This Court found that the record supported the trial court's denial of the defendant's challenge for cause. (*Ibid.*)

This Court has stated:

> It is not surprising that the juror was less than consistent in her answers. "In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the

> complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of the prospective juror's state of mind, and such evaluation is binding on appellate courts."

(*People v. Moon* (2005) 37 Cal.4th 1, 15-16, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1094.)

Code of Civil Procedure section 223 grants the trial court broad discretion to conduct voir dire of prospective jurors. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1184.) This Court has noted that there is "no single way to voir dire a juror." (*People v. Cleveland* (2004) 32 Cal.4th 704, 737.) "'The Constitution ... does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.'" (*Ibid.*, quoting *Morgan v. Illinois* (1992) 504 U.S. 719, 729.) The trial court has wide discretion in the number and nature of the questions it asks prospective jurors about the death penalty. (*People v. Mills, supra,* 48 Cal.4th at p. 189.) To be an abuse of discretion, the trial court's conduct of voir dire "must render the defendant's trial fundamentally unfair." (*People v. Cleveland, supra,* 32 Cal.4th at p. 737, citing *Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426.)

Applying the foregoing principles to appellant's case, appellant fails to show that the trial court abused its discretion when it denied appellant's for cause challenges against 48 seated and prospective jurors. As outlined below, each juror indicated his or her ability to serve as a fair and impartial juror in this case. The responses given by the 48 seated and prospective jurors during voir dire provided substantial evidence of their impartiality and capacity to serve.

1. Dennis Herbert (Prospective Juror No. 200079847)

Appellant's claim that the trial court erred in failing to dismiss Mr. Herbert for cause is unavailing. Mr. Herbert stated that his daughter's

fiancé knew Chad Yarbrough or his family but that this would not affect his ability to be fair in this case. (14 RT 3320.) Although Mr. Herbert indicated on his questionnaire that the death penalty should be imposed for deliberate murder except in rare cases, during voir dire he stated he would keep an open mind regarding the evidence and penalty in the case. (14 RT 3323-3324.) Mr. Herbert stated that he could set aside what he knew about the case, and that he could set aside any preconceived views on the death penalty and consider both life without the possibility of parole (LWOP) or death as punishment. (14 RT 3328-3329.) Appellant's challenge for cause was denied. (14 RT 3329.) Respondent submits the responses Mr. Herbert gave during voir dire provide substantial evidence of his impartiality and capacity to serve.

Further, even if the trial court erred in refusing to dismiss Mr. Herbert for cause, appellant is not entitled to a reversal of his convictions since he cannot demonstrate he was denied an impartial jury. Where a prospective juror did not even serve on the defendant's jury, there is no merit to a claim that the trial court erred in failing to excuse the juror for cause, since the defendant could not possibly have suffered prejudice as a result of the trial court's refusal to excuse the juror. (*People v. Hinton* (2006) 37 Cal.4th 839, 860, fn. 7; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 487-488.) Mr. Herbert was never seated as an actual juror during trial. Instead he was excused for hardship by the court with no objection by the defense or prosecution. (16 RT 3872-3873.) Thus, he could not possibly have compromised the impartiality of the jury.

2. Patricia O'Neill (Prospective Juror No. 200336322)

Ms. O'Neill stated that she had some concern about how she would feel emotionally because she had a brother the same age as the victim. However, she stated she believed she could be fair and impartial and consider the evidence presented in court. (14 RT 3360-3361.) Ms. O'Neill

had heard a rumor that the victim's penis had been cut off and placed in his mouth. (14 RT 3363, 3365.) She did not know if it was true or not, and stated she had no problem putting what she heard aside and only considering the evidence presented in court. (14 RT 3363-3364.) Ms. O'Neill could consider both life without the possibility of parole and death as possible punishments. (14 RT 3370-3372.) The trial court denied appellant's challenge for cause. (14 RT 3373-3374.)

The trial court did not err in denying appellant's challenge for cause. Although Ms. O'Neill had some hesitation because her brother's age was similar to the victim's age, she ultimately stated that she could be fair and impartial and that she would only consider the evidence presented in court. Although appellant takes issue with her response that the death penalty was appropriate in murder cases except in rare cases (AOB 144), he fails to acknowledge that she said she could consider both LWOP and the death penalty as possible penalties. Respondent submits the responses given during voir dire provided substantial evidence of her impartiality and capacity to serve.

Appellant also fails to establish prejudice because Ms. O'Neill was not a seated juror in his case. Appellant used his third peremptory challenge to dismiss Ms. O'Neill from the jury. (28 RT 6606-6607.) Thus, any "theoretical error" is based on the loss of a peremptory challenge. (*People v. Bonilla* (2007) 41 Cal.4th 313, 340.) "'[T]he loss of a peremptory challenge in this manner "provides grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."'" (*Ibid.*, citing *People v. Yeoman, supra,* 31 Cal.4th at p. 114.) As will be explained below (see Arg. II, parts B, C), the seated

jurors were impartial and competent to serve, and appellant has failed to establish prejudice.[20]

3. George Haller (Prospective Juror 200074069)

Mr. Haller knew of the Yarbrough family but did not know any of the Yarbroughs personally. His knowledge of the family would not affect his ability to be fair in the case. (14 RT 3426.) Mr. Haller had heard of the case but did not know details other than it involved a carjacking. (14 RT 3427.) Mr. Haller stated he would consider both LWOP and the death penalty as possible penalties for first degree murder depending on the circumstances of the case. (14 RT 3430-3432.) Mr. Haller had a family member and friend in law enforcement but the relationships would not affect his ability to be fair and impartial. (14 RT 3432-3433.) The trial court denied appellant's challenge for cause. (14 RT 3433.)

Nothing in the record suggests that Mr. Haller was anything but fair and impartial. His answers were unequivocal and he demonstrated no bias to either party. He had not prejudged the case and was willing to consider either penalty. The trial court did not abuse its discretion in denying appellant's challenge for cause.

Moreover, appellant used a peremptory challenge to dismiss Mr. Haller from the jury. (28 RT 6729-6730.) Since Mr. Haller did not sit as a juror on the case there is no prejudicial impact from the denial of appellant's challenge for cause because the jury was comprised of fair and impartial jurors.

4. Juror No. 12 (200322141)

Juror No. 12 had heard about the case in the news. (14 RT 3436.) She stated she heard that Chad had been bound and shot "execution style"

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[20] Respondent's harmless error argument will be discussed fully in section II, C of the argument.

in an orchard. (14 RT 3439.) She understood that what she heard through the news was not evidence and could not be considered at trial. (14 RT 3436-3437). She had no concern that she could put aside what she heard about the case and remain fair and impartial. (14 RT 3439-3440.)

On her questionnaire she marked that she would not be able to keep an open mind regarding the penalty. (14 RT 3437-3438.) However, on voir dire, she explained that she erroneously marked that box and that she would be open-minded in deciding the penalty. (14 RT 3438.) Juror No. 12's ex-husband was a deputy sheriff and she knew several people on the witness list. She stated she could judge those witnesses by the same standard as she did every witness. (14 RT 3443-3444.) In ruling on appellant's challenge for cause, the trial court noted, "considering all of the circumstances, the juror's demeanor, as well as her responses, both oral and written, the challenge is denied." (14 RT 3444-3446.)

Juror No. 12's responses during voir dire demonstrated she could be fair and impartial. The trial court was able to evaluate her demeanor and credibility in resolving the difference between her questionnaire and answers on voir dire. Based on her responses the trial court did not abuse its discretion in denying the challenge for cause.

5. Silver Ordiway (Prospective Juror 200286463)

Appellant takes issue with Mr. Ordiway's responses regarding his ability to be fair at the penalty phase of the trial because in his juror questionnaire he stated that the death penalty should be imposed in every case where someone deliberately takes another human being's life. (AOB 146.) Appellant argues that Mr. Ordiway's responses to voir dire also indicated that he was a "strong and determined supporter of the death penalty . . . ." (AOB 151.)

While Mr. Ordiway certainly believed in the death penalty, he stated early in voir dire that he could keep an open mind regarding punishment

and that "it would depend on the circumstances of the case." (14 RT 3490-3491.) Mr. Ordiway stated it would be difficult for him to consider LWOP if the victim was killed with three bullet shots to the back of the head. (14 RT 3503.) However, he then stated that if there were other facts to consider he would be open-minded and fair. (14 RT 3504-3505.) The prosecutor then asked:

> [Question]: And in the penalty phase, the Judge will tell you that you're able to consider circumstances other than those of the crime, other than the way the killing took place, other things, such as perhaps the state of mind of the defendant, his background, things of that nature, would you have an open mind. In other words, even though you know how the killing was, even though you decided it was deliberate and premeditated, could you promise us you could still have an open mind to the penalty phase so that you could consider any other mitigating factors, maybe not how the crime was carried out, but about the defendant himself or what led up to that, and still be open to life without parole, could you do that?
>
> A. Yes, sir, I could.

(14 RT 3513-3514.)

Appellant's challenge for cause was denied. (14 RT 3517.) Out of the presence of the jury the trial court stated:

> [I]n considering my ruling here, I had to consider the jurors believability with regard to whether his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. And I also had to consider the credibility of the juror, and I'm satisfied that this juror would be able to perform his duties without any substantial impairment.

(14 RT 3518.)

Although the questioning of this juror was more extensive than others, and some of his responses were equivocal, the trial court was within its discretion to deny appellant's challenge for cause because the trial court found he could adequately perform his duties as a juror. The trial court

based this decision, in part, on the juror's credibility and state of mind. Mr. Ordiway repeatedly stated that he could keep an open mind and consider all the factors of the case before he decided what the appropriate penalty was in the case. (14 RT 3491-3492, 3502, 3513-3514, 3517.) The record supports the trial court's ruling denying appellant's challenge for cause.

Appellant also cannot establish prejudice. Appellant used one of his peremptory challenges to excuse Mr. Ordiway from the jury. (28 RT 6605-6606.) As will be stated in more detail below, the jury empaneled was fair and impartial and there was no prejudice resulting from any arguable error by the trial court.

6. Roger Dilbeck (Prospective Juror No. 200080030)

Mr. Dilbeck knew Rick Yarbrough because Rick Yarbrough had done plastering on his residence. (15 RT 3609.) Mr. Dilbeck saw Mr. Yarbrough "in his truck" but did not know him. (15 RT 3608-3609.) He thought Rick Yarbrough was the victim's uncle. (15 RT 3609.) Mr. Dilbeck explained that his contact with Rick Yarbrough would not influence him as a juror and that he could be fair to both sides. (15 RT 3610.) He had read about the case in the paper but could only vaguely recall that a confession was involved. (15 RT 3612.) He understood that what he heard or read about the case was not evidence. (15 RT 3612.) Mr. Dilbeck thought both LWOP and death were appropriate penalties for first degree murder depending on the evidence presented at trial. (15 RT 3617.) Appellant's challenge for cause was denied. (15 RT 3619.)

The trial court properly exercised its discretion in denying appellant's challenge for cause. The trial court properly credited Mr. Dilbeck's unequivocal statement that he could be fair and impartial and base his verdicts on the evidence presented at trial. He was willing to consider both LWOP and death as possible penalties. In any event, appellant cannot demonstrate prejudice because, by stipulation of both parties, Mr. Dilbeck

was subsequently excused by the trial court for good cause due to his wife's medical condition. (15 RT 6575-6576.).

7. Floyd Moore (Prospective Juror No. 20006880)

Mr. Moore had not heard of the case prior to the commencement of jury selection. After jury selection began he heard on the radio that a jury was being selected in this case. He did not hear anything else about the case. (15 RT 3763-3764.) He stated that he could keep an open mind and consider both LWOP or death at the penalty phase of the trial. (15 RT 3765.) He stated he would not automatically vote for death if someone was convicted of first degree murder. (15 RT 3766.) When questioned by appellant's counsel and asked if he thought death was the appropriate punishment for first degree murder committed during a carjacking and kidnapping, he responded yes. (15 RT 3769.) When asked again if he could keep an open mind, he responded "yes." (15 RT 3774.) Appellant's counsel then asked again if he would automatically vote for death if it was a first degree murder in the course of a kidnapping and carjacking and he responded that he would hear both sides and then decide the penalty. (15 RT 3775.) The court denied appellant's challenge for cause noting he considered all of the circumstances including the juror's demeanor. (15 RT 3777.)

The trial court did not err in denying appellant's challenge for cause. Although Mr. Moore provided conflicting statements relating to his view of whether the death penalty was the appropriate punishment when a murder was committed in the course of a kidnapping and carjacking, the trial court's determination of Mr. Moore's state of mind is binding on appeal. (*People v. Crittenden* (1994) 9 Cal.4th 83, 123.) Here, the court noted that he considered the juror's demeanor when denying the challenge for cause. (15 RT 3777.) Even assuming there was error, appellant cannot

demonstrate prejudice because Mr. Moore was excused by appellant using a peremptory challenge. (28 RT 6698.)

8. Juror No. 11 (200239389)

Juror No. 11 knew several deputies who were listed as witnesses in the case. (15 RT 3567-3568.) Juror No. 11 stated she could keep an open mind and be fair in evaluating the witnesses. (15 RT 3568-3569.) Juror No. 11 had read about the case three years prior to jury selection but could not recall details of the case. (15 RT 3569.) She recalled that someone in Arvin was killed. (15 RT 3570.) She assured the court that she would not consider anything she read or heard about the case and would decide the case only on the evidence presented in court. (15 RT 3570.)

On the juror questionnaire, Juror No. 11 stated that the death penalty should be imposed in every case where someone deliberately takes another person's life. (15 RT 3572.). However, when asked if Juror No. 11 would consider both LWOP and death as possible penalties for first degree murder, she responded yes. (15 RT 3571.). She stated that the questionnaire was confusing. (15 RT 3574.) She explained what she meant was that once someone was sentenced to death, it should be carried out. (15 RT 3574.). She stated she could keep an open mind and could vote for LWOP if she found someone guilty of murder in the commission of a carjacking and kidnapping. (15 RT 3578.). She stated she could follow the law and set aside her personal views on the death penalty. (15 RT 3578-3579.) When questioned by appellant's attorney she indicated that she thought death was the appropriate penalty for a deliberate murder carried out during a carjacking and kidnapping. (15 RT 3580.) The trial court denied appellant's challenge for cause. (15 RT 3580-3581.)

Here, as in *McKinzie* and *Rountree*, Juror No. 11 appeared to have a preference for the death penalty. But as in *McKinzie* and *Rountree*, she stated that she could keep an open mind and consider both penalties.

Although Juror No. 11 at times gave conflicting answers regarding her views on the penalty phase of the trial, the question as to whether to excuse the juror was one for the trial court to decide. This Court should give deference to the trial court's decision because it was based on substantial evidence. Juror No. 11 never stated that she would not consider the evidence during the penalty phase and she explained that her responses on the questionnaire were conflicting at times because she found the questionnaire "confusing." She responded affirmatively that she could set aside her personal opinions on the death penalty, follow the law, and keep an open mind. (14 RT 3578-3579.)[21]

9. Michelle Diaz (Prospective Juror No. 200233871)

Ms. Diaz had heard of the case in the newspaper when the crime first occurred, but she could not recall details. (15 RT 3585.) She assured the court that she could set aside any views she had on the case based on what she had heard. (15 RT 3585.) Ms. Diaz stated she would decide appellant's guilt based on the evidence presented and that she would keep an open mind. (15 RT 3588.)

Ms. Diaz acknowledged that she had responded on the questionnaire that if appellant was found guilty of murder that the appropriate penalty would be death. (15 RT 3589.) On voir dire, she explained that she did not have a "fixed" opinion on death, that her mind was not "set in stone," and that she would have to evaluate the penalty based on the evidence. (15 RT 3590-3591.) (15 RT 3591.) The trial court denied appellant's challenge for cause. (15 RT 3592-3593.)

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[21] Respondent will address appellant's contention that Juror No. 11 was "implicated" in a subsequent motion for mistrial and a renewed change of venue motion in arguments V and VI post. (AOB 157.)

Ms. Diaz informed the trial court during jury selection that she had learned that her brother and Chad Yarbrough's sister worked together at Vons. (28 RT 6708.) Her brother mentioned to her that he had to change Melissa Yarbrough's work schedule because of the trial. (28 RT 6708-609.) Ms. Diaz told her brother she did not want to hear anything about it because she might be chosen as a juror for the trial. (28 RT 6708, 6710.) Ms. Diaz stated that there was nothing about that experience that caused her any concern or that would influence her in the case. (28 RT 6710.) She did not know the victim's sister and was not told her name. (28 RT 6711-6712.) She stated that she does not shop at that particular Vons store nor does she shop in that neighborhood. (28 RT 6712.) Appellant renewed his challenge for cause. (28 RT 6715.) In denying the challenge the court noted:

> [T]his was obviously an innocent conversation with her brother, in which he brought up the fact that he was rescheduling somebody in connection with the Yarbrough case.
>
> As soon as the juror realized that the brother was referring to the case, she told him to not say anything further.
>
> She's brought it to the Court's attention.
>
> I'm satisfied based upon her demeanor, observation, and her answering of the court's questions as well as counsel's questions, that she can perform her duty in a manner that would not prevent or substantially impair her from performing her duty . . ..

(28 RT 6720-6721.)

The trial court did not abuse its discretion in denying appellant's challenges for cause against Ms. Diaz. She repeatedly stated that she would consider the evidence presented in both the guilt and penalty phases of trial, and she was forthright with the court about her conversation with her brother. Nothing in Ms. Diaz's responses indicated that she would be

unable to be fair and impartial. Moreover, appellant used a peremptory challenge to excuse Ms. Diaz from the jury. (28 RT 6723-6724.)

10. Raymond Benson (Prospective Juror No. 200266117)

Mr. Benson had read about the case in the newspaper but stated it would not affect his ability to be fair and impartial. (16 RT 3831.) He had heard that someone involved in this case was in prison in Tehachapi. (16 RT 3832.) He had heard this information from the woman he lives with but he does not know if the person in prison was appellant or anyone involved in the case. He had no "feeling or belief" that appellant was in Tehachapi State Prison. (16 RT 3834.) Mr. Benson understood that anything he had heard or read about the case could not be considered. (16 RT 3835.)

Mr. Benson noted on his questionnaire that he would not keep an open mind as to the penalty in the case. (16 RT 3838.) However, Mr. Benson explained during voir dire that he had answered that question incorrectly. He explained that he understood that LWOP and death were the two penalties that could be imposed but he could not say which penalty would be appropriate in this case. (16 RT 3840.) He assured appellant's counsel that he could consider both penalties if appellant was found guilty. (16 RT 3840.) When asked if he was willing to consider "childhood events" as a factor in mitigation, Mr. Benson stated no. (16 RT 3842.) He explained that if a person understood the difference between right and wrong then "childhood events" should not be a factor. (16 RT 3842.) The following dialogue then took place:

> Q. [Appellant's counsel] Surely. Is it fair to say that the only way you could not find a verdict of death would be mental problems or mental problems of the defendant?
>
> A. [Mr. Benson] No, sir. Just what I explained to you.

> Q. [Appellant's counsel] Well, I'm sorry. Well, I thought you said that if the defendant knew what he was doing then your opinion was that the penalty should be death.
>
> [Prosecutor]: Objection, your honor. That misstates the answer of the juror.
>
> The Court: Sustained. Rephrase, please.
>
> By [Appellant's counsel]: Q. What did you mean when you said if the defendant had no mental problems and knew what he was doing you could not find life without the possibility of parole? I thought that's what you said.
>
> A. [Mr. Benson] I'm a little confused here. But I really don't know how to answer you.

(16 RT 3842-3843.)

The trial court then interjected and explained to Mr. Benson that the jury had a duty to consider evidence at the penalty phase that related to a defendant personally and the circumstances of his life, and that the defendant's childhood and experiences may be circumstances he had to consider as a juror. (16 RT 3843-3844.) When asked by the trial court if he could keep an open mind and consider things like the defendant's childhood Mr. Benson stated he would consider those circumstances. (16 RT 3844, 3846-3847.) Appellant's challenge for cause was denied. (16 RT 3847.)

The trial court did not abuse its discretion in denying appellant's challenge for cause. Mr. Benson assured the court that he could be fair and impartial and that he would not consider information he had received from any outside sources. Although he wavered on his personal view as to whether "childhood events" should be a factor in mitigation, after the court explained to him the law he agreed that he would keep an open mind and consider it. Moreover, appellant's counsel used a peremptory challenge to

excuse Mr. Benson so he never sat as a juror on appellant's case. (16 RT 6673.)

11. Juror No. 8 (200061224)

Juror No. 8 worked as a correctional officer. (16 RT 3849.) Juror No. 8 had read one article in the newspaper about the case when it first occurred in 1997. (16 RT 3852.) He saw another article in the newspaper after jury selection began but once he realized it was about this case he stopped reading it. (16 RT 3852.) Juror No. 8 understood that anything he read in the paper was not to be considered as evidence in the case and should not be considered at trial. (16 RT 3854-3855.)

Juror No. 8 stated on his juror questionnaire that he did not think that LWOP was enforced because of the appellate system. (16 RT 3855.) He explained that he had worked for the Department of Corrections for 15 years and that in his experience he had not seen many prisoners with LWOP sentences which made him assume either they died or they were released from prison. (16 RT 38555-3856.) Juror No. 8 assured the court that he could set his assumptions aside and not let them influence him as a juror in the case. (16 RT 3856.) Juror No. 8 said he could assume that whatever penalty was imposed by the jury would be carried out whether it be LWOP or death. (16 RT 3857.)

Juror No. 8 said he could consider LWOP or death as a possible punishment and that he would be willing to decide the penalty based on the circumstances in mitigation and aggravation. (16 RT 3858; 3863.) He was willing to consider problems that appellant may have had as a child in the penalty phase. (16 RT 3863.) He stated that he would be inclined to vote for death if the murder was intentional and the defendant was "lying in wait." (16 RT 3864.) Upon further questioning, Juror No. 8 agreed that it would be improper to decide the penalty before hearing all of the evidence and he was certain he could be fair. (16 RT 3867.) He agreed that

appellant was presumed innocent until proven guilty. (16 RT 3865.) The trial court denied appellant's challenge for cause. (16 RT 3865-3867.)

The trial court did not abuse its discretion in denying appellant's challenge for cause as to Juror No. 8. Juror No. 8 unequivocally stated that he could be fair, set aside any preformed opinions and decide the case on the evidence presented in court. He stated he would consider either penalty and agreed that it would be improper to decide the penalty prior to hearing aggravating or mitigating evidence. The record supports the trial court's ruling denying the challenge for cause.

12. Juror No. 10 (200343496)

Juror No. 10 recognized several names on the witness list. (16 RT 3882.) She understood that as a juror it was her duty to disregard her prior knowledge of witnesses and to evaluate all of the witnesses using the same standard. (16 RT 3882.)

Juror No. 10 stated that she could consider either death or LWOP as a possible penalty, and that she would be open-minded to considering both aggravating and mitigating factors before determining the penalty. (16 RT 3883.) She would hold the prosecution to its burden of proving appellant guilty beyond a reasonable doubt. (16 RT 3884.) Juror No. 10 was a member of the Catholic church and aware of the church's stance against the death penalty, however, that was not her personal position and for her, "It just depends on the case." (16 RT 3886.)

Appellant's counsel challenged Juror No. 10 for cause. The People joined. (16 RT 3888.) The trial court denied the challenges. (16 RT 3888.)

Based on Juror No. 10's responses to the juror questionnaire and jury voir dire, the trial court was well within its discretion to deny the challenge for cause. Juror No. 10 was unequivocal in her responses, and consistently stated that she could be fair and that she would decide appellant's guilt and

penalty based on the evidence presented at trial. The fact that both the People and appellant challenged her for cause does not change this result because the trial court concluded that Juror No. 10 could be fair and impartial. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 668-669 [A trial court is not compelled to accept the stipulation of the parties to excuse a potential juror for cause if it believes the juror is qualified to serve].)

13. Charles Julian (Prospective Juror No. 200206127)

Mr. Julian had heard of the case from the local news media, knew that the victim's name was Yarbrough and that his body was located in Arvin, but he did not know any specifics about the case and did not recall hearing anything about appellant. (17 RT 4155.) Mr. Julian stated he could set aside what he heard in the media and decide the case only on the evidence presented in court. (17 RT 4156.)

Mr. Julian was open to either possible penalty if appellant was found guilty. (17 RT 4160.) He stated that he thought death was the appropriate penalty for a first degree murder committed during the course of a kidnapping. (17 RT 4161.) However, when asked if he thought LWOP was not appropriate under those circumstances, Mr. Julian explained that he could not give a definitive answer because he does not know "the dealings of the case." He thought LWOP could be appropriate depending on the case. (17 RT 4164-4166.)

Mr. Julian's son had been released recently from prison following a parole violation due to drugs. (17 RT 4169.) Nothing about his son's incarceration would affect his ability to be fair and impartial. (17 RT 4169-4170.)

Appellant's counsel challenged him for cause and the People joined in the challenge. (17 RT 4171-4172.) The trial court denied the challenge stating,

> I don't find good cause to excuse this juror, either because of his son's drug situation, or the fact that he's a recovering alcoholic or the other answers he's given. I'm satisfied he can fairly perform the duties we've requested that he perform.

(17 RT 4172-4173.)

Based on Mr. Julian's responses to the jury questionnaire and jury voir dire that he would only consider the evidence and was open to either penalty, the trial court did not abuse its discretion in denying appellant's challenge for cause. Moreover, appellant cannot establish prejudice because he used a peremptory challenge to excuse Mr. Julian. (28 RT 6725.)

14. Juror No. 7 (200199345)

Juror No. 7 had read about the case in the newspaper and heard about it on the news but had not discussed the case with others. (17 RT 4194.) She knew that a high school boy had been shot and killed in an orchard in Lamont or Arvin. She heard that someone bought paint at Wal-Mart in East Hills to paint the victim's truck after the murder. (17 RT 4195-4196.) She was aware that after the victim's death, his brother took over as homecoming king. (17 RT 4197.) Based on what she had read and heard about the case, she had not formed any opinions about the case and she had no difficulty setting aside what she had heard. (17 RT 4197-4199.)

Juror No. 7 stated she would consider both LWOP and death as possible penalties and she would consider both aggravating and mitigating factors. (17 RT 4199-4200, 4202-4204.) Appellant's challenge for cause was denied. (17 RT 4202.)

Juror No. 7 gave straightforward, unequivocal answers in both her questionnaire and on voir dire which demonstrated that she could be a fair and impartial juror, and that she would disregard what she had heard about the case outside of the courtroom. Appellant has failed to cite to anything

in the record demonstrating that Juror No. 7 had any type of bias that would disqualify her from the jury. Appellant's attempt to argue that Juror No. 7 was "upset" when she discussed the victim's brother taking over as homecoming king does not change this result. The only thing indicating she was upset was appellant counsel's question which began, "I saw you got upset . . ." (17 RT 4200.) However, her response to his questions was that she could listen to the evidence despite what she had heard about the case. (17 RT 4200.) Nothing else indicates that the juror had any difficulty answering the questions, that she became overly emotional in her responses, or had prejudged the case. In fact, the record demonstrates she answered the questions coherently and intelligently without emotional outbursts. Even if she had been upset, that would not disqualify her as a juror. Jurors certainly have emotions and are not automatically disqualified for expressing them at times. We cannot ask jurors to be cold as stone as they listen to and recall facts that would naturally evoke an emotional response. The trial court did not abuse its discretion in denying the challenge for cause.

Appellant also takes issue with the fact that the trial court sustained the prosecution's objection to appellant's question asking the juror to assume, "it was a first degree accidental murder during a kidnapping or carjacking." (17 RT 4202-4203.) The trial court explained it sustained the objection because the question was confusing and

> creates too many potentials to try to get into the specifics of the case. I don't think it's necessary to explore their biases or prejudices to use that kind of scenario.

(17 RT 4205-4206.) The trial court noted that counsel had been exploring the same topics by asking jurors if they were open to the possibility that the murder was an accident or self-defense, and that counsel could continue to ask such questions. (17 RT 4207.)

This Court has explained that voir dire in death penalty cases must be balanced: it needs to be specific enough that the court and counsel can determine whether the jurors' views of the death penalty would prevent them from being fair and impartial, but it should not be so specific that it requires a juror to prejudge the penalty issue based on a summary of the evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 990-991 [trial court properly precluded counsel from asking whether a juror would impose the death penalty based on a detailed account of the facts].)

The trial court did not preclude appellant's counsel from asking this juror and other prospective jurors whether they could consider the possibility that the murder was an accident. The trial court properly sustained the objection and did not prevent appellant's counsel from exploring this topic with jurors.

15. Jane McKee (Prospective Juror No. 200222276)

Appellant's claim that the trial court erred in denying his challenge for cause fails to discuss with any detail why this decision was erroneous. His claim is conclusory and unsupported by any legal analysis. As such, the claims fails. (*People v. Stanley* (1994) 10 Cal.4th 764, 793; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Assuming the claim does not fail for being conclusory, it lacks merit. Ms. McKee vaguely recalled the names in the case from the media but could not recall any details of the case. (17 RT 4212.) She would only decide the case based on the evidence presented in court and she had no preconceived ideas about the case. (17 RT 4212.)

Ms. McKee had some "trepidation" about imposing the death penalty because of her moral beliefs. (17 RT 4218-4219.) But she believed in the justice system and could be impartial. (17 RT 4219-4220.) She would consider both death and LWOP as penalties and would decide the guilt and penalty based on the evidence presented in court. (17 RT 4221-4223.)

Appellant's challenge for cause was denied. (17 RT 4231.) Appellant used a peremptory challenge to excuse Ms. McKee from the jury. (28 RT 6665.)

The trial court did not abuse its discretion in denying appellant's challenge for cause. Ms. McKee's stated she could keep an open mind at both the guilt and penalty phases of the trial. Although she had some "trepidation" regarding the death penalty, she ultimately assured the trial court that she could impose either penalty based on the evidence presented and the law given. Appellant has not argued why this juror should have been excused for cause, and respondent submits the trial court was well within its discretion in denying the challenge.

16. Donna Wilson (Prospective Juror No. 200190765)

Ms. Wilson stated on her juror questionnaire that she believed street gangs were violent and bad for society and that it may prevent her from being a fair and impartial juror. (17 RT 4263.) During voir dire the trial court inquired if she could set aside her views regarding street gangs and decide appellant's guilt based on the elements of the crimes charged despite his possible association with, or membership in, a street gang. (17 RT 4263-42666.) Ms. Wilson affirmed that she would be able to set aside her personal opinions on street gangs when determining appellant's guilt and punishment. (17 RT 4266-4267, 4276.) Ms. Wilson would consider LWOP or death as possible punishments if appellant was found guilty of first degree murder. (17 RT 4274-4275.)

Ms. Wilson had heard about the case though the news media but could not recall anything specifically, except that someone was shot. (17 RT 4269.) She would be able to set aside anything she heard in the media about the case and decide the case on the evidence presented in court. (17 RT 4269.)

Ms. Wilson noted on her juror questionnaire that she would give greater weight to the testimony of a police officer. (11 JQ 3257.) On voir

dire Ms. Wilson stated that she could keep an open mind and decide how much weight to give to each witness based on their testimony, demeanor and credibility. She indicated she would not automatically give a law enforcement officer's testimony more weight. (17 RT 4277-4278.) Appellant's challenge for cause was denied. (17 RT 4278.) Appellant used a peremptory challenge to excuse her from the jury. (28 RT 6728.)

Appellant argues that Ms. Wilson "was clear" that she would give greater weight to an officer's testimony. (AOB 171.) While Ms. Wilson did state this on her juror questionnaire, she later explained on voir dire that she could follow the law and judge witnesses based on their testimony and demeanor on the stand, and she stated that she would not automatically give a law enforcement officer's testimony more weight simply because he was an officer. Based on her responses during jury voir dire, the trial court did not abuse its discretion in denying the challenge for cause because Ms. Wilson indicated she could be fair and impartial.

17. Felix Rodriguez (Prospective Juror No. 200161953)

Appellant's claim that the trial court erred in denying his challenge for cause as to Mr. Rodriguez, fails to discuss with any detail why this decision was erroneous. His claim is conclusory and unsupported by any legal analysis. As such, the claims fails. (*People v. Stanley* (1994) 10 Cal.4th 764, 793; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Assuming the claim does not fail for being conclusory, it lacks merit. Mr. Rodriguez had heard about the case through television broadcasts and the newspaper. (RT 4442.) He did not recall the specifics of the case. (19 RT 4442, 4452.) He assured the trial court that he could set aside anything he heard about the case and only consider the evidence presented in court. (19 RT 4442-4443.) Mr. Rodriguez would consider death or LWOP as possible penalties if appellant was found guilty. (19 RT 4443-4445.) Mr. Rodriguez's brother-in-law was a law enforcement officer but that would

not affect his ability to be fair and impartial. (19 RT 4450.) The trial court denied appellant's challenge for cause. (19 RT 4452.) The People used a peremptory challenge to excuse Mr. Rodriguez from the jury. (28 RT 6614.)

Appellant makes no argument as to how the trial court abused its discretion in denying his challenge for cause or how he could have been prejudiced since the People used a peremptory challenge to excuse him from the jury. As such, his claim as to Mr. Rodriguez fails.

18. Betty Hallum (Prospective Juror No. 200158112)

Ms. Hallum's husband went to high school in Arvin and her brother-in-law still lived there. (19 RT 4510.) Her brother-in-law knew the Yarbrough family and he had told her that the victim was taken from his car and shot execution style. (19 RT 4511-4512.) She did not know the Yarbrough family. (19 RT 4511.) She spoke to her brother-in-law about the case when it first happened in 1997 but had not spoken to him about the case since. (19 RT 4516-4517.) There was nothing about her brother-in-law's relationship with the Yarbrough family that would affect her ability to be fair and impartial. (19 RT 4517-4518.) She assured the court she could set aside any information she had received about the case prior to trial and decide the case only on the evidence presented in court. (19 RT 4518.) Appellant's challenge for cause was denied. (19 RT 4528.) The People used a peremptory challenge to excuse Ms. Hallum from the jury. (28 RT 6699.)

The trial court properly exercised its discretion in denying appellant's challenge for cause. Ms. Hallum indicated that she could set aside what she had heard about the case and decide the case based on the evidence presented in the courtroom. She was forthright in her responses and explained that nothing her brother-in-law had told her would influence her. Moreover, appellant has failed to show prejudice since Ms. Hallum was

dismissed from the jury when the People exercised a peremptory challenge. Appellant was neither denied a peremptory challenge or denied a fair and impartial jury since she never sat as a juror in appellant's case.

19. Wayne Epperson (Prospective Juror No. 200207952)

Mr. Epperson stated during voir dire that he could keep an open mind as to the penalty in the case and would consider all of the evidence during both the guilt and penalty phases of the trial. (19 RT 4536-4537.) He would not decide the case until he had heard all of the evidence. (19 RT 4537.) He stated that a lot of tax dollars are spent on people sitting on death row but that his personal feelings about the use of tax dollars would not influence his decision in the case. (19 RT 4538-4539.) He assured appellant's counsel that he would give each side a fair trial in both the guilt and penalty phases of the trial. (19 RT 4540-4541.) Appellant's challenge for cause was denied. (19 RT 4541.) Appellant used a peremptory challenge to excuse Mr. Epperson from the jury. (28 RT 6622.)

The trial court properly exercised its discretion in denying appellant's challenge for cause. Mr. Epperson was unequivocal in his responses and assured both sides that he could be fair and impartial. Nothing in Mr. Epperson's responses indicated anything to the contrary. Assuming the trial court erred, there is no prejudice to appellant because Mr. Epperson never sat as a juror on the case.

20. Jess Reeder (Prospective Juror No. 200191213)

Mr. Reeder's children had mentioned the case to him, and told him that a high school athlete was killed. (19 RT 4547.) He believed his children had heard about the case in the media. (19 RT 4548.) He did not know any specifics about the case. (19 RT 4549.) He understood that he could only consider evidence presented in court and he had no doubt he could perform that duty. (19 RT 4550.) Mr. Reeder would keep an open

mind and consider the evidence in determining the guilt and penalty phases of trial. He had an open mind as to both penalties and would make a decision based on the evidence. (19 RT 4551-4552, 4555-4556.) Appellant's challenge for cause was denied by the trial court. (19 RT 4559-4560.) Appellant later used a peremptory challenge to excuse Mr. Reeder. (28 RT 6726-6727.)

The trial court did not abuse its discretion in denying appellant's challenge for cause. Mr. Reeder assured the trial court and counsel that he could be fair an impartial, and that he would consider both LWOP or death as possible penalties. He stated that he would base his decision on the evidence presented. Moreover, Mr. Reeder did not sit as a juror at appellant's trial so he cannot establish prejudice because he had a fair and impartial jury.

21. Alternate No. 2 (Juror No. 200116134)

Alternate No. 2 explained that in 1972 her ex-husband was shot and killed by his best friend when they were drinking. (19 RT 4594.) At the time of her ex-husband's death she did not have a relationship with him and they had been separated for several years. (19 RT 4595.) There was nothing about the experience involving her ex-husband that would influence her in this case. (19 RT 4598-4599.) Alternate No. 2 had an open mind and could consider LWOP or death as possible penalties if appellant was found guilty. (19 RT 4517-4518.)

Alternate No. 2 stated the only cases she could not "judge" were child abuse cases. (19 RT 4599.) She stated the age of the victim and his brother would not influence her in this case. (19 RT 4600.)

Alternate No. 2 recalled very little about the case from the media. (19 RT 4602.) She recalled hearing that the victim was very popular but could not recall any other facts except what was said in court. (19 RT 4602-

4603.) She could set aside what she heard about the case and decide the case based only on the evidence presented in court. (19 RT 4604.)

While alternate Juror No. 2 was filling out her juror questionnaire, one juror asked her about a question on the questionnaire. (19 RT 4610-4612.) She explained he was not asking for her opinion but was asking for clarification because he did not understand the questions. She referred him to the bailiff. (19 RT 4609-4610.)

Appellant's challenge for cause was denied. (19 RT 4619-4620.)

Based on alternate Juror No. 2's responses to the juror questionnaire and jury voir dire, the trial court was within its discretion to deny the challenge for cause. Alternate No. 2 was selected as an alternate but never actually sat as a juror on appellant's case. Thus, appellant cannot establish prejudice.

22. Sherry Williams (Prospective Juror No. 200106487)

Ms. Williams noted she was friends with Sergeant Glen Johnson's daughter. (20 RT 4735.) She had never met Sergeant Johnson. (20 RT 4736-4737.) Ms. Williams stated that her friendship with Sergeant Johnson's daughter would not affect her ability to give equal weight to the testimony of any witness, including Sergeant Johnson. (20 RT 4737.)

Ms. Williams was a correctional officer at Shafter community corrections facility. (20 RT 4738.) Ms. Williams initially stated that she would give greater weight to a police officer's testimony because they take an oath to serve the public and tell the truth. However, she could set aside this possible bias and evaluate a witness's credibility based on the same factors. (20 RT 4739-4740.)

Ms. Williams had never heard of the case. (20 RT 4740-4741.) She would consider death or LWOP as possible penalties if appellant was found

guilty. (20 RT 4747-4748.) Appellant's challenge for cause was denied. (20 RT 4752-4753.)

Several weeks after Ms. William's voir dire but before the jury was sworn, Ms. Williams informed the trial court that she had heard her fellow coworkers talking about the case. (28 RT 6627.) She heard a correctional officer say that appellant kidnapped Chad Yarbrough and shot him execution style in an orchard. (28 RT 6627-6628.) She also heard the correctional officer say that the case was old and that appellant was not in good health. (28 RT 6628.) She had heard different people talking about the case on three occasions when she was walking through the break room. (28 RT 6629-6630.) No one was talking directly to her about the case. (28 RT 6639.) Ms. Williams stated that nothing she heard would influence her if she were to be chosen as a juror in the case, and that she could set aside what she heard. (28 RT 6633.) She stated that if selected as a juror she would not be working so there would be no danger that she would be exposed to any outside information from her coworkers. (28 RT 6632.) Appellant made a second challenge for cause as to Ms. Williams. (28 RT 6640.) The trial court denied the challenge stating:

> [C]onsidering all evidence and circumstances, I'm going to deny the challenge for cause as to this juror. I'm satisfied, based upon my observation of her, her demeanor, all the other responses she gave the Court, including her prior responses, that she can be fair.

(28 RT 6645.)

The trial court did not abuse its discretion in denying both of appellant's challenges for cause. The trial court was in the best position to judge Ms. Williams's demeanor and credibility when she asserted she could be fair, that she would weigh the credibility of witnesses fairly and without giving greater weight to police officers, and that if the case were to go to the penalty phase she would consider either penalty. Even assuming error,

appellant cannot show prejudice because appellant used a peremptory challenge to dismiss Ms. Williams. (28 RT 6650.)

23. Betty Emms (Prospective Juror No. 200213509)

Ms. Emms heard about the case in the media. She had heard that the victim was taken in a pick-up to the "woods" and killed. She did not know the manner of death. (20 RT 4763-4764.) She did not recognize appellant or his name and stated, "I honestly don't pay attention to the news." (20 RT 4764.) She could set aside what she heard about the case, keep an open mind, and decide the case based upon the evidence presented in court. (20 RT 4765-4767, 4773-4774.)

She stated that she would "have to know all the circumstances" before she could determine the penalty. (20 RT 4770.) Appellant's challenge for cause was denied. (20 RT 4774.)

The trial court did not abuse its discretion in denying appellant's challenge for cause. Furthermore, appellant used a peremptory challenge to dismiss Ms. Emms from the jury. (28 RT 6672.)

24. Ernest Shaw (Prospective Juror No. 200167435)

Mr. Shaw noted on his juror questionnaire that the death penalty should be imposed in all cases where someone deliberately kills another person. (14 JQ 4167.) Later on the questionnaire, Mr. Shaw indicated he could set aside his personal opinions, consider the evidence and render a verdict based upon the law and evidence presented. (14 JQ 4169.) On voir dire Mr. Shaw stated that he was not leaning towards the death penalty and that he could keep an open mind if the there was a penalty phase to the trial. (20 RT 4777-4780.) He stated that he did not believe that the death penalty should be imposed in every case where someone deliberately takes another person's life. (20 RT 4782.) Mr. Shaw believed that a person who

committed an intentional murder could turn their life around stating, "Right people, right medicine, yes." (20 RT 4783.)

Finally, Mr. Shaw's father had been murdered in 1975, but he stated this would not affect his ability to be a fair and impartial juror in the case. (20 RT 4783-4784.)

Appellant's challenge for cause was denied. The trial court stated,

> Having considered the challenge, having considered all the circumstances, including the juror's demeanor, the Court's observations of his responses, I'm going to deny the challenge.

(20 RT 4787.)

The trial court did not abuse its discretion in denying the challenge for cause. Although some of Mr. Shaw's responses on the jury questionnaire conflicted with his answers during voir dire, he ultimately assured the trial court and counsel that he could keep an open mind and consider both penalties based on the evidence presented. The trial court specifically denied the challenge based on the juror's demeanor and responses. Even assuming error, appellant still does not prevail because appellant used a peremptory challenge to excuse Mr. Shaw. (20 RT 6683.)

25. Glen Kellerhals (Prospective Juror No. 200133204)

Mr. Kellerhals stated that he believed members of street gangs were accused of a lot of criminal activities. He had no personal experience with street gangs but had heard about them from the media. (20 RT 4828.) He stated that he would not convict or acquit appellant solely because of an allegation that a street gang may be involved. He stated he would decide the case based on the evidence presented. (20 RT 4829.) Mr. Kellerhals told the trial court that "we really can't take away 55 years of background" but "I would do the best I could." (20 RT 4829-4830.) The trial court asked Mr. Kellerhals if he could set aside feelings of bias, anger, and sympathy and guard against those types of emotions swaying his decision

in the case. Mr. Kellerhals stated that he "would have to try . . . to put those feelings and those things to the side, and do according to the letter of the law . . .." (20 RT 4830.) Ultimately, he stated that he would not have trouble setting aside his personal emotions and deciding the case based on the facts presented. (20 RT 4831-4832.)

Mr. Kellerhals stated during voir dire that he would give more credence to the testimony of a police officer. (20 RT 4835.) When the trial court explained that police officers should be judged in the same manner as other witnesses and that their testimony should not automatically be considered more credible because they are officers, Mr. Kellerhals stated he understood and that although it would be "tough," he could consider the testimony of police officers using the same standard as any other witnesses. (20 RT 4836-4837.) Mr. Kellerhals stated that he may have "some problems" accepting that each witness's testimony should be considered equally credible. (20 RT 4848.) He said he could guard against his bias by "keeping the concept in mind." (20 RT 4838.) He could conceive of a police officer being dishonest or having an incorrect memory of an event. (20 RT 4838-4839.) Ultimately, he thought he could perform his duty as a juror and judge the credibility of witnesses equally. (20 RT 4839-4841.) When questioned by appellant's counsel, Mr. Kellerhals explained that he thought that most potential jurors would think that it was a "tough duty" to be a juror and to give all witnesses the same consideration. (20 RT 4846.) But again he stated he could listen and judge the credibility of witnesses based on their testimony. (20 RT 4858.)

If the trial proceeded to a penalty phase, Mr. Kellerhals stated he could keep an open mind, consider the evidence and consider both possible penalties. (20 RT 4845-4846.) He explained that he did not like the blanket statements in the questionnaire that related to LWOP or the death

penalty because "you have to look at the cases and the evidence, the circumstances." (20 RT 4857.)

Appellant challenged Mr. Kellerhals for cause. (20 RT 4859.) Appellant's counsel stated that Mr. Kellerhals had repeatedly stated that it would be difficult or impossible for him to be fair. (20 RT 4860.) Appellant's counsel went further and said the trial court was

> intimidating to this juror in the voice, in the range of voice volume. ... I think that this witness was finally intimidated by the Court into giving the so-called magic answers.

(20 RT 4860-4861.) The trial court responded that the court did not take the allegation lightly and had not been overly loud or sharp with Mr. Kellerhals. (20 RT 4861.) The prosecutor noted that he did not believe that the tone the court used with Mr. Kellerhals was any different than with any of the other jurors that day. The prosecutor did not think that Mr. Kellerhals was more nervous than any other juror during the trial court's voir dire. (20 RT 4865.) The prosecutor opposed the challenge and stated that in his opinion the trial court's questioning of Mr. Kellerhals was appropriate considering some of his ambiguous responses. (20 RT 4865-4866.) In denying the challenge for cause the trial court stated:

> Having considered all the arguments in connection with the challenge for cause, I'm going to specifically find, based on my own observation, I'm entitled to make my own record as to what I recall, that I did not noticeably change the volume of my voice, certainly don't recall doing anything in a manner to express some exasperation or frustration with the juror, and I appreciate that reasonable minds can differ sometimes, but I'll make a record that I have no memory or no recollection of my voice being different with this juror than any other juror.
>
> The record will reflect the nature of my questions, and whether they were repetitive, and the reasons for that.
>
> I'll deny the challenge for cause.

> I base that also not only on the juror's specific answer, but also on his demeanor, his body language, considering all the circumstances, I find that he can fairly and impartially perform his duties as a juror, and there's nothing about his demeanor or responses the would cause the Court to have a reasonable doubt as to whether he could fairly discharge his duties.

(20 RT 4867-4868.)

Appellant now complains that the trial court's denial of the challenge for cause "was based on an incorrect recall of what had transpired during voir dire, and its having improperly guided the prospective juror's responses." (AOB 195.) The trial court's denial of the challenge for cause was supported by the record. When a prospective juror gives conflicting or equivocal responses to a question, as Mr. Kellerhals did, the trial court's findings as to the juror's state of mind are entitled to deference and are binding if supported by substantial evidence. (*People v. Duenas* (2012) 55 Cal.4th 1, 10.) Mr. Kellerhals responded that he would favor a police officer's testimony, while at other times he stated he could set aside his personal views on police officers and judge each witness in the same manner. The trial court stated that based on Mr. Kellerhals' demeanor and responses, he could be a fair and impartial juror. Because Mr. Kellerhal gave responses to support that conclusion, the trial court's determination is supported by substantial evidence.

As to appellant's contention that the trial court guided the juror in his responses based on his questions during voir dire, his claim also fails. The trial court has broad discretion in deciding how to conduct voir dire. (*People v. Whalen* (2013) 56 Cal.4th 1, 29-30.) The manner in which a trial court conducts voir dire is not disturbed on appeal unless the voir dire "renders the trial fundamentally unfair." (*Id.* at pp. 30-31 citing *People v. Carter* (2005) 36 Cal.4th 1214, 1250.)

Here, the trial court's questioning was aimed at determining whether Mr. Kellerhals' first statement regarding his ability to judge an officer's testimony was a firm conviction or a preconceived notion that could be set aside with further questioning. Although the trial court asked leading questions, Mr. Kellerhals explained multiple times that while he thought it would be "tough" to be a juror, he believed he could perform his duty as a juror. The trial court's voir dire tested and clarified his responses that were inconsistent or confusing, and did not "guide" his responses as appellant contends. (See *People v. Mills* (2010) 48 Cal.4th 158, 190 [use of leading questions appropriate to rehabilitate "'death-leaning' jurors. ..."]) As such, the trial court's ruling denying the challenge for cause was not an abuse of discretion. Furthermore, appellant has failed to establish prejudice because he used a peremptory challenge to excuse Mr. Kellerhal from the jury. (28 RT 6604.)

26. Juror No. 3 (200316337)

Juror No. 3 had heard of the case through the news and his wife. He did not recall details of the case but he recalled his wife telling him the victim was young and had been shot. (21 RT 5041-505044.) He had read in the newspaper that two people were suspects in the case and one had been apprehended. (21 RT 5043-5044.) He had not formed any opinion about the case and could set aside what he heard. (21 RT 5044-5045.) He would be open-minded to either LWOP or death at the penalty phase of the trial depending on the evidence presented. (21 RT 5048-5051.) Appellant's challenge for cause was denied. (21 RT 5062.)

The trial court did not abuse its discretion in denying the challenge for cause because Juror No. 3 stated he could be fair and impartial and would only consider the evidence presented in court. He was willing to consider LWOP or death at the penalty phase of trial.

Moreover, appellant has not cited anything in the record that would support his contention that the trial court erred by denying his challenge for cause. (*People v. Stanley, supra,* 10 Cal.4th at p. 793.)

27. Richard Holmes (Prospective Juror No. 2300318135)

Mr. Holmes had heard about the case from the newspaper and television broadcasts. He recalled that the victim was abducted, taken to a field, and shot. (21 RT 5069.) He did not recall appellant's name or face. (21 RT 5072.) Mr. Holmes stated that he could set aside what he had heard in the media and decide the case based on the evidence presented in court. (21 RT 5071, 5072-5073.) Appellant's challenge for cause was denied. (21 RT 5083-5084.)

The trial court properly exercised its discretion to deny the challenge for cause because Mr. Holmes stated he could be fair and impartial and only consider the evidence presented in court. In any event, appellant cannot demonstrate prejudice because the People used a peremptory challenge to excuse Mr. Holmes from the jury. (28 RT 6662-6663.)

28. Alternate Juror No. 5

Alternate Juror No. 5 had heard about the case from the media. He recalled that there was a carjacking where the victim's younger brother was in the car and that the victim's vehicle was later found burned or painted. He remembered that the victim had been shot and that one of the suspects was arrested in Texas (21 RT 5091, 5100.) He heard about this two to three years ago. (RT 5089-5090.)

Alternate Juror No. 5 could keep an open mind regarding either penalty if the case went to a penalty phase. (21 RT 5094.) When questioned by appellant's counsel and asked if death was the appropriate sentence for a "first degree deliberate murder in the course of a kidnapping or carjacking," Alternate Juror No. 5 responded, "not necessarily. It could

be life in prison." (21 RT 5104.) Appellant's counsel asked the identical questions again and again Alternate Juror No. 5 stated, "There can be either life in prison or death, under the circumstances, depending on what – I don't know the circumstances." (21 RT 5105.)

Appellant's challenge for cause was denied. (21 RT 5108.) In denying the challenge the court stated that it based its decision on the juror's demeanor and responses to the questions. (21 RT 5108.)

Alternate Juror No. 5 responses were unequivocal. He stated that he could be fair and impartial and decide the case based on the evidence presented in court. He was willing to consider both LWOP and death as possible penalties. The trial court properly exercised its discretion to deny the challenge for cause.

Appellant complains that the trial court did not allow him to ask Alternate Juror No. 5 questions about circumstances that would lead the juror to vote for something less than death if there was an intentional murder during a carjacking. (AOB 200.) This claim is meritless. Appellant's counsel asked the juror several times whether he would automatically vote for death if it was an intentional murder in the course of a carjacking and Alternate Juror No. 5 had stated "no" on at the least two occasions. The People objected to appellant's counsel asking what circumstances would lead the juror to vote for life without the possibility of parole instead of death because the juror did not know the facts of the case or what the law allowed him to consider as factors in mitigation or aggravation. The trial court properly sustained the objection, but did not prevent appellant's counsel from asking further questions to determine if this juror was death qualified. (21 RT 5104-5105.) (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 990-991 [trial court properly precluded counsel from asking whether a juror would impose the death penalty based on a detailed account of the facts].) When the prosecutor began his voir dire of

alternate Juror No. 5 the prosecutor asked him whether he would consider things like appellant's background and the juror responded, "yes." (21 RT 5106.) As a result, the trial court did not abuse its discretion in denying the challenge for cause.

Even assuming the trial court erred, any error was harmless because alternate Juror No. 5 never rendered a verdict in appellant's case.

29. Kimberley Lindgren (Prospective Juror No. 200351872)

Ms. Lindgren noted on her juror questionnaire that she had read about the case in the newspaper and heard about it on a television broadcast. (17 JQ 4911-4912.) On the jury questionnaire she stated that she recalled the content of what she had heard but that it would not affect her ability to be fair and impartial. (17 JQ 4912.) However, when questioned during voir dire, she stated she could not recall what she heard through the media about the case. (21 RT 5131.) Appellant's challenge for cause was denied. (21 RT 5145.)

Although Ms. Lindgren's answers on the questionnaire and voir dire differed, she stated in both she could be fair and impartial. Nothing in her responses indicated she was biased or unfair and appellant has made no argument to the contrary. As such, the trial court properly exercised its discretion in denying the challenge for cause. Furthermore, appellant used a peremptory challenge to dismiss Ms. Lindgren from the jury so appellant cannot establish prejudice from any potential error. (28 RT 6658.)

30. Juror No. 1 (No. 200151234)

Juror No. 1 stated that she would not automatically find a person guilty because a person possessed an unlicensed firearm despite her view that firearms should be registered. (22 RT 5161-5162.) Juror No. 1 had heard about the case through the local news media. She heard about it around the time of Chad Yarbrough's death. She could not recall details

because, "It was such a long time ago." (22 RT 5162.) The only thing she recalled was that the victim was shot and a suspect was caught in a different state. (22 RT 5163.) Appellant did not look familiar to her and she did not recall seeing his name or face in the media. (22 RT 5164.) She remembered that Chad Yarbrough played football for Arvin High School. (22 RT 5164.) She understood that what she heard about the case could not be considered in court. (22 RT 5165.) She assured the court she would decide the case based only on the evidence presented in court. (22 RT 5165, 5174.) If the case went to a penalty phase she would "like to hear the evidence and how it occurred" before she could state what penalty should apply. She was open-minded and would consider both LWOP and death. (22 RT 5171-5172.) Appellant's challenge for cause was denied. (22 RT 5174-5175.)

The trial court's ruling denying the challenge for cause was supported by substantial evidence. Juror No. 1 repeatedly stated that she could set aside what she heard about the case in the media and remain fair and impartial. She said that she would listen to the evidence and keep an open mind regarding the penalty. During the People's voir dire she stated she understood that the burden of proof was with the People and that if the People did not prove beyond a reasonable doubt that a murder was committed that she would have to find appellant not guilty. (22 RT 5172-5173.) Nothing in the record suggests that Juror No. 1 could not be a fair and impartial juror in this case. As such, the trial court's denial of the challenge for cause should be upheld.

31. Robert Murphy (Prospective Juror No. 200250180)

Mr. Murphy stated on his juror questionnaire that he would give greater weight to law enforcement officers. However, on voir dire he stated he could set aside this feeling and evaluate each witness in the same manner. (22 RT 5239-5240.) Mr. Murphy heard about this case right after

it occurred. He recalled the victim was a football player at Arvin High School, that the case involved a carjacking, and that they found the victim and his vehicle. (22 RT 5242.)

Mr. Murphy stated he could keep an open mind as to both penalties and consider both aggravating and mitigating evidence. (22 RT 5245-5246.) Mr. Murphy felt that life in prison and death were essentially the same sentence because people on death row were never executed. (22 RT 5248.) He stated he could set aside his personal view regarding the execution of prisoners on death row and assume that the death penalty would be enforced if the jury returned a verdict of death in this case. (22 RT 5250-5251, 5263-5266.) The trial court denied appellant's challenge for cause. (22 RT 5269.)

In *People v. Farnam* (2002) 28 Cal.4th 107, a prospective juror stated that in his opinion "all first degree murders should get the death penalty and nothing else." (*Id.* at p. 133.) Upon further questioning the prospective juror stated that he could set aside his personal opinions, consider the evidence presented and be open to both penalties. (*Id.* at pp. 133-134.) This Court upheld the trial court's denial of the defendant's challenge for cause. (*Id.* at p. 134.)

Here, Mr. Murphy expressed his personal view that the death penalty was not carried out in a swift manner in this state. Much like the juror in *Farnam,* Mr. Murphy stated that despite his personal feelings regarding the length of time it took to impose death upon a sentenced prisoner, he could still set his feelings aside and vote for either penalty. Thus, the trial court did not abuse its discretion in denying the challenge for cause.

Assuming the trial court erred, appellant cannot demonstrate prejudice. Mr. Murphy was excused for good cause later in voir dire. (28 RT 6551.)

32. Alternate Juror No. 1 (200263191)[22]

Alternate Juror No. 1 stated on his questionnaire that he would give greater weight to the testimony of a police officer. (22 RT 5286.) On voir dire he assured the trial court that he would evaluate each witness's testimony using the same standard and that he would not give greater weight to a police officer's testimony. (22 RT 5286-5289.)

Alternate Juror No. 1 had heard about the case through the local media. (22 RT 5289.) He recalled that the victim played football for Arvin High School, that he was murdered, his car was stolen and two people were later apprehended. (22 RT 5291.) Alternate Juror No. 1 understood that what he heard in the media was not evidence and that he could only consider the evidence presented in court when deciding the case. (22 RT 5294-5295.)

Alternate Juror No. 1 stated that if the trial went into a penalty phase he could keep an open mind and consider either penalty. (22 RT 5297-5302.) Appellant's challenge for cause was denied. (22 RT 5308.)

The trial court properly exercised its discretion in denying the challenge for cause. Although Alternate Juror No. 1 stated in his questionnaire that he would give more weight to an officer's testimony, he later stated in voir dire that he would judge an officer's testimony in the same manner as any other witness. Alternate Juror No. 1 stated he would

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[22] Some portions of the reporter's transcripts have Juror No. 200263191 listed as Juror No. 20025863. This appears to be an error in the transcript.

consider both penalties, and could set aside anything he heard in the media. The trial court's ruling denying the challenge for cause should be upheld.

Furthermore, Alternate Juror No. 1 never rendered a verdict in appellant's case. He sat as an alternate but was not one of the twelve jurors who rendered a verdict. Thus, appellant has failed to demonstrate prejudice.

33. Gary Moreno (Prospective Juror No. 200325950)

Mr. Moreno heard about the case through the media. He recalled that it involved the victim being kidnapped, bound and killed. (23 RT 5336.) Mr. Moreno could set aside what he heard about this case and decide the case based upon the evidence presented in court. (23 RT 5338.) Mr. Moreno had met several of the witnesses but did not have relationships with them and indicated he could evaluate those witnesses in the same manner as any other witness in the case. (23 RT 5339-5441.)

Mr. Moreno initially thought that the law required him to vote for death if it was a premeditated first degree murder, but said he could keep an open mind and consider both penalties. (23 RT 5347-5349.) He stated he would consider mitigating factors such as appellant's background and psychological testimony. (23 RT 5349-5350.)

Appellant's challenge for cause was denied. The trial court stated, "I am considering all the circumstances including the juror's demeanor and my observation of his responses." (23 RT 5363.)

Substantial evidence supports the trial court's denial of the challenge for cause. It was clear that Mr. Moreno's misunderstanding of the law was the basis of his answer that death was the appropriate penalty in a first degree murder. Once it was explained to Mr. Moreno that death was not automatic he unequivocally stated that he would follow the law and consider the facts of the case. He admitted his misunderstanding of the law and stated he could consider either LWOP or death as possible penalties in

a premeditated first degree murder. The trial court properly exercised its discretion.

Moreover, appellant cannot show prejudice because appellant excused Mr. Moreno using a peremptory challenge. (28 RT 6608.)

34. Dianne Krotter (Prospective Juror No. 200266599)

Ms. Krotter had not heard of the case prior to her jury service. (23 RT 5370.) She expressed her opinion that if someone took another human's life that they should receive the death penalty. (23 RT 5374.) However, when the court explained the law and told her that a jury must consider both LWOP or death as possible penalties after they hear the evidence, Ms. Krotter agreed she would be able to do that but explained, "I have not heard any evidence." (23 RT 5373.) She assured the court that she could set aside her personal views of the death penalty, follow the law, and render a verdict based upon the evidence and circumstances presented in court. (23 RT 5378.) In denying appellant's challenge for cause the trial court stated,

> I'm going to deny the challenge for cause, and I'm going to base that not only on the juror's responses but also on her demeanor and my observations of her in the court.

(23 RT 5391.)

The trial court did not abuse its discretion in denying the challenge for cause because Ms. Krotter stated she could set aside her personal views and consider both LWOP or death as possible penalties. (See *People v. Farnam*, *supra*, 28 Cal.4th at pp. 133-134.) Furthermore, appellant cannot establish prejudice because he used a peremptory challenge to excuse Ms. Krotter from the jury. (28 RT 6664.)

35. Lee Woolfolk (Prospective Juror No. 200247847)

Mr. Woolfolk had heard about the case in the media. He heard that the victim had been taken to a field and shot. He recalled that there were two suspects involved, that they fled out of state after the crime, and that

one was found out of state. (23 RT 5400.) Mr. Woolfolk could set aside what he heard in the media and decide the case based on the evidence presented in court. (23 RT 5401-5402.) In Mr. Woolfolk's questionnaire, he had noted that death was appropriate for most murders depending on the crime. (19 JQ 5428-5429.) On voir dire, he clearly stated that he would consider the evidence and that he had no personal opinion as to what the punishment should be in this case. (23 RT 5406.) He stated that he could vote for LWOP if he deemed it more appropriate than death after listening to all of the evidence at the penalty phase of the trial. (23 RT 5406-5407.)

Mr. Woolfolk assured the court that he would consider evidence presented during the penalty phase of the trial and that he would consider both LWOP and death as possible penalties. (23 RT 5403-5404.) Appellant's challenge for cause was denied. (23 RT 5408.)

Nothing in Mr. Woolfolk's responses indicated that he would be biased or unfair as a juror. To the extent appellant is arguing that Mr. Woolfolk's responses in the jury questionnaire should have excluded him as a juror, his claim fails. (AOB 213.) The trial court properly exercised its discretion in denying the challenge for cause. Even assuming error, appellant cannot demonstrate prejudice because appellant used a peremptory challenge to excuse Mr. Woolfolk from the jury. (23 RT 6674.)

36. Teresa Gonzales (Prospective Juror No. 200245105)

Ms. Gonzales had heard of the case from television broadcasts and newspaper articles. She recalled that a truck was involved, two people were suspects, and one suspect was captured out of state. (23 RT 5434.) Ms. Gonzales could set aside anything she heard about the case and decide the case only on the evidence presented at trial. (23 RT 5439.) Ms. Gonzales indicated that she could keep an open mind and listen to the

evidence in the penalty phase. She could vote for LWOP or death depending on the evidence presented. (23 RT 5449-5450.) Appellant's challenge for cause was denied. (23 RT 5451.)

The record establishes that the trial court was within its discretion when it denied the challenge for cause. In any event, the People used a peremptory challenge to excuse Ms. Gonzales, so there could be no prejudice to appellant. (28 RT 6624.)

37. Jeffrey Hart (Prospective Juror No. 200290059)

Mr. Hart recalled hearing in the media that the victim was taken in his truck to an orchard and shot. (23 RT 5454.) He remember hearing that it was an accident and that the suspects did not intend to kill the victim. He thought that one of the suspects went to Mexico. (23 RT 5454-5455.) Mr. Hart understood that what he heard in the media was not evidence and that he could decide this case based only on the evidence presented in court. (23 RT 5456.)

Mr. Hart stated that if there was a penalty phase to the trial he could keep an open mind, consider the evidence and penalties. (23 RT 5459-5460.) He did not believe that he would lean towards death or LWOP prior to hearing the evidence. (23 RT 5460.) Appellant's challenge for cause was denied. (23 RT 5465.)

The trial court properly exercised its discretion in denying the challenge for cause. Nothing in the record indicated that this juror was biased or unfair. His answer were unequivocal and straightforward. He stated he could consider both penalties and had no preconceived opinion as to what the verdict should be in the case. Furthermore, appellant dismissed Mr. Hart using a peremptory challenge, so he cannot establish prejudice. (28 RT 6614.)

38. Juror No. 2 (200336734)

Juror No. 2 had a brother who worked in the Sheriff's Department and a daughter who worked for child protective services. (23 RT 5546.) She had never discussed the case with her brother or any other person in law enforcement and nothing about her relationship with law enforcement personnel would affect her ability to be fair and impartial. (23 RT 5556-5557, 5561.) She had heard of the case in the media but could not recall the details. (23 RT 5547.) Juror No. 2 remembered hearing that the victim was a football player who was found murdered. (23 RT 5549.) She recalled a conversation between women expressing sympathy for the mother of Chad Yarbrough but could not recall where she heard the conversation. (23 RT 5547-5548.) Juror No. 2 was confident that she could set aside anything she heard or saw regarding this case and consider only the evidence presented in court. (23 RT 5552-5553.)

Juror No. 2 stated she could keep an open mind and consider the evidence if the case reached the penalty phase at trial. She did not have a tendency to lean towards LWOP or death if appellant was found guilty of first degree murder in connection with a kidnapping or carjacking. (23 RT 5554-5555.) Appellant's challenge for cause was denied. (23 RT 5562.)

The trial court properly exercised its discretion in denying appellant's challenge against Juror No. 2. Juror No. 2's responses demonstrated she was fair and impartial to both parties. Her responses were straightforward and unequivocal. Nothing in the record demonstrates that she had any bias towards appellant or the death penalty. As such, the trial court's denial of the challenge for cause should be upheld.

39. Jerry Franklin (Prospective Juror No. 200352346)

Mr. Franklin expressed a concern for street gangs and felt that law enforcement needed to take control of street gangs. (23 RT 5569-5570.)

He stated he could set aside his feelings about street gangs and not let them influence any decision he made as a juror in this case. (23 RT 5570-5571.)

Mr. Franklin had read several newspaper articles about the case but he could not recall the specifics. (23 RT 5573.) He also heard about the case on the radio. (23 RT 5573.) At his workplace people had discussed the case and he recalled speaking to his supervisor about the case. (23 RT 5574-5575.) He remembered a newspaper article stating that the victim was shot with a gun and found in a field. He thought that the victim's car was "hijacked." (23 RT 5576-5577.) He recalled that there were two Hispanic suspects. Appellant's named seemed familiar but he did not recognize him. (23 RT 5577-5578.) Mr. Franklin could set aside what he heard about the case and decide the case based solely on the evidence presented in court. (23 RT 5579-5580.)

If the trial reached a penalty phase Mr. Franklin could keep an open mind, consider the evidence, and consider either LWOP or death as possible penalties. (23 RT 5582-5583, 5589-5590.) Appellant's challenge for cause was denied. (23 RT 5592-5593.)

Appellant has not cited to anything in the record that indicates that Mr. Franklin was biased or unfair to either party. Rather, Mr. Franklin clearly stated that he was willing to set aside what he had previously heard regarding the case and would remain open-minded to either possible penalty if appellant was found guilty of first degree murder. The trial court properly exercised its discretion in denying appellant's challenge for cause. Even assuming error, appellant cannot demonstrate prejudice because appellant used a peremptory challenge to excuse Mr. Franklin from the jury. (28 RT 6608.)

40. Edward Caudill (Prospective Juror No. 200252753)

Mr. Caudill recalled his wife had stated that the victim played football for Arvin and that he was carjacked. (23 RT 5595-5596.) He did not know

any other details about the case. (23 RT 5597-5598.) He said he could set aside anything he heard about the case and decide it based on the evidence presented in court. (23 RT 5598-5599.)

Mr. Caudill could keep an open mind if the case reached the penalty phase at trial. He could consider either LWOP or death as possible penalties. (23 RT 5600-5601, 5603, 5605-5606.) Mr. Caudill had worked as a deputy from 1981 to 1984 at a minimum security facility in Los Angeles County. Nothing about that experience would affect his ability be fair and impartial in this case. (23 RT 5607-5608.) Appellant's challenge for cause was denied. (23 RT 5608-5609.)

The record supports the trial court's finding that Mr. Caudill could be a fair and impartial juror in this case. Any statements in his juror questionnaire that arguably were pro-death were clarified on voir dire. (AOB 221; 23 RT 5600-5606.) He plainly stated that he could consider the evidence at the penalty phase of the trial, and that he would be open-minded to either possible penalty. As such, appellant's claim fails. Moreover, appellant used a peremptory challenge to excuse Mr. Caudill from the jury so he cannot demonstrate prejudice. (28 RT 6625.)

41. Michael Cera (Prospective Juror No. 200318903)

Mr. Cera heard about the case in the media. He recalled that the victim was a popular football player and that it took some time to catch the suspects. He could not recall any other details about the case. (24 RT 5631-5632.) He had not come to any conclusions regarding the case based on what he read in the newspaper. He was willing to hear evidence from both sides regarding appellant's guilt. (24 RT 5637.) Mr. Cera indicated he could be open-minded to either LWOP or death and weigh factors in mitigation and aggravation before reaching a decision. (24 RT 5635-5639.) Appellant's challenge for cause was denied. (24 RT 5642.)

Nothing in the record supports appellant's claim that the trial court abused its discretion in denying the challenge for cause as to Mr. Cera. All of his answers indicated he could be fair and impartial. Moreover, appellant fails to argue how Mr. Cera was biased or why his challenge should have been granted. (*People v. Stanley, supra,* 10 Cal.4th at p. 793.)

Furthermore, Mr. Cera never rendered a verdict in this case because appellant exercised a peremptory challenge against him. (28 RT 6607.) Thus, even assuming error, appellant cannot establish prejudice.

42. Juror No. 4 (200118551)

Juror No. 4 was dean of students for Highland High School. (19 RT 4410-4411.) She had heard about the case on the news and had heard about the memorial for Yarbrough through her workplace. (19 RT 4411.) Other than discussions about the memorial she never had any discussion about the case. She did not read the newspaper and had little knowledge of the case. (19 RT 4412-4413.) She assured the court that she could set aside any opinions she had formed and decide the case based on the evidence presented in court. (19 RT 4413-4414.)

Juror No. 4 would consider both mitigating and aggravating circumstances if the trial reached the penalty phase. (19 RT 4414-4415.) She could keep an open mind and decide which penalty was appropriate based on the evidence. (19 RT 4415.) Appellant's challenge for cause was denied. (19 RT 4419.)

Appellant fails to demonstrate any prejudice or bias on the part of Juror No. 4. In fact, appellant fails to argue how Juror No. 4 was actually biased against him or why his challenge for cause should have been granted. (*People v. Stanley, supra,* 10 Cal.4th at p. 793.) Her answers were unbiased, she knew very little about the case, and she was open-minded to both penalties. As such, the trial court did not abuse its discretion in denying the challenge for cause.

43. Juror No. 6 (200301163)

Juror No. 6 worked for the Department of Corrections as a correctional counselor. (24 RT 5705-5707.) She stated on her juror questionnaire that she felt street gangs were generally crime oriented. (24 RT 5705-5706.) She did not have any special knowledge about street gangs in Lamont or Arvin. (24 RT 5707-5708.) She had been in contact with gang members in the prison systems and as a parole agent. She felt that gang members could leave a street gang and turn their lives around. (24 RT 5710.) Juror No. 6 could set aside any prior knowledge or opinions she had regarding street gangs and not let it influence her in her decision making in this case. (24 RT 5711.)

Juror No. 6 had heard about the case from news broadcasts. (24 RT 5718.) She had heard Yarbrough was killed, that his body was found, and that arrests were made in the case. (24 RT 5718.) She could set aside what she had heard about the case and decide the case on the evidence presented in court. (24 RT 5720-5723.)

Juror No. 6 had an open mind and would consider all of the evidence in the guilt and penalty phases of the trial before rendering a verdict. (24 RT 5724-5725, 5728-5730.) Appellant's challenge for cause was denied. (24 RT 5735.)

The trial court properly exercised its discretion in denying appellant's challenge for cause. Appellant fails to demonstrate any bias on the part of Juror No.6 or show how her responses on voir dire establish that the trial court's ruling was wholly outside the bounds of reason. The trial court's decision to deny the challenge for cause should not be disturbed on appeal.

44. David Bohanon (Prospective Juror No. 200297577)

Mr. Bohanon noted on his juror questionnaire that he would give greater weight to a police officer's testimony. However, on voir dire he

assured the trial court that he could set aside this opinion and judge police officers in the same manner he would any other witnesses. (24 RT 5769-5772.)

Mr. Bohanon had no prior knowledge of the case. (24 RT 5772.) He could consider either penalty – LWOP or death – if the trial reached a penalty phase. (24 RT 5774-5775.) Mr. Bohanon initially stated he would not consider appellant's childhood as a factor in mitigation. (24 RT 5786.) However, when the trial court explained that would be a factor the jury could consider in the penalty phase, he stated he would consider it as a factor in deciding what penalty was appropriate. (24 RT 5791-5792.)

Appellant challenged Mr. Bohanon for cause. Appellant argued that Mr. Bohanon's answers regarding whether he would consider appellant's childhood as a factor in mitigation were inconsistent. (24 RT 5779.) The People argued that Mr. Bohanon was qualified to sit as a juror because he stated he would follow the law and consider appellant's childhood as a factor in mitigation if instructed to do so. (24 RT 5800-5801.)

In denying the challenge for cause the trial court stated:

> I'm satisfied, based upon my entire review of the juror's responses, as well as his demeanor in the courtroom, that this juror will have the ability to perform his duties, that his views on circumstances in mitigation would not prevent him or substantially impair him from performing his duties as a juror . . .

(24 RT 5801-5802.)

The trial court properly exercised its discretion in denying appellant's challenge for cause. Although some of Mr. Bohanon's responses were equivocal regarding his consideration of factors in mitigation, the trial court was in the best position to evaluate his responses and the trial court's determination as to Mr. Bohanon's state of mind based on those equivocal responses is binding on this Court. (*People v. Harris, supra*, 37 Cal.4th at

p. 329.) Moreover, appellant later used a peremptory challenge to excuse Mr. Bohanon from the jury. (28 RT 6658-6659.)

45. Charles West (Prospective Juror No. 200221567)

Prior to voir dire the prosecutor informed the trial court and appellant's counsel that he had contact with Mr. West in the past when Mr. West was a police officer at Bakersfield College. The prosecutor did not think that Mr. West had any recollection of him based on his questionnaire. (25 RT 5866.) On voir dire Mr. West stated that he did not know the prosecutor. (25 RT 5956, 5965-5966.)

Mr. West's two sons had both been defendants in criminal cases in Kern County. One of his sons was incarcerated at the time of jury selection. (25 RT 5936-5937.) Nothing about his sons' cases would affect his ability to be fair and impartial in this case. (25 RT 5947-5948.)

Mr. West initially stated on his questionnaire that he felt the appropriate punishment for murder was, "an eye for an eye." (25 RT 5960.) During voir dire he explained that he thought the appropriate punishment would be life without the possibility of parole or death depending on the evidence at the penalty phase of the trial. (25 RT 5961-5965.) He explained,

> I would consider both of the penalties in which the Judge has described. I think it should be looked – both should be looked at in order to be fair to the person that is being prosecuted.

(25 RT 5965.) Appellant's challenge for cause was denied. (25 RT 5967.)

The trial court properly exercised its discretion in denying the challenge for cause. Although Mr. West stated in the juror questionnaire that he believed in an "eye for an eye," he stated multiple times during voir dire that he would not automatically vote for death and he would consider both penalties, and he did not hold a fixed opinion in favor of the death penalty. Nor did he demonstrate any bias based on his sons' cases.

Moreover, appellant cannot demonstrate prejudice because he excused Mr. West using a peremptory challenge. (28 RT 6697.)

46. Lorraine Kilby (Prospective Juror No. 2000013345)

In 1997 Ms. Kilby had heard about the case on the news. She recalled that the victim was a football player who had been killed but she could not recall the details. (25 RT 6011-6012.) She assured the court she could set aside anything she heard on the news and evaluate the case based on the evidence presented in court. (25 RT 6013.)

If appellant was found guilty, Ms. Kilby stated she could keep an open mind and return a verdict of LWOP or death depending on the evidence presented. (25 RT 6014.) Appellant's challenge for cause was denied. (25 RT 6024.)

Appellant fails to demonstrate any bias on the part of Ms. Kilby or to show how her responses on voir dire establish that the trial court's ruling was wholly outside the bounds of reason. Nothing in Ms. Kilby's responses indicated that she would be biased towards either party. She stated she could keep an open mind regarding the penalty and disregard anything she had previously heard about the case. Furthermore, appellant cannot demonstrate prejudice because Ms. Kilby was excused from the jury when appellant used a peremptory challenge to dismiss her. (28 RT 6624.)

47. Josie Pinkston (Prospective Juror No. 200366521)

Ms. Pinkston had a friend who was a teacher in Arvin. She recalled that there was "some mention" of the case with her friend. (25 RT 6042.) She could not recall hearing details of the case. (25 RT 6043.) She stated she could set aside anything she heard about the case and decide the case based on the facts presented. (25 RT 6046.)

Ms. Pinkston favored the death penalty stating she believed in the idea of an "eye for an eye and a tooth for a tooth." (25 RT 6048-6049.) She

went on to state that she could set aside her personal views and consider both LWOP and death as possible penalties. (25 RT 6051, 6055, 6057.) Appellant challenged Ms. Pinkston for cause. The People joined the challenge on different grounds. (25 RT 6068-6069.) The challenges were denied. (25 RT 6069.)

Appellant fails to demonstrate any bias on the part of Ms. Pinkston or show how her responses on voir dire establish that the trial court's ruling was wholly outside the bounds of reason. The trial court properly exercised its discretion in denying the challenge for cause as to Ms. Pinkston. Ms. Pinkston indicated she could be fair and impartial throughout her voir dire. Moreover, the People excused Ms. Pinkston from the jury using a peremptory challenge so appellant cannot establish prejudice from any potential error. (28 RT 6676-6677.)

48. Steven Turner (Prospective Juror No. 200282539)

Mr. Turner had heard that a football player from Arvin was killed but could not recall anything else about the case. (25 RT 6072.) Mr. Turner assured the trial court he would decide the case based only on the evidence presented in court. (25 RT 6073.)

If there was a penalty phase to the trial Mr. Turner would consider the evidence and keep an open mind as to the appropriate penalty. (25 RT 6075-6077.) Appellant's challenge for cause was denied. (25 RT 6084.)

Appellant fails to demonstrate any bias on the part of Mr. Turner or show how his responses on voir dire establish that the trial court's ruling was wholly outside the bounds of reason. The trial court properly exercised its discretion in denying appellant's challenge for cause. Mr. Turner unequivocally stated that he could be fair, set aside any preformed opinions and decide the case, including any possible penalty, on the evidence presented in court. Moreover, the People excused Ms. Turner from the jury

using a peremptory challenge so appellant cannot establish prejudice from any potential error. (28 RT 6610-6611.)

49. The Manner In Which the Trial Court Conducted Voir Dire Was Proper

Appellant argues that the manner in which the trial court conducted voir dire was improper. Specifically, he complains that the tone of the judge and leading questions asked by the trial court, lead to an unfair jury trial. (AOB 134-135, 194-195.) This claim is without merit.

The trial court properly exercised its discretion during voir dire. Although the trial court asked some leading question to prospective jurors, these questions were aimed at obtaining clear answers from jurors who were unfamiliar with the law and may have had difficulty articulating their views or opinions. (*People v. Whalen , supra*, 56 Cal.4th at p. 34 [upholding trial court's use of leading questions].) The trial court often asked leading question to confirm what prospective jurors had written on their questionnaires. (14 RT 3325-3326; 15 RT 3765-3766; 19 RT 4463-4466; 22 RT 5199-5203; 23 RT 5351; 25 RT 5871-5875.) Many of the leading questions were asked of jurors who gave equivocal responses, expressed a misunderstanding of the questionnaire or law, or needed clarification of a question asked during voir dire. (14 RT 3326-3327, 3587-3588; 15 RT 3574, 3578-3579; 13720-3721, 3726; 3773-3774; 16 RT 3846-3846, 3904-3905, 3919-3920; 17 RT 4308-4311; 20 RT 4836-4839; 21 RT 4930-4933.) The trial court asked leading questions to jurors who were both death-leaning and life-leaning. (15 RT 3738-3745; 16 RT 3897-3902, 3920-3925; 17 RT 4312-4313; 19 RT 4475; 21 RT 5031-5032; 25 RT 5877-5884, 5910-5911.)

The voir dire was aimed at determining prospective jurors views on the death penalty to assess if they would be death qualified in a capital case. The trial court explained to counsel that many of its questions for jurors

were intended to clarify responses in jurors' questionnaires and that the court was not attempting to suggest an answer to the jurors. (14 RT 3337-3338.) The trial court properly exercised its discretion because its questions were aimed at determining if jurors were qualified to sit on a capital jury and the trial court did not display any bias towards life-leaning or death-leaning jurors.

C. Assuming Arguendo That The Trial Court Abused Its Discretion, Any Error Was Harmless Because Appellant Fails to Establish That Any Of The Seated Jurors Were Biased

Even if the trial court erred in refusing to dismiss one of the 48 jurors for cause, appellant is not entitled to a reversal of his convictions since he cannot demonstrate he was denied an impartial jury.

Error in failing to excuse a juror for cause is not prejudicial where the defendant used all of its peremptories, but the jury actually picked was fairly composed. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 86-91; *People v. Yeoman, supra,* 31 Cal.4th at p. 114.) Where a prospective juror did not even serve on the defendant's jury, there is no merit to a claim that the trial court erred in failing to excuse the juror for cause, since the defendant could not possibly have suffered prejudice as a result of the trial court's refusal to excuse the juror. (*People v. Hinton, supra*, 37 Cal.4th at p. 860, fn. 7; *People v. Hillhouse, supra*, 27 Cal.4th at pp. 487-488.)

Here, 38 of the 48 identified prospective jurors never sat on appellant's jury. Thus, they could not possibly have compromised the impartiality of the jury. Appellant challenges the trial court's ruling as to 10 of the 12 jurors who sat on his jury. However, these 10 jurors, as well as the 2 who were not challenged, had no bias against appellant, assured the court they could be fair and impartial, and stated they would consider LWOP or death as possible penalties if the trial reached that phase. (14 RT 3438, 3443-3444 [Juror No. 12]; 15 RT 3578, 3578-3579 [Juror No. 11];

3633, 3635-3635 [Juror No. 9]; 16 RT 3858-3863 [Juror No. 8], 3883-3886 [Juror No. 10];17 RT 4199-4200, 4202-4204 [Juror No. 7]; 19 RT 4414-4415 [Juror No. 4]; 21 RT 5044-5045, 5048-5051 [Juror No. 3]; 22 RT 5171-5172 [Juror No. 1]; 23 RT 5552-5553, 5554-5555 [Juror No. 2]; 24 RT 5711, 5720-5721, 5724-5725 [Juror No. 6], 5742, 5756-5757 [Juror No. 5].) As a result, appellant was not denied an impartial jury.

III. THE TRIAL COURT'S DISMISSAL OF PROSPECTIVE JUROR KATY GONZALEZ DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS AND REVERSAL OF THE DEATH PENALTY JUDGMENT IS NOT REQUIRED

Appellant contends that the trial court erroneously excused prospective juror Katy Gonzalez based upon her view of the death penalty. (AOB 232-242.) This argument is unavailing because Ms. Gonzalez was properly excused based on her views on capital punishment.

A. The Record

Ms. Gonzalez noted on her juror questionnaire that she was "somewhat opposed" to the death penalty but that in rare cases she thought it should be imposed. (5 JQ 1367.) When asked in the questionnaire if the nature of the punishment would affect her ability to follow the law if she were a juror, she responded, "yes," and she further stated that she had mixed feeling about the death penalty. (5 JQ 1367-1368.) Later in the questionnaire she answered that she could be fair and impartial regarding the death penalty despite any moral, religious, or personal beliefs regarding the death penalty. (5 JQ 1369.)

On voir dire Ms. Gonzalez confirmed that she had mixed feelings about the death penalty but stated that she could set aside her personal views and follow the law. (15 RT 3689-3690.) The court explained that if the case went to a penalty phase, jurors would need to keep an open mind about both possible penalties after considering all of the evidence and

circumstances of the case. (15 RT 3690.) When asked if she could keep an open mind, consider both penalties and render a verdict, she responded, "I'm not sure." (15 RT 3690.) She explained that if a defendant "show[ed] remorse" she did not think he should be sentenced to death despite the circumstances in the case. (15 RT 3690-3691.) The court again asked if she could keep an open mind and weigh the evidence at the penalty phase and she stated, "I don't think I'd have an open mind. I mean, I don't think I could have any part in sentencing someone to that – to death." (15 RT 3692.)

The court then asked:

> [Court]: [I]f the law required you to consider the evidence, consider all the circumstances relating to the defendant, and then fairly reach a verdict of either death penalty or life without parole, if the evidence and the circumstances supported a death penalty, could you or could you not return a verdict for a death penalty?
>
> A. Well, if the evidence was there, I believe I could.

(15 RT 3692.) She then stated that she was satisfied she could keep an open mind and consider both penalties. (15 RT 3693.) The prosecutor then asked Ms. Gonzalez:

> Q. I'm a little bit confused. You told the Judge that you could have no part in sentencing somebody to death[]; is that correct?
>
> A. Yes, I did say that.
>
> . . .
>
> Q. Is that how you feel? You wouldn't want to be responsible for sentencing somebody to death?
>
> A. I think it would weigh heavy on me, knowing that I had a part in it. But if the law required me to have an open mind about it, I mean –

(15 RT 3693-3694.)

Upon further questioning Ms. Gonzalez reiterated that she would consider whether a defendant had remorse in deciding whether death was the appropriate penalty. (15 RT 3695.) The prosecutor then asked:

> Q. I've noticed a few times you've glanced over at the defendant, it's okay, and you would have to sit here during the trial, looking directly at this defendant, and having done that for a couple weeks, it's one thing to sit here and intellectually say I would follow the law, if the Judge told me to keep an open mind?
>
> A. (Affirmative nod.)
>
> Q. It's another thing to search your sole (sic) and say am I really capable of doing that. What we want, both sides are entitled to a fair trial, honest jurors, there's no right or wrong answer, nobody is going to be mad at you for telling us what you belief believe to be the truth. Can you do that for me, can you look inside yourself and say okay, I wouldn't be leaning towards life without parole going into that penalty phase? Can you say that honestly?
>
> A. No.
>
> Q. Okay. And can you say honestly that even if you felt somebody didn't have remorse, and – you sit in this courtroom, you'd be looking at the defendant every day, you actually have the ability to say I vote for the death penalty. You can't do that, can you?
>
> A. No.

(15 RT 3694-3695.)

The prosecutor then challenged her for cause and appellant's counsel attempted to rehabilitate her. (15 RT 3695.)

> Q. Now, if you felt, after listening to all the evidence in the case, that this was a cold-blooded calculated murder and the man deserved to die, you could vote for the death penalty, couldn't you?
>
> A. Yes.

(15 RT 3596.)

The following colloquy then took place between the trial court and Ms. Gonzalez:

> Q. Ma'am, I appreciate that you're expressing some concern about what you're personally capable of doing. And just – and we've used the word sentence. I want to clarify that. That the jury doesn't actually sentence the defendant.
>
> The jury would return a verdict on a penalty phase, where – where they had –where they would return a verdict of either death or life without parole. Then the Court pronounces any sentence. We want you to be honest, just as both attorneys expressed. What is your honest feeling about your ability to keep an open mind and come out here and sit down and look at all of us, and either say yes, I voted for the death penalty or yes, I voted for life without parole, could you do that and look at every one and say yes, I voted for the death penalty?
>
> A. No.
>
> Q. So when you answered [appellant counsel's] last question, can you explain your answer to him?
>
> [Appellant's counsel]: I object to the last question. That's not a jurors responsibility.
>
> THE COURT: Overruled.
>
> BY THE COURT:
>
> Q. [Appellant's counsel] asked [] you a question that related to a situation where somebody committed, and the exact words I can't recall, but something like a cold-blooded murder or something to that effect, and you said yes, you could vote for the death penalty. Could you explain that?
>
> A. Well, I don't -- gosh I don't think I could.
>
> Q. Could what?
>
> A. Explain it. I just know that I wouldn't be able to come out here and -- I don't think I could have any part in somebody going to -- sentenced to death.

(15 RT 3696-3697.)

Appellant's counsel then argued that Ms. Gonzalez's answers were the "flip side" of a prior pro-death jurors responses. Appellant's counsel argued that the trial court rehabilitated the pro-death juror who was "cajoled and manipulated by the prosecution and the Court" to give generic answers so that she could remain a prospective juror. (15 RT 3699.) He stated Ms. Gonzalez was "hounded into giving inconsistent answer" and that there was not a "level playing field" because she was asked by the prosecution and the court if she could "look[] at the defendant face to face and deliver her verdict." (15 RT 3701.)

The court noted that the language he used was that the juror would have to come out and look at everyone and state what her verdict was if she were a juror. The court clarified it was referring to the possibility that the jurors would be polled and that they must be able to individually respond that is their verdict. (15 RT 3701.) The court stated that it was not trying to sway the jurors towards either side by his questions. (15 RT 3702-3703.)

The trial court then granted the challenge for cause stating:

> I find under the circumstances, including the demeanor of the juror, that she was clearly equivocal in her responses, and that she would be unable to carry out the duties that she would be required to, that her views on capital punishment would prevent or substantially impair her ability to be neutral and follow the Court's instructions.

(15 RT 3706.)

B. Law and Analysis

As noted above, under federal and state law, a prospective juror may be excluded for cause only where his or her views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.)

A criminal defendant facing the death penalty has the right to "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause," "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.)

> [T]o balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible.

(*Ibid.*)

> "There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." [Citation.] "Assessing the qualification of jurors challenged for cause is a matter falling within the broad discretion of the trial court." (*People v. Gray, supra,* 37 Cal.4th at pp. 192-193, 33 Cal.Rptr.3d 451, 118 P.3d 496.)

(*People v. Abilez* (2007) 41 Cal.4th 472, 497.) "[T]he goal of voir dire is not to 'salvage' problematic jurors, but rather to find 12 fair-minded jurors who will impartially evaluate the case." (*People v. Hoyos* (2007) 41 Cal.4th 872, 907, fn. 19.)

The record supports the trial court's ruling that Ms. Gonzalez's views regarding the death penalty would prevent or substantially impair her ability to perform her duties as a juror. Ms. Gonzalez's responses on the juror questionnaire were ambiguous. She stated that she could impose the death penalty in rare cases but that the nature of the punishment would affect her ability to follow the law. Conversely, she stated on her questionnaire that she could be fair and impartial regarding the death

penalty despite any personal or moral beliefs. On voir dire, when the court questioned her regarding her ability to keep an open mind and impose either penalty if she were a juror, she was equivocal stating that she was "not sure" and that it would depend on whether the defendant showed remorse. She wavered in her responses before telling the court that she thought she could follow the law and return a verdict of death if "the evidence was there." However, immediately after that statement she told the prosecutor that she would lean towards life without parole and that she did not think she could vote for the death penalty. She again wavered when she responded that she could vote for death if it was a "cold-calculated murder." Due to the conflicting responses the trial court asked additional questions which confirmed that she would be unable to vote for the death penalty.

The trial court was in the best position to view Ms. Gonzalez's demeanor and its conclusion of her state of mind in light of her equivocal responses is binding. (*Uttecht v. Brown, supra*, 551 U.S. at p. 9; *People v. Harris, supra*, 37 Cal.4th at p. 329.) Ms. Gonzalez wavered on her ability to vote for the death penalty and repeatedly stated that she did not believe that she could vote for the death penalty. (See *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 25 [excusal for cause because of conflicting statements regarding ability to vote for death].)

Appellant's counsel conceded that Ms. Gonzalez's answers were inconsistent and that she was "obviously sensitive to begin with" but asserted both at trial and on appeal that the trial court and prosecutor's questions about "looking the defendant in the eye" were inappropriate. (5 RT 3700; AOB 241.) Similar claims have been rejected by this Court.

In *People v. Samayoa* (1997) 15 Cal.4th 795, the defendant argued that the prosecutor committed misconduct during voir dire when it asked jurors whether if polled they could "'stand up and tell' defendant or 'look at

the defendant' and tell him that their verdict was death." (*Id.* at p. 853.) This Court found no misconduct on the part of the prosecutor explaining,

> By its choice of questions, the prosecution evidently sought to shed light upon the prospective jurors' views of capital punishment in order to enforce their appreciation of the gravity of the decision regarding a sentence of death. The prosecution's use of such phrases as "look at the defendant" was an acceptable means of impressing upon each prospective juror that the verdict of death would affect a real person who would be in the courtroom at that time, and sought to elicit whether, under these circumstances, the prospective juror nevertheless would be able to vote for death.

(*Id.* at p. 853; see also *People v. Lynch* (2010) 50 Cal.4th 693, 734 [inquiry whether juror could affirm a vote for death in open court was a proper question on voir dire].)

Both the trial court's and the prosecutor's questioning of Ms. Gonzalez during voir dire were proper and aimed at determining whether Ms. Gonzalez's views of capital punishment would prevent her from being a juror on this case. The trial court's concern regarding polling that may take place if a death verdict was returned, was a "fair way of ferreting out" the juror's true feelings and determining whether Ms. Gonzalez would be capable of voting for death.

The trial court, "aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve [any ambiguity] in favor of the State." (*Witt, supra*, 469 U.S. at p. 434.) Its determination that Ms. Gonzalez was substantially impaired in her ability to impose the death penalty was supported by substantial evidence and the judgment should be upheld.

IV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL BASED ON ITS EXERCISE OF DISCRETION IN CONDUCTING VOIR DIRE ON THE SCOPE OF DEATH QUALIFICATION AND JUROR BIAS

Appellant contends that the trial court abused its discretion during voir dire by the manner in which it attempted to rehabilitate death-leaning prospective jurors. He specifically argues that the trial court used leading and suggestive questions "in an effort to salvage plainly biased" members of the venire, that the error deprived him of a fair and impartial jury, and the trial court erred in denying his mistrial motion. (AOB 243-292.) The trial court was evenhanded in its questioning, did not abuse its discretion in the manner it conducted voir dire, and the court properly denied the motion for mistrial.

A. Relevant Law

A trial court should grant a mistrial only when a defendant's "'chances of receiving a fair trial have been irreparably damaged.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) Trial courts retain broad discretion over the manner in which voir dire is conducted, and its decision on how to conduct voir dire "will not be disturbed on appeal unless it renders the trial fundamentally unfair." (*People v. Whalen, supra,* 56 Cal.4th at pp. 30-31.) The trial court may decide how many questions to ask a juror and the manner in which it asks the questions. (*People v. Mills, supra*, 48 Cal.4th at p. 189.)

> A reviewing court should not require a trial court's questioning of each prospective juror in the *Witherspoon-Witt* context [citations] to be similar in each case in which the court has questions, lest the court feel compelled to conduct a needlessly broad voir dire, receiving answers to questions it does not need to ask.

(*People v. Thornton* (2007) 41 Cal.4th 391, 425.)

> The trial court has discretion to limit voir dire, and the court abuses that discretion, warranting reversal of a conviction on appeal, only when its decision falls outside the bounds of reason (*People v. Waidla* (2000) 22 Cal.4th 690, 713–714 [94 Cal. Rptr. 2d 396, 996 P.2d 46]) resulting in a "miscarriage of justice." (Code Civ. Proc., § 223.)

(*People v. Navarette* (2003) 30 Cal.4th 458, 486.)

As previously stated, the United States Supreme Court has "made clear that 'the conduct of voir dire is an art, not a science,' so '"[t]here is no single way to voir dire a juror."' [Citation.]" (*People v. Cleveland, supra*, 32 Cal.4th at p. 737; see Argument II, A, 49.) "'The Constitution does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.'" (*People v. Cleveland*, at p. 737, quoting *Morgan v. Illinois, supra,* 504 U.S. at p. 729.) A critical function of voir dire is to assure a defendant receives a fair and impartial jury. (*Morgan v. Illinois,* at p. 729.)

In evaluating a trial court's handling of voir dire, this Court has stated that a trial court must be "evenhanded" and ask prospective jurors their views both for and against the death penalty to determine whether they can serve as jurors. (*People v. Mills, supra*, 48 Cal.4th at p. 189.)

> Evenhandedness is encouraged because "[i]t is entirely possible ... that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State."

(*People v. Whalen, supra*, 56 Cal.4th at p. 30, citing *Witherspoon v. Illinois* (1968) 391 U.S. 510, fn. 7; see also *Lockhart v. McCree* (1986) 476 U.S. 162, 172 [Jurors who can state "that they are willing to temporarily set aside their own beliefs in deference to the rule of law" may serve on a jury.].) In assessing the impartiality of a prospective juror the trial court acts much like a juror in that it must rely on its evaluation of the

prospective juror's demeanor and responses to the questions. (*People v. Holt* (1997) 15 Cal.4th 619, 661 citing *Mu'Min v. Virginia, supra,* 500 U.S. at p. 424.)

B. The Trial Court Properly Denied Appellant's Motion for Mistrial Based on the Court's Handling of Voir Dire

Appellant claims that during voir dire the trial court was "hypersensitive, quick to threaten defense counsel, and unwilling to acknowledge error." (AOB 247-252.) To support his claim he cites to the voir dire of prospective juror Terri Burton. (AOB 247-251.)

The trial court first confirmed that Mr. Burton's answers on the juror questionnaire were correct. (17 RT 4305.) In response to additional questioning from the court, Mr. Burton indicated he could keep an open mind but that there would need to be "overpowering evidence" for him to vote for the death penalty. (17 RT 4307-4308.) Mr. Burton stated he thought he could keep an open mind and that he assumed that the trial court would give juror's "directions to go by" so some of their decisions would be based "on what [the court's] direction is." (17 RT 4308-4309.) Mr. Burton indicated that he would "hate" to be the person to return a verdict of death but that if he "had to do it" he could. (17 RT 4311-4312.)

The court then conducted the following voir dire of Burton:

Q. [The Court] Can you think of any reason why you could not perform your duty as I described it?

A.[Mr. Burton] No.

Q. If the evidence and law required it, could you return a verdict for the death penalty?

A. (Affirmative nod.)

Q. Yes or no?

A. Yes.

Q. If the evidence and law required it, could you return a verdict for life without parole?

A. Yes.

THE COURT: Thank you.

For the defense.

MR. BRYAN: Your Honor, I object to the last form of questioning, because the law never requires death.

THE COURT: What is your objection, Mr. Bryan?

MR. BRYAN: Irrelevant. It does not go to cause.

THE COURT: Overruled. Do you have any questions, Mr. Bryan?

MR. BRYAN: No, your Honor.

(17 RT 4312-4313.) The prosecutor then asked several questions on voir dire, after which both sides passed for cause. (17 RT 4316.)

Appellant's counsel stated he wished to be heard because Mr. Burton had been misinformed on an important aspect of the law. (17 RT 4316.) Appellant's counsel stated that the trial court's question, "if [the juror] could find the death penalty, if the law required it," was an improper question because the law never required death. (17 RT 4318-4319.) The court noted that was not how the court phrased the question, and explained that its question was "if the evidence and law required it" and that was terminology he used frequently with jurors. (17 RT 4318-4319.) The court explained that what it meant was that the court instructs the jury on the law and the jury must follow the law. (17 RT 4319.) The court stated that its purpose in asking the question was to make sure that the juror could return a verdict of death or LWOP based on the evidence and the law. (17 RT 4321.)

Appellant's claim that the above dialogue demonstrated that the trial court was "hypersensitive" and "unwilling to acknowledge error" is without merit. The trial court was merely correcting what defense counsel had stated because it was not a complete rendition of what the court had stated. The court did this outside the presence of the jury, and allowed both defense counsel and the prosecutor to argue the merits of the objection. While it does appear defense counsel and the court differed in their interpretation of the court's questions to the juror, the record does not reveal that defense counsel was "right" about what the trial court said, or that the trial court misunderstood the law. (AOB 252.) Thus, it does not appear that the trial court abused its discretion in the manner in which it conducted the voir dire of Mr. Burton.

Appellant next complains about the trial court's demeanor, citing the voir dire of two prospective jurors who were excused for cause. (AOB 252-261 [voir dire of prospective jurors Costa and Davis].)

Prospective juror Nicollete Costa worked at Vons with two girls who knew Chad Yarbrough. (16 RT 3932-3933.) During voir dire Ms. Costa answered several questions asked by the court, and the court began questioning her regarding the penalty phase of the trial. During this point in the questioning Ms. Costa became emotional. (16 RT 3851.) After Ms. Costa became emotional the court specifically asked her if she needed a break or a glass of water, if it had done anything to upset her, and assured her that it was not trying to pick on her or embarrass her by its questions. Ms. Costa told the court she was okay and that it was not anything that the court had said or done. The court's reaction to Ms. Costa's emotional response was appropriate and demonstrated its concern that jurors not feel overwhelmed or embarrassed by the voir dire process. Moreover, appellant did not object to the manner in which Ms. Costa was questioned, and his request to excuse her was granted.

Appellant next cites the voir dire of prospective juror James Davis to support his claim. (AOB 254-261.) Mr. Davis was a correctional officer who expressed some hesitation about his ability to be fair and set aside his bias based on his employment. (16 RT 3790-3795.) After questioning from the court to clarify his equivocal responses, Mr. Davis said that while he did have doubts about his ability to set aside his personal beliefs, he thought that he could set aside his biases. (16 RT 3794-3796.) Mr. Davis then explained that three days prior to voir dire he had to shoot three inmates, and that the situation had affected him. (16 RT 3796-3797.) The court then accepted the parties stipulation to excuse Mr. Davis. (16 RT 3797.) The court noted defense counsel's objection to the manner in which it had conducted the voir dire of Mr. Davis. (16 RT 3802.)

There was nothing improper about the manner in which the trial court conducted the voir dire of Mr. Davis. Mr. Davis was equivocal in his responses, and the court's questions were aimed at clarifying those responses to determine whether he could be fair and impartial. The questions were not an attempt to rehabilitate a life-leaning juror but to clarify ambiguous responses. (*People v. Mills*, *supra*, 48 Cal.4th at p. 190 [the manner of the trial court's questioning can be based on the individual responses and demeanor of each juror].)

Appellant argues that "the actual practice of the trial court with jurors it favored, invariably strong supporters of the death penalty and/or people with detailed knowledge about or connection to this case, was to repeat with slight variations a depiction of the juror's duties" in an effort to "clarify" their responses. (AOB 261.) Not so. The trial court was even-handed in its questioning of jurors.

The court dismissed several death-leaning jurors after very brief, non-leading questions were asked regarding their views of the death-penalty because it was obvious they could not be fair and impartial. For example,

appellant successfully challenged for cause prospective juror Gary Clayton who stated that he was inclined to vote for death, and after brief questioning stated he could not keep an open mind. (17 RT 4079-4080.) Without any effort by the court to rehabilitate, appellant successfully challenged for cause prospective juror John Orr, who stated that he believed the death penalty was the appropriate penalty if it was proven that a crime had been committed, irrespective of any circumstances in mitigation. (22 RT 5187-5188.) After prospective juror Brent Drummond stated that he believed in an "eye for an eye," very little was done to rehabilitate him, and he was excused for cause without argument by counsel. (23 RT 5416-5417.) Prospective juror Elvina Davis stated that she believed that the death penalty should be imposed in murder cases to deter criminals, and was excused with little attempt to rehabilitate her. (24 RT 5807-5808, 5813-5814.)

Moreover, the trial court questioned jurors who appeared favorable to the defense in the same manner it questioned jurors who appeared favorable to the prosecution. The court spent a considerable amount of time clarifying Mr. Gunthrie's responses after he stated that he did not believe in the death penalty and that he would vote "the other way" if it was the death penalty. (15 RT 3735-3757.) The People's challenge to Mr. Gunthrie for cause was denied. (15 RT 3737-3761.)

Prospective juror Joyce Barreto had at first stated that she was unsure about how she felt about the death penalty, but ultimately acknowledged that she could follow the law and set aside any personal feeling or beliefs. (16 RT 3900-3902.) This line of questioning was used regularly with life-leaning jurors and jurors who expressed some doubt regarding their ability to impose the death penalty. (16 RT 3904-3913, 3917-3918, 3919-3920 [prospective juror Greg Golich]; 17 RT 4061-4069 [prospective juror Douglas Harlan]; 23 RT 5498-5502 [prospective juror Mandelyn Hobbs];

24 RT 5666-5680, 5683-5687 [prospective juror Leticia Martin]; 25 RT 5871-5885, 5911 [prospective juror Evangelina Heredia].)

Appellant cites five jurors who he claims were biased and initially survived challenges for cause. Specifically, he claims Mark Torres (Juror No. 200151661), Kyle Dock (Juror No. 200221141), Edward Wright (Juror No. 200109830), Charlene Hicks (Juror No. 200216085), and Sam Lozano (Juror No. 200222973) survived what should have been meritorious challenges for cause. All of these prospective jurors were later dismissed by stipulation. (AOB 262-288.) Appellant contends that the court's voir dire of these five jurors is "illustrative of how the trial court proceeded." (AOB 262.)

Mr. Torres, Mr. Dock, Mr. Wright, Ms. Hicks, and Mr. Lozano all equivocated in some of their responses during voir dire, and the court and counsel made an effort to clarify some of their responses. (15 RT 3665, 3668, 3669-3673, 3673; 17 RT 4042-4047, 4049, 4100-4119, 4247-4257; 20 RT 4682, 4700-4701.) However, after the completion of voir dire by the court and counsel, they all expressed their ability to be fair and impartial. (15 RT 3676, 3678, 4049-4050, 4106, 4109, 4111, 4118-4119, 4256-4257, 4260; 20 RT 4696-4701.)

Several weeks later prospective juror Torres indicated that he did not believe he could be fair. Without further voir dire, the parties stipulated to excuse him. (28 RT 6616.)

Approximately one month later when Mr. Dock returned during jury selection, he informed the court that he had heard additional information regarding the case while he was at work. (28 RT 6667.) He stated he would continue to work if selected as a juror and would have no way to separate himself from the other workers. (28 RT 6670.) The parties stipulated to excuse Mr. Dock. (28 RT 6670-6671.)

On January 17, 2001, Mr. Wright returned during jury selection. (28 RT 6650-6651.) At that time, he indicated that he had a doubt regarding his impartiality due to his son's girlfriend's relationship with the Yarbrough family and that he thought he was "leaning too far for guilty." (28 RT 6652.) The parties stipulated to excuse Mr. Wright, and the court accepted the stipulation. (28 RT 6652-6653.)

Approximately one month later during jury selection, Ms. Hicks informed the court that she had concerns about her ability to be a juror in the case. The parties stipulated to excuse her and the court accepted their stipulation. (28 RT 6721-6722.)

On January 17, 2001, Mr. Lozano returned for jury duty and expressed to the court that he was informed that he would be missing mandatory training if he were to serve on the jury. (28 RT 6116.) The court found good cause to dismiss Mr. Lozano. (28 RT 6119.)

Appellant criticizes the trial court's voir dire of all prospective jurors who equivocated in their responses. Appellant appears to suggest, incorrectly, that the law requires a trial court to simply dismiss a juror without any further voir dire whenever the juror initially indicates a bias against the defense. (See *People v. Thornton, supra*, 41 Cal.4th at pp. 421-422 [trial court asking questions to assess if jurors could follow the law and set aside their personal views "worked no unfairness to defendant."]) Yet, the trial court has a duty to determine if a juror can be fair and impartial (*Morgan v. Illinois, supra*, 504 U.S. at p. 729), and questions aimed at determining the juror's ability to be fair and impartial are proper. (*People v. Whalen, supra*, 56 Cal.4th at p. 31.) A trial court is not required to ask the same, or even similar, questions to every prospective juror. (*People v. Thornton, supra*, 41 Cal.4th at p. 425.)

The fact that, after the parties passed for cause, these five jurors later received additional information regarding the case or determined that they

could not serve as a juror, does not establish that the trial court's voir dire was biased or improper. There is no correlation between the court's voir dire and the jurors later request to be excused. The record establishes that the court did not use a different standard in questioning jurors based on their attitude towards the death penalty. (*People v. Martinez* (2009) 47 Cal.4th 399, 446-447.)

Appellant contends that the "court directed counsel on what questions to ask" and refused to allow defense counsel to ask questions regarding juror's views on what circumstances would lead them to vote for a verdict of LWOP. (AOB 290.) A review of the record belies this argument. Appellant's counsel was afforded ample opportunity to question prospective jurors in this case. Although at times the court asked both counsel to be brief in their questioning or their arguments, quite often each side was able to pose numerous questions after these admonitions. (See *People v. Navarette*, *supra*, 30 Cal.4th at p. 490 [trial court's discretion regarding the conduct of voir dire].)

In *People v. Valdez* (2012) 55 Cal.4th 82, this Court held that the trial court did not abuse its discretion in precluding defense counsel from asking specific questions of jurors regarding the fact that two of the victims were children. (*Id.* at pp. 166-169.) This Court reasoned that if the age of the victims was raised by the defense during voir dire, it would open the door to the prosecution exploring all the anticipated evidence on that issue, which in turn, "'could have led to a lengthy examination of prospective jurors about specific details of the case.' [Citation.]" (*Id.* at p. 168.) Thus, while a defendant may inquire about the attitudes of prospective jurors regarding facts and circumstances that might cause the juror to vote automatically for death, the defendant cannot pose questions so specific that they require the prospective juror to prejudge based on a summary of aggravating and mitigating evidence. (*Id.* at p. 165.)

Here, appellant points to three jurors to support his claim that he was precluded from asking jurors questions regarding circumstances that would lead them to reach a verdict of life in prison. (AOB 290, fn. 109 [Juror No. 8, Mr. Moore, and Alternate No. 5].) Appellant claims all three of these jurors were "seated jurors who strongly favored the death penalty," and that he was precluded from asking them their views regarding what circumstances would lead them to vote for LWOP instead of death. (AOB 290, fn. 109.) Only one these jurors (Juror No. 8 [20061224]) actually rendered a verdict in this case. Appellant used a peremptory challenge to excuse Mr. Moore (Juror No. 200006880). Alternate No. 5 (Juror No. 200362275) remained an alternate throughout trial and deliberations. (28 RT 6698.)

Additionally, appellant was afforded ample time to ask these jurors questions to determine their views on the death penalty. Juror No. 8 was questioned at length by defense counsel regarding his views on the death penalty. (16 RT 3859-3865.) The court interposed one objection during defense counsels' voir dire after the juror stated he did not understand the question asked, however, the only limit placed on defense counsel by the court was to "stay with the general nature of the juror's duties to consider circumstances in aggravation and mitigation and address it more generally, please." (16 RT 3862.) Subsequent to this admonition, Juror No. 8 was specifically asked by defense counsel, "Are there circumstances regarding the defendant's background that you would not consider in mitigation?" (16 RT 3862-3863.) Juror No. 8 responded that in some cases he would consider "if someone has some problems as a child." (16 RT 3863.)

Moore was questioned by defense counsel regarding his view of the death penalty, and he assured counsel and the court that he would consider either death or LWOP if appellant was convicted of first degree murder in the course of a kidnapping and carjacking. (15 RT 3766-3770, 3774-3776.)

Defense counsel then asked Mr. Moore if he would consider things such as appellant's childhood in determining what the appropriate penalty was in the case. (15 RT 3776.) Mr. Moore responded "I would tend not to." (15 RT 3776.) The following then took place:

> Q. [Defense counsel] Isn't it true, sir, that your personal views in favor of the death penalty would lead you to favor the death penalty in any penalty phase deliberation that you were in as a juror?
>
> A. Not in any one, no.
>
> THE COURT: We've spent sufficient time. Do you have any new questions, Mr. Bryan.
>
> MR. BRYAN: No, your Honor.
>
> THE COURT: All right. Sir, with regard to a possible penalty phase, if you got to the penalty phase, the jury is required to consider not only the evidence that was presented about the crime that's alleged in this case, but also circumstances about the defendant, himself, those include circumstances in mitigation, circumstances in aggravation, you'd have to (sic) a duty to keep an open mind and consider all that, whether it involved the defendants childhood or anything else, you would have to be willing to listen to it with an open mind, and then you'd decide what weight to give to it. Do you understand that?
>
> A. Yes, sir.
>
> Q. Do you have any doubt as to whether you can do that?
>
> A. No.

(15 RT 3776-3777.)

The only limit placed on appellant's counsel during the voir dire of Mr. Moore was to limit the circumstances to those that the law permitted. (15 RT 3776.) This was not an unreasonable limitation during voir dire. (See *People v. Carasi* (2008) 44 Cal.4th 1263, 1286 ["[A] defendant cannot

insist upon questions that are 'so specific' that they expose jurors to the facts of the case ... ."].)

As with Juror No. 8 and Mr. Moore, appellant was given ample time and opportunity to question Alternate No. 5 (200362275) during voir dire. (21 RT 5099-5105.) Nothing in the voir dire indicates that the court improperly limited the voir dire. (See Argument II, A, 28, *ante*.)

Here, each juror was individually voir dired outside the presence of other prospective jurors. (*Hovey v. Superior Court, supra*, 28 Cal.3d at p. 1.) In questioning the prospective jurors, the trial court relied first on the juror's responses in their questionnaires regarding both pretrial publicity and death qualification. If the responses were ambiguous or equivocal the judge asked pointed questions to the prospective juror to reliably determine the juror's views on capital punishment or on any other bias that may disqualify him to serve. The trial judge, the prosecutor, and defense posed (or had the opportunity to pose) follow-up questions where necessary to determine the prospective juror's views on capital punishment, pretrial publicity, and other possible biases, and the prospective juror's ability to set aside his personal views and follow the law. The trial court allowed sufficient time for both counsel to pose their own follow-up questions, and did not restrict them to the three minute time estimate it initially recommended to both counsel. (E.g., 14 CT 3343-3349 [Juror No. 2000292160's voir dire]; 14 CT 3358-3374 [Prospective Juror O'Neill's voir dire]; see 25 RT 5903 [the court noting that the three minute limit on counsel's voir dire "went out the window" at the beginning of voir dire].) As such, appellant fails to establish that the trial court's voir dire rendered appellant's trial "fundamentally unfair." (*People v. Whalen, supra,* 56 Cal.4th at pp. 30-31.)

C. The Trial Court Properly Denied Appellant's Mistrial Motion

Appellant contends that the trial court abused its discretion in denying his mistrial motion on January 8, 2001, challenging the court's handling of the voir dire. Specifically, he argues that the trial court mishandled the voir dire of prospective jurors Moreno and Krotter. (AOB 290-292.) A review of the record supports the trial court's denial of the mistrial motion.

The trial court's denial of a motion for mistrial is reviewed for abuse of discretion. (*People v. Welch, supra*, 20 Cal.4th at p. 749; *People v. Cox* (2003) 30 Cal.4th 916, 953.)

Initially, Mr. Moreno stated he could keep an open mind and consider either penalty. (23 RT 5343.) However, when appellant questioned him he stated that he believed the law required him to impose death if it was a first degree murder. (23 RT 5347-5348.) Mr. Moreno also expressed some confusion as to whether the law required him to impose death. (23 RT 5351-5355.) Although the court took some time on voir dire explaining the law and procedure to Mr. Moreno, its purpose was not to rehabilitate a death-leaning juror but to correct his misunderstanding of the law and assess whether he would be open minded if there was a penalty phase to the trial. (23 RT 5354-5355, 5358-5360; 23 RT 5479-5481.) A trial court does not exceed its discretion by explaining the law to a juror to ascertain whether a juror's view on the death penalty would change after he is instructed on the law. (*People v. Whalen, supra*, 56 Cal.4th at pp. 33-34.) Contrary to appellant's contention, the court did not "spoon-feed" Mr. Moreno answers or "severely limit" defense counsel's voir dire. (23 RT 5346-5348, 5356, 5363 [objection to defense counsel's question sustained because it misstated the law].)

Appellant makes the same argument with prospective juror Dianne Krotter. Like Mr. Moreno, Ms. Krotter gave equivocal responses regarding

her ability to consider the death penalty. Ultimately, she stated she could set aside her personal views of the death penalty, follow the law, and render a verdict based upon the circumstances in aggravation and mitigation. (23 RT 5374-5391; Argument II, A, 34.) The court's voir dire was directed at determining whether she could be a fair and impartial juror in the case. The court did not force answers upon her or mishandle her voir dire. (23 RT 5374, 5377.)

The trial court properly denied appellant's motion for a mistrial The manner and number of questions asked of jurors is something that it within the discretion of the trial court. The trial court was in the best position to view the jurors' attitudes and demeanor and determine whether additional questions would be beneficial in determining whether these jurors could be fair and impartial. In denying the mistrial motion, the trial court stated that its questions were asked to explore jurors views, explain the law, and determine a juror's ability to follow the law. The court explained it was not attempting to lead jurors into being "pro-prosecution or pro-defense[.]" (23 RT 5479-5480.)

The trial court's ruling denying the motion for mistrial motion was not arbitrary, capricious, or outside the bounds of reason, and the voir dire did not render appellant's trial fundamentally unfair. This claim should be denied.

V. APPELLANT FAILS TO ESTABLISH THAT JUROR NO. 11 COMMITTED PREJUDICIAL MISCONDUCT

Appellant contends that he is entitled to reversal of his conviction because of a comment Juror No. 11's father made to her regarding appellant's guilt during trial. (AOB 290-297.) Respondent submits that Juror No. 11 did not commit misconduct, and, assuming there was misconduct, appellant was not prejudiced.

A defendant accused of a crime has a constitutional right to a trial by a jury who is impartial and unbiased. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16.) "'It is misconduct for a juror during the course of trial to discuss the case with a nonjuror.'" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1309, citing *People v. Danks* (2004) 32 Cal.4th 269, 304.) However,

> "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; *it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.* Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."

(*In re Carpenter* (1995) 9 Cal.4th 634, 647-648, citing *Smith v. Phillips* (1982) 455 U.S. 209, 217.) This Court has explained that where a juror has received information from an extraneous source:

> . . .the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not "inherently" prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant.

(*People v. Nesler* (1997) 16 Cal.4th, 561, 578-579.)

> A finding of inherently likely bias is required only when
>
> the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment.

(*In re Carpenter, supra*, 9 Cal.4th at p. 653.) The determination of such bias depends upon a review of the trial record to determine the prejudicial effect of the extraneous information. (*Ibid.*.)

Actual bias is defined as:

> "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

(*People v. Nesler, supra*, 16 Cal.4th at p. 581, quoting Code Civ. Proc., § 225, subd. (b)(1)(C).) Under the test for actual bias, the court considers all pertinent portions of the record. (*People v. Danks, supra,* 32 Cal.4th at p. 303.)

> "The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual" bias.

(*Ibid.*, quoting *In re Carpenter, supra*, 9 Cal.4th at p. 654.) "Actual bias supporting an attack on the verdict is similar to actual bias warranting a juror's disqualification." (*People v. Nesler, supra*, at p. 581.)

In assessing prejudice, the reviewing court accepts the trial court's findings of fact where supported by substantial evidence, but independently reviews whether prejudice arose from juror misconduct. (*People v. Danks, supra*, 32 Cal.4th at pp. 303-304; *People v. Nesler, supra*, 16 Cal.4th at p. 582.)

Juror No. 11 had lunch with her father during appellant's trial. During lunch her father asked her why the trial was taking so long since "they know he did it." (39 RT 8978-8979; see Argument I, A, 3, above.) She told her father she could not talk about the case since she was a juror. (39 RT 8979.) She immediately alerted the court about her father's comment and clarified that she did not see any other jurors in the area when

her father made the comment. (39 RT 8981, 8984.) She told several jurors that her father had made an inappropriate comment at lunch that she needed to address with the court. However, she did not tell any of the jurors the details of the comment her father made. (39 RT 8996, 8999-9005, 9007-9008, 9011-9012.).) Based on the comment Juror No. 11's father made to her, appellant moved for a mistrial and renewed his change of venue motion. (39 RT 8986.) The mistrial motion was denied. (39 RT 8993, 9023.)

The comment by Juror No. 11's father, "they know he did it," was not extraneous evidence; it was simply her father's opinion on the case. She immediately told her father that she could not discuss the case, and promptly informed the court about her father's actions. She did not express any personal opinion about the case to her father, and he did not attempt to discuss the case any further. (39 RT 8980-8981.) The trial court disagreed with appellant's assertion that Juror No. 11 was hostile to defense counsel, but noted that she seemed surprised by his asking whether she would recognize her fellow jurors. (39 RT 8987, 8991-8992; see AOB 296.) And the trial court found that Juror No. 11 had not violated any of the court's rules because she had not been conversing with anyone who was connected to the case. (39 RT 9020-9021.)

Even assuming juror misconduct, reversal would not be required because there is no substantial likelihood that any juror was biased because of the comment made by Juror No. 11's father. The court confirmed that no juror except Juror No. 11 heard the comment, and Juror No. 11 stated that the opinion her father expressed would not influence her as a juror. (39 RT 8982, 8999-9014, 9022.) Her father only made the one comment, she immediately told him she could not discuss the case, and she promptly informed the court. The court reminded the jurors not to discuss the case

with anyone, or form or express any opinions about the case until they had heard the entire case. (39 RT 9026.)

Appellant's contention that juror misconduct requires the reversal of the guilt and penalty judgment should be rejected.

VI. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS JUROR NOS. 1 AND 11 FROM THE JURY

Appellant contends that his conviction should be reversed because the trial court abused its discretion by refusing to discharge Jurors 1 and 11 because of their "bias" against appellant. (AOB 298-303.) Respondent disagrees.

A. Law

Section 1089[23] specifies that a juror may be discharged upon the court's finding of good cause. (*People v. Daniels* (1991) 52 Cal.3d 815, 864.) Serious and willful misconduct by a juror constitutes "good cause" to dismiss that juror. (*Ibid.*) A juror's inability to perform his or her duties under section 1089 must appear in the record as a "demonstrable reality" and will not be presumed. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) A trial court's decision to discharge or retain a juror is reviewed for abuse of discretion. (*People v. Harris* (2013) 57 Cal.4th 804, 856; *People v. Osband* (1996) 13 Cal.4th 622, 675-676.)

Any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the

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[23] Section 1089 provides, in relevant part,

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefore, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box . . ..

jury is presumptively prejudicial. (*People v. Lewis, supra*, 46 Cal.4th at p. 1309.) If the court finds there was misconduct it "then considers whether the misconduct was prejudicial." (*People v. Danks, supra*, 32 Cal.4th at p. 303.)

> [W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias.

(*In re Carpenter, supra*, 9 Cal.4th at p. 653.)

Juror bias can appear in two different ways. (*In re Carpenter, supra*, 9 Cal.4th at p. 643.) "First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror." (*In re Carpenter, supra*, 9 Cal.4th at p. 653.)

> Under this standard, a finding of "inherently" likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this "inherent prejudice" test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.

(*In re Carpenter, supra,* at p. 653.)

> "[E]ven if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias under the first test," the nature of the misconduct and the "totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose."

(*People v. Danks, supra*, 32 Cal.4th at p. 303 citing In re *Carpenter, supra*, 9 Cal.4th at pp. 653–654.)

The issue of whether prejudice resulted from juror misconduct is a mixed question of law and fact subject to independent review. (*People v. Danks, supra*, 32 Cal.4th at p. 303.) The reviewing court accepts the trial

court's credibility determinations and findings on questions of historical fact where supported by substantial evidence. (*Id.* at p. 304; *People v. Harris* (2008) 43 Cal.4th 1269, 1305.)

B. The Trial Court Properly Determined There Was Not Good Cause To Discharge Juror No. 1

Appellant contends that the trial court prejudicially erred in failing to discharge Juror No. 1 because she was biased against appellant. (AOB 298-302.)

After the jury was sworn but before evidence was heard, Juror No. 1 alerted the court to the fact that she owned rental properties in the Lamont area and that she went to Lamont once a month to collect rent. (30 RT 7063; see Arg. I.) She expressed some concern about her physical safety and the safety of her property once she learned that the case may be connected to Lamont gangs. (30 RT 7067-7068.)

During an examination of Juror No. 1 outside the presence of other jurors, she revealed she was not familiar with the Lamont area. (30 RT 7074.) When shown a map of Lamont and asked if her rental properties were near any of the locations that pertained to the crimes, she indicated that one rental property was next to the location on Habecker Road. (30 RT 7075.) She stated that since the court, in its 13 years of experience, had not experienced "retaliation against jurors" she felt comfortable remaining as a juror. (30 RT 7078) The court then asked:

> THE COURT: Okay. Ma'am, again, I'm not trying to put words in your mouth. I'm not trying to have you tell me something you think I want to hear. Recognizing you still might have some apprehension or some possible fear, I want you to honestly tell me if you think that there's any reasonable possibility that you might have some fear that could influence your ability to be fair to both sides.
>
> JUROR No. 1: No. I would be honest, even if I felt I was in danger.

THE COURT: If you felt you were in danger?

JUROR No. 1: Or my property. I would still feel I would be honest with my opinions.

THE COURT: Right now, do you feel that you are in danger in any way in being on this jury?

JUROR No. 1: I don't feel like I'm in danger. But like I said, I'm -- I don't go there often. I really don't know people that live there. I lived there for many years, and I'm not in contact with anybody other than one person that lives there.

THE COURT: Okay. Well, if at any point you felt danger, I'd want you to tell me. Okay?

JUROR No. 1: Oh, I will.

THE COURT: If at any point you have a feeling that there's some fear that might cause you to be concerned about what your verdict should be or whether you could be fair to either side, I want you to tell me. Okay?

JUROR No. 1: I will.

(30 RT 7079-7080.)

In *People v. Harris, supra,* 43 Cal.4th 1269, the defendant argued that the trial court erred in failing to excuse a juror who reported that his father, with whom he lived, had received a death threat over the telephone that the juror thought was related to the case. (*Id.*, at p. 1300.) The juror stated the threat would not affect his ability to deliberate in the case. (*Id.* at p. 1301.) In upholding the trial court's denial of the defendant's request to dismiss the juror under section 1089, this Court held that a trial court may rely on a juror's assurance that they "can maintain his or her impartiality after an incident raising a suspicion of prejudice. [Citations.]" (*Id.* at p. 1304.)

Much like the juror in *Harris*, Juror No. 1 maintained that she could remain an impartial juror despite any potential fear she may have had. The fact that she had rental properties in Lamont that were near the crime scene

did not compel the court to dismiss her as a juror. She explained she was not familiar with Lamont or people who lived there. Although she expressed some concern that the case may involve gangs in the Lamont area, she was not presently in fear and assured the court on multiple occasions that she could perform her duties as a juror. (30 RT 7069, 7079-7080.) She assured the court that if she felt that her fear would affect her ability to be fair to either side that she would advise the court. Juror No. 1 never stated that appellant was a "gangster" nor did she indicate that she was biased against appellant. Instead, she stated that she became concerned when she learned that the case may be related to Lamont gangs. (30 RT 6063-6065.) However, she told the court that she would make arrangements to have someone else collect the rent while she was a juror in the case and that if she did go to Lamont she would not investigate anything connected to the case. (30 RT 7079-7080.)

The trial court was in the best position to determine Juror No. 1's credibility and assurances that she could remain an impartial juror. (*People v. Harris, supra*, 43 Cal.4th at p. 1305.) Based on the totality of the circumstances surrounding her potential fear, there was no substantial likelihood that Juror No. 1 was actually biased against appellant. (*People v. Danks, supra*, 32 Cal.4th at p. 303.) The trial court properly determined there was not good cause to discharge Juror No. 1.

C. The Trial Court Properly Found There Was Not Good Cause To Discharge Juror No. 11

Appellant contends that the trial court erred in failing to discharge Juror No. 11 from the jury. (AOB 302.) As he did above (see Argument V, AOB 290-297), he contends that the comments by Juror No. 11's father compelled her dismissal. For the same reasons as discussed above (see Argument V), appellant's claim fails.

In *People v. Danks, supra*, 32 Cal.4th 269, a juror discussed with her husband the fact that she was feeling stress in having to make her decision regarding the death penalty, and from having to complete her household duties every evening after a full day in court. (*Id.* at pp. 300-301.) This Court found the juror's communication was not misconduct because the juror discussed only the stress she was feeling and did not discuss the case, evidence, or deliberations with her husband. (*Id.* at p. 304.) The comment here from Juror No. 11's father is similar to the discussion in *Danks* between the juror and her husband, because neither situation involved any exchange of information pertinent to the trial. Juror No. 11's father did not comment on evidence pertaining to the trial and appeared to be making a spontaneous statement about his feelings regarding the length of the trial. Juror No. 11 did not converse with her father about the case, but rather she specifically told him that she could not discuss the case. Juror No. 11 promptly informed the court, and assured the court that her father's comment would not affect her ability to be fair and impartial. Based on the totality of the circumstances surrounding her father's comment, there was no substantial likelihood that Juror No. 11 was actually biased against appellant, and the trial court properly declined to find good cause to discharge her under section 1089. (*People v. Danks, supra*, 32 Cal.4th at p. 303.) Appellant's claim to the contrary should fail.

VII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS ALL CORRECTIONAL OFFICERS FROM APPELLANT'S JURY POOL

Appellant contends that the trial court prejudicially erred in denying his motion to exclude all correctional officers from his jury. (AOB 303-308.) Appellant's contention fails because his constitutional right to an impartial jury was not violated by the trial court's denial of his motion to exclude correctional officers from the jury pool.

A defendant is entitled to a trial by a fair and impartial jury under the Sixth Amendment of the United States Constitution. California Code of Civil Procedure section 203 sets out who can serve as a juror in California. Nothing in that section, or any other California statute, excludes correctional officers from the list of potential jurors.[24]

In *People v. Ledesma* (2006) 39 Cal.4th 641, 668, the defendant complained that the trial court erred in refusing to excuse a juror who worked as a correctional officer for the county department of corrections, and that the error violated his Sixth Amendment right of a trial by an impartial jury. During voir dire, the juror stated that he knew the defendant was housed at the "old building." (*Ibid.*) On appeal, the defendant argued that the trial court should have excused the juror because his employment constituted an "implied bias." (*Id.* at p. 669.) In rejecting this argument this Court stated:

> Under California law, a juror may be excused for "implied bias" only for one of the reasons listed in Code of Civil Procedure section 229, "and for no other." (Code Civ. Proc., § 229.) If the facts do not establish one of the grounds for implied bias listed in that statute, the juror may be excused for "[a]ctual bias" if the court finds that the juror's state of mind would prevent him or her from being impartial. (Code Civ. Proc., § 225, subd. (b)(1)(C).)

(*People v. Ledesma, supra*, at p. 670.) This Court further held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated because the juror's knowledge that the defendant was incarcerated did not render him unfair or partial. (*Ibid.*)

Appellant complains here that the correctional officers on his panel had "special knowledge" of the case and thus were not fair and impartial

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[24] Correctional officers' status as peace officers is in Penal Code section 830.5, a section not listed in California Code of Civil Procedure 219 as being exempt from jury service.

jurors. To support this contention, he cites prospective jurors Sam Lozano, Sherry Williams, and Mark Torres. (AOB 303-307.) However, as explained previously, the trial court properly exercised its discretion when it denied appellant's challenges for cause as to Lozano, Williams, and Torres. Further, appellant's trial was not rendered fundamentally unfair because those three did not sit as jurors at his trial. (See Arg. II, B, 22 [Sherry Williams]; Arg. IV, B [Mark Torres]; IV, B [Sam Lozano].)

Two correctional officers were seated as jurors, Juror No. 6 and Juror No. 8, when the jury rendered verdicts in appellant's case. The following took place during the court's voir dire of Juror No. 8 (200061224):

> Q. What is it about your line of work that would cause you any concern about being on this jury?
>
> A. Some people would think because of that you would be prejudiced against someone who has committed a crime or a felony.
>
> Q. What I'm now asking for is what is your state of mind. We need to have you express your honest views, your honest opinion as far as your ability to be fair. How do you feel in your mind about being fair and being on this jury?
>
> A. I think I'm probably pretty fair because I'm not prejudgmental with the people that I work with. I have worked with them 15 years in the Department of Corrections. During that time, I have become to look at inmates as human beings. I'm not prejudgmental because I live with them eight hours every day. And so, like I said before, I do not become judgmental on them.
>
> Q. So without regard to what other people might think, I need to know if you are comfortable and satisfied in your mind that you can be fair or if you have some doubt about that.
>
> A. I can be fair.
>
> Q. You have no doubt about that?
>
> A. I have no doubt about that.

(16 RT 3849-3850.) Juror No. 8 stated he had heard about the case through one newspaper article, but he had not heard about the case from any other source. (16 RT 3852; see Arg. II, B, 11 [challenge for cause as to Juror No. 8 properly denied] .) Juror No. 8's voir dire refutes appellant's contention that all correctional officers should have been excluded because of the "widespread dissemination" of facts at their workplace. (AOB 307.)

Likewise, Juror No. 6's (200301163) voir dire also negates appellant's argument. Juror No. 6 stated she had heard about the case through news broadcasts, but had not heard anyone speaking of the case or expressing an opinion on the case. (24 RT 5718 ["Whatever I heard [about the case], it was on TV."]) Although she noted that she may have more knowledge about street gangs than the average person, she did not consider herself an expert in gangs, she was not familiar with Arvin or Lamont gangs, and she would set aside any prior knowledge she had regarding street gangs and not let it influence her in this case. (24 RT 5708-5711; see Arg. II, B, 43 [appellant's challenge for cause as to Juror No. 6].)

Appellant fails to establish that correctional officers, as a class, are incapable of serving as fair and impartial jurors. (See Code Civ. Proc., § 229.) The fact that two of the five correctional officers here made it past challenges for cause and peremptory challenges demonstrates that the motion against correctional officers as a class was meritless even if the court could have granted it.

The voir dire of Juror Nos. 6 and 8 demonstrate that both jurors did not harbor any implied bias based solely on their status as employees of the Department of Corrections. (See *People v. Ledesma, supra*, 39 Cal.4th at p. 670.) Appellant fails to establish that either juror, or some other prospective juror, due to his or her status as a correctional officer, possessed any information that was "damaging" to appellant's character or his defense, or rendered his trial fundamentally unfair. The trial court

properly denied appellant's request to exclude all correctional officers from his jury, and appellant had a fair and impartial jury.

VIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *BATSON/WHEELER* CHALLENGES

Appellant contends that the trial court erred in denying his *Batson/Wheeler*[25] motions. Specifically, he contends the court erroneously found no prima facie case of purposeful discrimination after four of the prosecutor's peremptory challenges. (AOB 309-316.) The trial court correctly found that appellant failed to show a prima facie case of group bias, and appellant's contention should be rejected.

A. Relevant Proceedings

On January 17, 2001, appellant brought a *Wheeler*[26] motion after the prosecutor exercised a peremptory challenge against Thomas Bell, an African-American juror. The trial court denied the motion and noted that it would make a record of its ruling at a later time. (28 RT 6610.) Appellant subsequently brought three *Wheeler* motions after the prosecution exercised peremptory challenges against Joyce Barreto, Teresa Delacruz, and Felix Rodriguez. The court denied each motion and indicated it would make a record of its ruling at a later time. (28 RT 6613-6617.) After the jury was excused for a brief recess, the following proceedings ensued:

> THE COURT: Just to make a brief record on the *Wheeler* motions, the Court having considered the four *Wheeler* motions made up to this point, I'm going to confirm that Thomas Bell (200268054), who was seated in Seat No. 6 appeared to be an African-American. The juror in Seat No. 12, Teresa Delacruz (200214147), appeared to be an Hispanic female, and her

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[25] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

[26] An objection referencing only *Wheeler* is sufficient to preserve a *Batson* claim being raised for the first time on appeal because the claims are so closely related. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3.)

surname is Hispanic. The juror in Seat No. 2, Felix Rodriguez (200161953), appeared to be an Hispanic male. His surname is Hispanic.

The juror in Seat No. 2, Joyce Barreto (200386220) -- the Court initially tries to note the racial or ethnic background of jurors by their appearance. And her appearance appeared to be white. I'll use that term in the sense that we use it when we discuss *Wheeler* motions. She appeared to be a white female. The name Barreto (200386220) may be Italian, may be Hispanic. It's not clear to the Court.

I had noted that she was a white female. If Counsel feel that she is something other than a white female, you can make a record on that.

MR. GARDINA [Defense counsel]: Yes, your Honor. I felt she was a mix of Hispanic and Filipino. She gives the appearance of white. She had light skin, but her eyes and her name and her other facial features indicated she was Hispanic with some Filipino in her.

THE COURT: Any reason to argue that the name Barreto (200386220) is necessarily Hispanic?

MR. GARDINA: The name Barreto (200386220) is Hispanic.

THE COURT: How do you know it's not Italian?

MR. GARDINA: Barreta would be Italian.

THE COURT: Do you want to make any observations just on the racial or ethnic background of the four jurors, Mr. Barton? That's all I'm asking right now.

MR. BARTON: I would agree with the Court's assessment. She would appear to me to be Caucasian. But since that wasn't is (sic) the reason I kicked her, I didn't pay much attention to it.

THE COURT: Well –

MR. BARTON: I'll submit it on the Court's – my observations of the person's physical appearance are the same as the Court's.

THE COURT: I'm not -- I see a lot of Hispanic names. The name Baretto (*sic*) is not one I'm familiar with in terms of being a Hispanic name. It may be an uncommon Hispanic name. She had the appearance of a white female, and I have categorized her as such.

And I have considered the *Wheeler* line of cases. I'm familiar with them. I have reviewed them recently in connection with the jury selection in this trial, as well. And I do not find a prima facie case was established at the time of any of the *Wheeler* motions, and the People therefore have no duty to respond.

Any further record to make on that?

MR. BARTON: That was my assumption with all the Court's rulings. There was no prima facie. So I didn't respond.

THE COURT: Submit it?

MR. BARTON: Submit it.

MR. GARDINA: Your Honor, I think systemically the prosecution has been excluding Hispanics and blacks, and we have an Hispanic defendant here. We have got at least three Hispanics already excluded. I think there is a prima facie case. I disagree.

THE COURT: Submit it?

MR. GARDINA: Submit it.

THE COURT: I have considered all of the relevant circumstances including the ethnic and racial background of other jurors in the box, other jurors in the panel remaining to be selected, the circumstances involving those jurors who were excused. I don't find a prima facie case. That's my ruling.

(28 RT 6619-6622.)

The following day after the jury was selected, the court made a further record on the *Wheeler* motions by confirming the racial make-up of the

jury.[27] (28 RT 6745-6752.) The court noted that Juror numbers 1 and 10 were Hispanic females and Juror number 3 was a Hispanic male. Juror numbers 2, 4, 6, 7, 9, 11 and 12 were white females. Juror numbers 5 and 8 were white males.[28] (28 RT 6745-6751.) Alternate number 1 was a white male, alternate number 2 was a white female, alternate number 3 was a Hispanic female, and alternate numbers 4 and 5 were Hispanic males. (28 RT 6751-6752.)

B. Applicable Legal Principles

Both the federal and state Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) The discriminatory use of peremptory challenges

> violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution . . . [and] the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution.

(*People v. Avila* (2006) 38 Cal.4th 491, 541.) It is presumed that a prosecutor who uses a peremptory challenge does so for a purpose other than to discriminate. (*People v. Griffin* (2004) 33 Cal.4th 536, 554; *People v. Wheeler*, at p. 278.)

The first step in a *Batson/Wheeler* analysis requires a defendant to make a prima facie case of discrimination by "showing that the totality of

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[27] On January 18, 2013, defense counsel brought additional *Wheeler* motions based on the prosecutor's use of his peremptory challenges. These motions were denied and appellant has not raised these *Wheeler* motions on appeal. (28 RT 6745, 6752.)

[28] Defense counsel disagreed with the court's characterization of Juror No. 1 as a Hispanic female. He thought she was white and married to someone with a Hispanic surname. The People noted that she appeared Hispanic. (28 RT 6745-6748.)

the relevant facts give rise to an inference of discriminatory purpose." (*People v. Blacksher* (2011) 52 Cal.4th 769, 801, quoting *Johnson v. California* (2005) 545 U.S. 162, 168.) If a defendant has made a prima facie case of purposeful discrimination, the burden shifts to the prosecutor to provide race-neutral reasons explaining his or her use of peremptory challenges as to the excluded jurors in question. (*Johnson v. California*, at p. 168; *People v. Bonilla* (2007) 41 Cal.4th 313, 341.) The trial court must then determine whether the defendant proved purposeful discrimination. (*People v. Bonilla*, at *id.*) The same three-step procedure applies to state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)

A prima facie case of discrimination is established when a defendant produces

> "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." [Citation.] An inference is a logical conclusion based on a set of facts.

(*People v. Lancaster* (2007) 41 Cal.4th 50, 74.) The proof of a prima facie case may depend upon all relevant evidence in a trial court record. (*People v. Bell, supra*, 40 Cal.4th at p. 597.) This Court has found the following types of evidence particularly relevant in this context:

> [T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining

jurors belong, these facts may also be called to the court's attention.

(*Ibid.*, citing *People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.)

While it is proper for the trial court to examine the responses of other jurors in considering whether the defendant has made a prima facie case of a *Wheeler* violation, "such an examination for the first time on appeal is unreliable." (*People v. Cornwell* (2005) 37 Cal.4th 50, 71, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) In reviewing the trial court's determination that a defendant failed to make a prima facie showing, a reviewing court examines the entire record of voir dire for evidence to support the trial court's ruling. (*People v. Young* (2005) 34 Cal.4th 1149, 1172.)

C. Discussion

Appellant argues that the trial court erred by denying his *Wheeler* motions. (AOB 311-315.)

This Court has stated that a trial court is not obligated to explain its ruling on a *Batson/Wheeler* motion on the record. (See *People v. Mai* (2013) 57 Cal.4th 986, 1048-1049, citing *People v. Reynoso* (2003) 31 Cal.4th 903, 919; *People v. Bell* (2007) 40 Cal.4th 582, 600-601.) Here, in the first stage of the *Batson/Wheeler* analysis the trial court did not ask the prosecutor to state the reason for his challenges, nor did the prosecutor proffer any reasons. The trial court was able to determine that appellant failed to make a prima facie case "without hypothesizing permissible reasons that might have motivated the prosecutor's challenge." (*People v. Bell, supra*, 40 Cal.4th at p. 600.) There is no "constitutional duty" for the trial court to explain its ruling or for the prosecutor to state its reasons for his challenges during this first stage of a *Batson/Wheeler* motion. (See *Id.* at pp. 600-601.)

Appellant further argues that the trial court did not expressly state the standard it used in determining whether appellant had made a prima facie case of race-based peremptory strikes, and suggests the trial court likely used the wrong standard. (AOB 312-313.)

> Where it is unclear whether the trial court applied the correct standard, we review the record independently to "apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis.

(*People v. Bell*, *supra*, 40 Cal.4th at p. 597, quoting *People v. Cornwell*, *supra*, 37 Cal.4th at p. 73; emphasis in original.) Respondent submits that an independent review of the record and relevant factors support the trial court's finding of no prima facie case of racial discrimination.

1. Mr. Bell

Appellant claims the prosecutor challenged Mr. Bell because he was African-American. (AOB 309.) The record, however, suggest race-neutral reasons for the prosecutor's challenge.

Mr. Bell stated that if he were to serve as a juror, he would lose overtime pay. (1 JQ 144-145.) The loss of overtime pay would have "some impact" on his family but it would not prevent him from being on the jury. (14 RT 3404-3405.) He also stated that he had intended on going to Las Vegas for a wedding and vacation in February. (1 JQ 144, 14 RT 3401-3402.) When the court asked him if he could plan the Las Vegas trip so he was only gone over the weekend, Mr. Bell responded, "Actually, we wanted to get up there Thursday. But, I mean, whatever." (14 RT 3401.)

Mr. Bell had noted on his juror questionnaire that he, a family member or a close friend had been charged with possession of marijuana in 1987. When asked to circle an answer on the questionnaire that corresponded to his views on the death penalty he circled two answers: "B. While I favor the death penalty, I do believe there are rare cases where the

death penalty should not be imposed even if someone has deliberately taken another human being's life;" and "E. While I am somewhat opposed to the death penalty, I do believe there are rare cases where a death sentence should be imposed for a deliberate murder." (1 JQ 163.) When asked in the questionnaire how he felt regarding the death penalty he stated that he was not strongly for or against it. (1 JQ 164.) He further stated that he felt the death penalty was used randomly. (1 JQ 164.) When asked during voir dire what he thought the sentence should be for a first degree murder, he responded, "It depends. Life in prison or something like that." (14 RT 3410.)

"[T]he challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion. [Citations.]" (*People v. Bonilla, supra,* 41 Cal.4th at p. 343.) Appellant was not African-American and appellant does not claim that the prosecutor used an extraordinary number of his peremptory challenges against African-American jurors.

Moreover, Mr. Bell revealed in his questionnaire that he, a family member or a close friend had been charged with possession of marijuana in 1987. A prosecutor may reasonably infer that if a juror, his family or close friends had an adversarial contact with the police or criminal justice system the juror might be unsympathetic to the prosecution. (*People v. Farnam, supra,* 28 Cal.4th at p. 138.) The prosecutor may also have excused Mr. Bell because of his concern over losing overtime pay and having to reschedule a vacation. From this, the prosecutor could have reasonably concluded that if Mr. Bell was chosen to sit on the jury that he would have been distracted by the fact that he was not receiving his overtime pay and that he may have to change his vacation plans and would not be devoting his full attention to the case. (Cf. *People v. Mai, supra,* 57 Cal.4th at p. 1049, fn. 26 ["A party has an absolute right, within statutory limits, to

excuse a prospective juror for any nondiscriminatory reason, however, subjective, that gives the party concern about the juror's suitability."])

Finally, Mr. Bell's answers concerning his view of the death penalty were conflicting on the juror questionnaire. He circled two answers regarding his views on the death penalty that conflicted. (1 JQ 163 [circled "B" that he favored the death penalty and circled "E" that he was somewhat opposed to the death penalty].)

On voir dire, he stated he could be fair and impartial regarding the penalty phase of the trial, but when specifically asked what he thought the appropriate penalty was for first degree murder he stated life without the possibility of parole. (14 RT 3410.) These responses could have caused the prosecutor to believe that Mr. Bell was inclined to vote for life without the possibility of parole in any first degree murder case. (See *People v. Williams* (2013) 56 Cal.4th 630, 656 [juror's ambivalence and equivocation regarding the death penalty was a race-neutral reason].)

Appellant has failed to demonstrate that the trial court erred in denying his motion because he has failed to show any inference of discrimination. (*People v. Young, supra,* 34 Cal.4th at p. 1172.)

2. Teresa Delacruz, Felix Rodriguez, and Joyce Barreto

Appellant claims the prosecutor challenged Ms. Delacruz, Mr. Rodriguez, and Ms. Barreto because they were Hispanic. (AOB 309.) In light of the entire record of voir dire, substantial evidence supports the trial court's ruling. (*People v. Young, supra,* 34 Cal.4th at p. 1172.)

In Ms. Delacruz's response to a question in the juror questionnaire regarding her views on the death penalty, she circled, "C. While I am somewhat in favor of the death penalty, I do not believe it should be used as a punishment for most murder cases, even where a life has been taken deliberately." (12 JQ 3523.) In response to the question asking what she

thought about a sentence of life without the possibility of parole for the crime of first degree murder, she wrote, "A humane alternative to the crime of murder vs. death penalty." (12 JQ 3523.) In response to the question asking what she thought of the death penalty she stated, "Does it's (*sic*) execution really exist in California? Isn't it just death row?" (12 JQ 3524.) She left blank question number 75, which asked whether she had any moral, religious or personal views that would make it impossible to return a verdict of death, but in the portion for an explanation wrote, "While I have a strong relationship with my maker I would strive for a equitable and fair verdict." She explained on voir dire that she inadvertently left that question blank, as well as an answer to another question pertaining to her views on the death penalty. (12 JQ 3524; 19 RT 4574-4576.)

Ms. Delacruz noted on her questionnaire that her husband had a child support/custody matter in Kern County that was not disposed of to her satisfaction. (12 JQ 3508.) She explained on voir dire that the judgment in Kern County had been set aside because of a jurisdictional issue, and that she was dissatisfied with the disposition because her husband's filing fee was not refunded. (19 RT 4577.) She also disclosed that her husband had been convicted of driving under the influence in 1991. (12 JQ 3509; 19 RT 4578.)

Ms. Delacruz was one of the original 12 jurors called to the box. She filled seat number 12 prior to the parties exercising their peremptory challenges. (28 RT 6578.) The prosecutor had accepted four panels with Ms. Delacruz on each of them prior to using his peremptory challenge to dismiss her. (28 RT 6607 [The People accept the panel and pass]; 6608 [The People pass]; 6608-6609 [People pass]; 6609 [People pass]; 6613 [People excuse Ms. Delacruz].) The fact that the prosecutor accepted four panels before exercising his peremptory challenge against Ms. Delacruz indicates "the prosecutor's good faith in exercising his peremptories[.]"

(*People v. Williams, supra,* 56 Cal.4th at p. 659 citing *People v. Snow* (1987) 44 Cal.3d 216, 225.)

In light of Ms. Delacruz's answers regarding the death penalty, leaving questions blank, and her apparent hostility to the justice system, the record supports the trial court's finding that there no prima facie showing of discrimination. (*People v. Young, supra,* 34 Cal.4th at p. 1172.)

Felix Rodriguez noted on his juror questionnaire that the statement that best corresponded to his view on the death penalty was, "E. While I am somewhat opposed to the death penalty, I do believe there are rare cases where a death sentence should be imposed for a deliberate murder." (10 JQ 2935.) In response to the question asking how he felt about the death penalty, he wrote, "It's hard to be fair when it involves you personally." (10 JQ 2936.) When asked on voir dire about that response, Mr. Rodriguez stated,

> Recently a friend of mine had a relative that was killed, and he lost his ability what I would consider to keep good judgment about everything. And that's what I meant by that. If it were your son – I'm sure if it were my son it would make me feel different.

(19 RT 4445.)

The record supports the prosecutor's race-neutral reasons for excusing Mr. Rodriguez. Mr. Rodriguez's answers on the juror questionnaire demonstrated that he was not inclined to vote for the death penalty. His responses during voir dire and on the questionnaire also demonstrated that he was not inclined to vote for death unless it was a family member that was the victim. (Cf *People v. Mai, supra,* 57 Cal.4th at pp. 1052-1053.) He also indicated that his close friend had lost his judgment when a family member was murdered. In light of the entire record, substantial evidence supports the trial court's conclusion that

appellant failed to make a prima facie case. (*People v. Young, supra*, 34 Cal.4th at p. 1172.)

As to Ms. Barreto, there was some dispute over her race and ethnicity. Appellant's counsel claimed she was Hispanic, but the court determined that she was Caucasian. Respondent submits the trial court's factual findings are entitled to deference, but even assuming Ms. Barreto was Hispanic, substantial evidence supports the trial court's finding that appellant failed to make a prima facie case.

On her juror questionnaire, Ms. Barreto noted that the answer that corresponded to her view on the death penalty was, "E. While I am somewhat opposed to the death penalty, I do believe there are rare cases where a death sentence should be imposed for a deliberate murder." (4 JQ 1115.) She also noted that she had "mixed feelings" regarding the death penalty but that if she lost a loved one she may want the person who committed the crime executed. (4 JQ 1116.) During voir dire, Ms. Barreto stated that she was unsure of her views on the death penalty, and that she did not know whether she could sentence someone to death. (16 RT 3898.) She stated that if she had to make a choice "I guess I would do it," but repeated that she was not sure. (16 RT 3899.)

Ms. Barreto stated that her daughter's close friend, who was an ex-gang member, had been murdered. (16 RT 3893.) She did not know the details of the murder but stated that she thought her daughter's friend had been a member of the "Norte 14" street gang and that he had tried to stay out of the gang lifestyle. (16 RT 3893.) In light of such answers, it is reasonable to believe that a prosecutor would have had some concern about Ms. Barreto's apparent sympathy for her daughter's friend who tried to escape the gang life only to be murdered, or that Ms. Barreto would sympathize with appellant who could claim that he had moved to Arizona to escape the gang life and be with his children.

Based on Ms. Barreto's equivocal view of the death penalty and her daughter's close friend being an ex-gang member who had been murdered, there was substantial evidence to support the trial court's determination that the prosecutor had race-neutral reasons for excusing her and that appellant had failed to make a prima facie case. (*People v. Young, supra*, 34 Cal.4th at p. 1172; see *People v. Williams, supra*, 56 Cal.4th at p. 654 [prospective juror's reluctance to impose the death penalty].)

Additional factors further support the trial court's finding. At the time the trial court ruled on the *Batson/Wheeler* motions, the court stated that it had considered the ethnic and racial make up of the remaining jurors in the box and in the panel. (28 RT 6619-6620.) The following day after the jury was selected, the court made a further record by noting the racial make up of the selected jurors: Of the twelve seated jurors three were Hispanic and of the five alternates, three were Hispanic.[29] (28 RT 6745-6752.)

> While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is a indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.

(*People v. Stanley* (2006) 39 Cal.4th 913, 938, fn. 7 citing *People v. Turner* (1994) 8 Cal.4th 137, 168.)

Finally, appellant asserts that if the trial court erred in its ruling on the *Wheeler* motions, that the error was prejudicial and reversal is warranted because the trial took place more than 11 years ago. (AOB 315-316.) Not so. Assuming arguendo this Court finds error, a limited remand to the trial court to allow the prosecutor to explain the race-neutral reasons for his

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[29] As previously noted, Juror No. 12 who was a Caucasian female, was replaced by Alternate No 3, a Hispanic female at the beginning of the guilt phase of the trial. Ultimately, four of the jurors who rendered a verdict in this case were Hispanic.

challenges and for the court to evaluate the explanations is proper. (*People v. Johnson, supra*, 38 Cal.4th at pp. 1103-1104.) The fact that more than 11 years has passed since the trial took place does not make any alleged error reversible per se. In this case, as in *People v. Johnson, supra*, 38 Cal.4th at page 1096, "the court and parties have the jury questionnaires and a verbatim transcript of the jury selection proceeding to help refresh their recollection." (*Id.* at p. 1102.)

In sum, the record shows that the trial court properly performed its duties and correctly found that appellant had not produced evidence that was sufficient for the trial court to "draw an inference that discrimination had occurred." (*People v. Young, supra*, 34 Cal.4th at p. 1172.) Accordingly this claim should be denied. Assuming arguendo that this Court determines substantial evidence does not support the trial court's determination, a limited remand is appropriate. (*People v. Johnson, supra*, 38 Cal.4th at pp. 1098-1099.)

IX. THE TRIAL COURT PROPERLY ADMITTED THE GANG EVIDENCE; ANY ERROR WAS HARMLESS

Appellant agues that the admission of gang evidence was irrelevant and more prejudicial than probative, violating his federal constitutional right to due process and rendering his trial unfair. (AOB 317-324.) Respondent submits the trial court properly admitted the gang evidence because it was relevant to motive, intent and identity and that the admission of the evidence did not violate appellant's statutory or constitutional rights.

A. Trial Court Proceedings

Appellant filed a written motion in limine to "exclude gang evidence on [the] Leonel Parades and Juan Carlos Ramirez cases." (11 CT 3187-3189.) Appellant argued that gang evidence was insufficient to prove conspiracy or intent, and that testimony by gang experts was not scientific evidence. (11 CT 3188-3189.) The prosecutor responded stating that he

sought to introduce gang evidence to prove identity, a common pattern of these gang members, and the consequences of snitching. (11 CT 3247-3249.)

At a hearing on November 29, 2000, appellant argued that evidence that he was in the same gang as Efrain Garza was not relevant and did not demonstrate identity or motive. (8 RT 2124.) He argued that identity was not an issue in this case because Daniel Quintana, Carlos Rosales, Hector Valenzuela and Willie Santiago all identified appellant and linked him to the crime. (8 RT 2124, 2128.) Appellant further argued that there was no relevance to motive because the carjacking was for "profit" and had no relation to gangs. (8 RT 2125.) Appellant stated that the prosecution was not alleging that any of the victims were gang members or that the crimes were carried out for retaliation. (8 RT 2125-2126.) He moved to exclude the "gang testimony" under Evidence Code section 352, the California Constitution, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. (8 RT 2149-2150.)

The People responded by arguing that the crimes involving Leonel Paredes, Juan Carlos Ramirez, and Chad Yarbrough were motivated by the gang and that appellant committed the crimes with his fellow gang affiliates which was probative of his identity. (8 RT 2133.) The People stated that if appellant was willing to stipulate to his presence in the Leonel Paredes and Juan Carlos carjackings then he would leave out the gang evidence. (8 RT 2133-2134.) The prosecutor pointed out that he had already been put on notice that appellant would be attacking the identification of appellant in the Paredes carjacking. (8 RT 2134.)

The People noted that *People v. Champion* (1995) 9 Cal.4th 879, was on point and similar to the issue in this case. (8 RT 2134.) The People stated that the gang expert, Deputy Contreras, would be testifying regarding

appellant's tattoos to identify him as a member of the same gang the other coconspirators were part of or associated with. (8 RT 2135.)

After hearing argument the trial court ruled:

> With regard to -- assuming that Officer Contreras qualifies as an expert on gangs, gang -- street gangs and issues related to street gangs, the Court does find it would be relevant, both to the issues of identification, as well as issues of motive and intent, with respect to the charges pending against the defendant.
>
> And I've done my 352 weighing, in that regard, and I'm not getting into the issue of snitching yet. So other than the issue of snitching, under 352, I do find that the evidence of gang activity and affiliation would be probative, and would not be substantially outweighed by the prejudicial effect, based upon the offers of proof I've heard. And then the Court does not find it would involve an undue consumption of time within the 352 objection.

(8 RT 2166-2167.)

During trial, Deputy Contreras testified that appellant was affiliated with the LFS subset of Lamont 13, one of the main street gangs in Lamont. He further testified that De La Rosa, Quintana, Santiago, and Valenzuela claimed Lamont 13, and Garza was an LFS gang member. (37 RT 8560-8565, 8575.) Deputy Contreras explained that appellant had "LFS" tattooed on his shoulder with "13" next to it, and a tattoo of "Sur" on his chest. (37 RT 8574.) Gang tattoos showed loyalty to the gang, and demonstrated that the person identified with the gang. (37 RT 8572.) Deputy Contreras explained that someone could be initiated into a gang or claim a gang by committing crimes. (37 RT 8632.) Appellant objected to Deputy Contreras's testimony on relevancy and Evidence Code section 352 grounds. (37 RT 8561, 8571 [objection deemed continuing].) The court instructed the jury:

> The Court is going to admonish the jury consistent with my earlier ruling as to the limited purpose of this testimony at this time.

> Ladies and gentlemen of the jury, to the extent that this witness is being offered as an expert witness on the subject of street gangs, his testimony related to street gangs is going to be admitted at this time for the limited purpose of being circumstantial evidence on the subjects of identification, motive, or intent. And it's limited to those areas -- identification, motive, and intent.
>
> Keep in mind those limitations as you listen to this testimony.

(37 RT 8561-8562.)

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

Appellant contends that the admission of evidence that appellant and his coconspirators were affiliated with Lamont 13 constituted an abuse of discretion requiring reversal. (AOB 317-324.) Respondent submits that the trial court properly admitted the gang evidence for the limited purpose of proving motive, intent and identity.

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351; see Cal. Const., Art I, § 28, subd. (f)(2); Evid. Code, § 350.)

> The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent or motive. [Citations.]

(*People v. Garceau* (1993) 6 Cal.4th 140, 177.) The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision "exceeds the bounds of reason." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Prince* (2007) 40 Cal.4th 1179, 1222.)

> Admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged.

(*People v. Williams* (1997) 16 Cal.4th 153, 193.) However, it is well established that gang evidence is admissible when the very reason for the crime is gang related. (*People v. Champion, supra,* 9 Cal.4th at p. 922.) Thus, regardless of whether there is a criminal street gang enhancement allegation, gang evidence is admissible in the prosecutor's case-in-chief, where it is relevant to establish motive, intent or some fact other than the defendant's criminal propensity, provided that the probative value of the evidence is not substantially outweighed by its prejudicial effect. (*People v. Williams, supra*, 16 Cal.4th at p. 193; see *People v. Olguin,* at p. 1370; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516-1519.)

Here, the gang evidence was admissible in the trial of the substantive offenses to prove appellant's motive and intent. The prosecution's theory of the case was that appellant and Garza murdered Yarbrough because they believed Yarbrough was "banging with Arvin," the rival gang of Lamont 13. (14 CT 4147, 4176; RT 8626.) Appellant himself inserted his status as a gang member into the crime when, before murdering Yarbrough, appellant told him that it was not "a game to be playing around with gangbangers [] cause you don't want to be playing games with us . . .." (14 CT 4152-4153; see *People v. Hernandez* (2004) 33 Cal.4th 1040. 1050-1051 [defendant injected gang status into crime].) Appellant told Detective Wahl that he was trying to scare Yarbrough because "he was playing around with gangs, you know and gangbangers are not a game to playing around with . . .." (14 CT 4149.) Appellant also told Detective Wahl that when Yarbrough and his friends went to appellant's aunt's house in an attempt to find Carlos Rosales, Yarbrough and his friends were saying Rosales was a "punk" and that "it's about Arvina." (14 CT 4148.) This evidence demonstrated motive for an otherwise senseless crime. The evidence also showed that appellant harbored the necessary intent, that is, malice aforethought and that he acted with premeditation and deliberation,

negating appellant's defense that he accidently shot Yarbrough. It also demonstrated why appellant and Garza were "acting together in the commission of the crime, thus buttressing such guilt issues as motive and intent." (*People v. Hernandez,* at p. 1051.)

The same is true in the Paredes and Juan Carlos Ramirez kidnappings. The prosecution offered substantial evidence that appellant and members of Lamont 13 participated in these carjackings and kidnappings. The money stolen from Juan Carlos Ramirez was split between members of the gang, including appellant. Evidence that appellant was in the same gang as other people identified in the commission of the crimes reinforced the testimony of Leonel Paredes and Juan Carlos Ramirez. Evidence that appellant and his coconspirators were all "members of the same gang formed a significant evidentiary link in the chain of proof tying them to the crimes in this case." (*People v. Champion, supra*, 9 Cal.4th at p. 921.)

The probative value of this evidence was not substantially outweighed by the risk of undue prejudice so as to warrant exclusion under Evidence Code section 352. Appellant stated that there was no reason other than to show appellant's criminal disposition to admit the gang evidence. (AOB 323-324.) That is not correct. The eyewitness identification of appellant in the Leonel Paredes case was attacked by the defense at trial and appellant's intent and motive in all three crimes was a serious area of contention.

Moreover, any prejudicial impact of the evidence was lessened by the trial court's limiting instruction to the jury that the gang evidence was admitted only as circumstantial evidence to prove appellant's identity, motive and intent, and should not be considered for any other purpose. (37 RT 8561-8562.) It is presumed that the jury follows the instructions given. (*People v. Fuiava* (2012) 53 Cal.4th 622, 669; *People v. Osband* (1996) 13 Cal.4th 622, 714.) Appellant has not established that any of the gang

evidence was so prejudicial that it threatened to sway the jury to convict appellant regardless of his actual guilt.

There was also no federal constitutional violation. (AOB 324.) The admission of evidence violates due process only if it is so prejudicial as to render the entire trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67-72; *People v. Partida, supra*, 37 Cal.4th at p. 439.) In other words, the admission of evidence can violate due process only if there are no permissible inferences that can be drawn, and the evidence is of such a quality that it necessarily prevents a fair trial. (*Partida*, at p. 439.) Non-arbitrary application of the rules of evidence does not ordinarily infringe on a defendant's federal constitutional rights. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035; see *Rock v. Arkansas* (1987) 483 U.S. 44, 56; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) In particular, a state trial court's Evidence Code section 352 determination is a judgment call that is "unquestionably constitutional." (See *Montana v. Egelhoff* (1996) 518 U.S. 37, 42.) For all of the reasons explained herein, there was no due process violation.

C. Any Error In The Admission Of The Gang Evidence Was Harmless

To the extent the court erred in admitting any of the gang evidence, the error was harmless under either the state or federal standard. (See *Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

> Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.

(*People v. Partida, supra*, 37 Cal.4th at p. 439; Evid. Code, § 353, subd. (b).)

The evidence in this case consisted of far more than evidence of appellant's gang membership and affiliation with his coconspirators. Appellant was identified by Leonel Paredes as one of the three people who carjacked and kidnapped him on October 4, 1997. Paredes identified appellant as the person who held the shotgun to his chest during the kidnapping. (30 RT 7121-7122.)

Juan Carlos Ramirez identified appellant as one of the individuals who was involved in his kidnapping. (31 RT 7379-7380.) Juan Carlos Ramirez testified that appellant struck him with a belt on his back and continued beating him after he fell to the ground. (31 RT 7380-7381; 32 RT 7579, 7587.) Juan Carlos testified that after he was beaten and robbed, appellant tied him up with a rope and left with the other men. (31 RT 7381-7383.) Quintana and Rosales also testified that appellant took part in the kidnapping and beating of Juan Carlos Ramirez. They further explained that the money taken from Juan Carlos Ramirez was split amongst them after they left the scene. (32 RT 7585.) Appellant himself admitted that he took part in the abduction and beating of Juan Carlos Ramirez. (47 RT 10403-10404.) Appellant testified that he beat Juan Carlos Ramirez because Juan Carlos Ramirez had hit De La Rosa's sister. (47 RT 10403.) Appellant admitted that he received $20 of the money taken from Juan Carlos Ramirez along with a medallion that said "Juan" on it. (47 RT 10404.)

Finally, the evidence that appellant murdered Yarbrough was overwhelming. Prior to Yarbrough's abduction on October 14, 1997, Rosales, Garza, Santiago, and Quintana were at Quintana's house in Lamont. Appellant was cleaning a Tec-9 handgun while they were at the house. The magazine was loaded and appellant put the clip in the gun. (33 RT 7854-7866.) After being at Quintana's house for a few hours, Rosales heard Garza say, "here comes Chad's truck." (33 RT 7867.) Appellant

flagged down Yarbrough's truck and Santiago and Rosales heard a gun being cocked as Garza and appellant approached the truck. (33 RT 7878-7879, 35 RT 8229-8230.) Brent Yarbrough, Yarbrough's younger brother, was ordered out of the truck at gunpoint and told to sit on the curb. (36 RT 8284.) Brent Yarbrough identified appellant as one of the males who abducted his brother. (33 RT 7782.) Appellant and Garza left Quintana's house with Yarbrough.

At approximately 1:30 a.m., Yarbrough's uncle, Sam Handel, found Yarbrough's lifeless body in an orchard one to two miles northeast of Lamont. (37 RT 8536.) Yarbrough's hands were bound behind his back with shoelaces and black electrical tape was covering his eyes and nose. (39 RT 9028-9029.) The cause of death was gunshot wounds to the head. (39 RT 9030.) There were three entrance and exit wounds to the head. (39 RT 9032, 9037.) There was no powder stippling on the wounds which indicated the gun was at least two feet away from the body when it was fired and the bullet wounds were evenly spaced apart indicating the weapon likely was not a fully automatic weapon. (39 RT 9038, 9045-9046, 9048; 40 RT 9176.)

Appellant admitted in a taped interview that he shot and killed Yarbrough. (41 RT 4143.) Appellant's defense at trial was that the shooting was an accident and that he had only intended to scare Yarbrough because of Yarbrough's actions at appellant's aunt's house. (14 RT 4147-4148.) However, this evidence was contradicted by the fact that there were three shots to Yarbrough's head, Yarbrough's eyes and nose had tape over them, Yarbrough had been stripped of most of his clothes, appellant's initial denial of any involvement in the murder, and two prosecution experts who testified that the weapon that shot Yarbrough likely was not fully automatic.

Even without the gang evidence the jury would have convicted appellant of the charged crimes because the evidence was overwhelming, and the gang evidence was not likely to affect the outcome of the case. Assuming arguendo that the gang evidence was admitted in error, there is no reasonable probability the verdict would have been more favorable to appellant absent the error. (*People v. Partida, supra*, 37 Cal.4th at p. 439; Evid. Code, § 353, subd. (b).)

X. THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENT TO POLICE BECAUSE HE VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVED HIS *MIRANDA* RIGHTS

Appellant contends the trial court erred in admitting his statement made to Sergeants Johnson and Wahl on July 24, 1998, because he did not validly waive his *Miranda*[30] rights. (AOB 325-336.) Respondent submits that appellant voluntarily, knowingly and intelligently waived his rights.

A. Procedural Background

Detective Glenn Johnson testified he and Sergeant Rosemary Wahl first spoke with appellant on July 19, 1998 in the jail at the El Paso Police Department in Texas. (5 RT 1372-1373.) Sergeant Wahl advised appellant of his *Miranda* rights. (5 RT 1414.) Appellant denied any involvement in the Yarbrough murder. (5 RT 1385.) At the end of the interview on July 19, 1998, Sergeant Wahl stated that she and Detective Johnson would step out of the room for a few minutes to let appellant "rethink everything" and then come back in. (5 RT 1414.) Appellant responded, "I don't have nothing else to say to you guys." (5 RT 1414.) Both Detective Johnson and Detective Wahl understood appellant to mean that he had nothing to add to the statement he had already made. They did not think that he was

[30] *Miranda v. Arizona* (1966) 384 U.S. 436.

invoking his right to silence. (5 RT 1414-1415.) There was no further questioning on July 19, 1998. (5 RT 1415.)

On July 24, 1998, at approximately 10:00 a.m., Detective Johnson contacted appellant a second time to extradite him to California. (5 RT 1377-1378.) Detective Johnson drove appellant from the El Paso jail to the airport. Detective Johnson drove the vehicle, appellant sat in the front passenger seat, and Sergeant Wahl sat in the rear passenger seat. (5 RT 1379.) Detective Johnson advised appellant of his *Miranda* rights while they were in the vehicle. (5 RT 1379, 1440-1441.) Detective Johnson and Sergeant Wahl did not ask him any specific questions about the case at that time, or during the flight to Bakersfield. (5 RT 1379.)

When they arrived in Bakersfield, appellant was taken to the Kern County Sheriff's Department. (5 RT 1379.) On the drive to the Sheriff's Department they stopped at a Carl's Jr. restaurant and picked-up three hamburgers. (5 RT 1380.) Approximately seven to eight hours had passed since Detective Johnson had advised appellant of his *Miranda* rights. (5 RT 1380.) During that time, no questions were asked of appellant regarding the Yarbrough case. (5 RT 1395, 1416.) When they arrived at the Sheriff's Department they ate their hamburgers in a room with a table and chairs. (5 RT 1380.) Towards the end of the meal Detective Johnson left the room. (5 RT 1380.) After Detective Johnson left the room, appellant asked Sergeant Wahl general questions relating to booking and when he would go to court. (5 RT 1418-1419.) Sergeant Wahl came out of the room approximately five minutes later and told Detective Johnson that she thought they should talk to appellant. (5 RT 1381.) Detective Johnson re-entered the room and Sergeant Wahl started the tape recording so that the conversation would be recorded. (5 RT 1382.) Detective Johnson testified that approximately five minutes elapsed between the time he re-entered the room and the time Sergeant Wahl re-entered the room. (5 RT

1382.) Approximately five to ten minutes into Detective Johnson's conversation with appellant, Detective Johnson partially re-advised him of his *Miranda* rights. (5 RT 1384.) Specifically, Detective Johnson stated:

> Okay, Like I said it's uh, you know I'm gonna, before we get there I'm gonna remind you that the rights I read you uh in the car when we picked you up (inaudible). You have the right to have an attorney and you have a right to have an attorney present before and during questioning, one will be appointed by the court. If you can't afford one and anything you say can and will be used against you in a court of law. I don't have the card in front of me uh but I was reminding you of those rights. Having those rights in mind do you wish to tell us about it now?
>
> Ramirez: Yeah.

(14 CT 4142.)

After Detective Johnson re-advised appellant of his *Miranda* rights, appellant admitted his involvement in the Yarbrough murder. (5 RT 1384.)

Appellant filed a motion to suppress his July 24, 1998 statement. (8 CT 2385.) The court denied the motion stating:

> [D]efendant was not invoking his right to remain silent in using the words that he did when he said, quote, I don't have nothing else to say to you guys, closed quote.
>
> I further specifically find that there were no promises of leniency or coercion on either of the days in question here which would violate the basic tenets of Miranda, which would make the statements involuntary.
>
> So that's a specific finding by me that there was no coercive conduct by law enforcement officers in terms of references to leniency or promises that would have caused the defendant to rely upon those improperly in waiving his rights or failing to invoke his rights.
>
> I, finally, find that the statement given on the July 24th, 1998, occasion was voluntarily given under the totality of the circumstances and that there was no invocation of Miranda rights on that date either.

(5 RT 1497.) The court further found that Detective Johnson advised appellant of his *Miranda* right on the morning of July 24, 1998, during the drive to the airport and that appellant waived those rights. (5 RT 1498-1499.)

B. Appellant Did Not Invoke His Right to Remain Silent, and Made a Voluntary, Knowing, and Intelligent Waiver of His *Miranda* Rights

Under the Fifth Amendment to the United States Constitution "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." (U.S. Const., 5th Amend.) To combat the pressures of a custodial interrogation and to allow a suspect the opportunity to exercise the privilege against self-incrimination, the suspect must be advised of his right to remain silent and his right to the assistance of counsel. (*Miranda, supra*, 384 U.S. at p. 467.) If a suspect invokes his right to remain silent or his right to counsel, questioning must cease, and any statements made afterward may not be used in the People's case in chief. (*People v. Nelson* (2012) 53 Cal.4th 367, 375.)

A defendant may, however, waive his *Miranda* rights. To establish a valid waiver, the People must demonstrate by a preponderance of the evidence that the defendant's waiver was knowing, intelligent, and voluntary. (*People v. Williams* (2010) 49 Cal.4th 405, 425.) "No particular manner or form of *Miranda* waiver is required." (*People v. Davis* (2009) 46 Cal.4th 539, 585.) The waiver may be either "express" or "implied." (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 283; *People v. Whitson* (1998) 17 Cal.4th 229, 244, 250.) An express waiver is not required if a suspect's actions make it clear that a waiver is intended. (*People v. Whitson, supra*, 17 Cal.4th at p. 250; *Berghuis v. Thompkins* (2010) 560 U.S. 370, 371-372.)

On appeal, the trial court's resolution of disputed facts and its credibility evaluations are accepted by the reviewing court if supported by substantial evidence. (*People v. Whitson, supra*, 17 Cal.4th at p. 248.) The reviewing court independently determines whether, from the undisputed facts and those facts properly found by the trial court, the challenged statements were obtained illegally. (*Ibid.*)

1. Appellant Did Not Invoke His Right to Remain Silent on July 19, 1998

Appellant contends that he invoked his right to remain silent in El Paso when he stated, "I have nothing else to say." (AOB 332.) Respondent submits that appellant's comment was not an unambiguous invocation of his right to remain silent.

A suspect may invoke his right to silence "by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Samayoa* (1997) 15 Cal.4th 795, 829.) The invocation of a suspect's right to silence must be unambiguous. (*Berghuis v. Thompkins, supra*, 560 U.S. at p. 372.)

> It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda, supra*, 384 U.S. 436, either to ask clarifying questions or to cease the questioning altogether.

(*People v. Stitely* (2005) 35 Cal.4th 514, 535, citing *Davis v. United States* (1994) 512 U.S. 452, 459-462.) When determining whether a suspect has invoked his right to remain silent, courts will consider what the suspect said and the context of his statements. (*People v. Nelson, supra*, 53 Cal.4th at p. 385.)

In *People v. Martinez* (2010) 47 Cal.4th 911, 949-952, the defendant initially waived his *Miranda* rights and denied any involvement in the crime. After officers pointed out inconsistencies in the defendant's story,

the defendant responded, "That's all I can tell you." (*Id.* at p. 944.) The officer ended the interrogation. (*Ibid.*) The defendant was interviewed two times the following day, made equivocal statements, and the officers ended the interrogation. (*Id.* at pp. 944-946.) The next morning officers approached the defendant in his cell and defendant admitted his involvement in the crime. (*Id.* at p. 946.) On appeal, this Court upheld the trial's court determination that the defendant's statements taken in context, did not invoke his right to remain silent. (*Id.* at p. 952; see *In re Joe R.* (1980) 27 Cal.3d 496, 516 [equivocal statement not invocation of right to remain silent]; *People v. Stitely, supra,* 35 Cal.4th at p. 534 [same]; *People v. Jennings* (1988) 46 Cal.3d 963, 977-978 [same].)

In the present case, appellant's statement "I don't have nothing else to say[,]" was not an unambiguous invocation of his right to remain silent. Taken in context, the statement was simply an expression that he had nothing to add to the story that he had already told the detectives after he agreed to speak with them. Appellant's statement after Detective Johnson told him he could think about things appeared to be an expression of frustration on his part because of the detectives apparent refusal to accept his denial of guilt. (*People v. Nelson, supra*, 53 Cal.4th at p. 383; *People v. Jennings, supra.* 46 Cal.3d at pp. 977-978.)

Even assuming appellant's statement on July 19, 1998, was an invocation of his right to remain silent, it does not invalidate appellant's statement on July 24, 1998, because appellant expressly waived those rights after he was re-advised.

> [T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

(*Michigan v. Mosley* (1975) 423 U.S. 96, 104.) However, this does not mean that police can not renew their questioning of a suspect. (*People v. Mickle* (1991) 54 Cal.3d at 140, 169-170.)

Here, if appellant's statement "I don't have nothing else to say to you guys[,]" were to be deemed an invocation of his right to remain silent, the subsequent round of questioning approximately five days later, was proper. The detectives did not badger appellant. Five days had passed between the initial questioning in El Paso and the second round of questioning. Appellant was re-advised of his *Miranda* rights, and expressly agreed to speak with the detectives. Nothing in the record suggests that appellant's decision to speak to officer's on July 24, 1998, was involuntary.

2. Appellant Waived His *Miranda* Rights

Appellant asserts that he did not waive his *Miranda* rights. (AOB 334.) No so.

A valid Miranda waiver may be express or implied. (*Whitson, supra*, 17 Cal.4th at p. 246.) An express waiver occurs when a suspect expressly states a willingness to go forward and answer an officer's questions after receiving his or her *Miranda* rights. (*People v. Williams* (2010) 49 Cal.4th 405, 426.) A valid *Miranda* waiver may also be implied. A *Miranda* waiver may be implied through "'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating a waiver.'" (*Berghuis v. Thompkins, supra*, 560 U.S. at p. 372 citing *North Carolina v. Butler* (1979) 441 U.S. 369, 373.)

Here, appellant was initially advised of his *Miranda* rights by Sergeant Wahl on July 19, 1998. (5 RT 1414.) On July 24, 1998, at approximately 10:00 a.m., Sergeant Wahl and Detective Johnson drove appellant from the El Paso jail to the airport. (5 RT 1379.) On the drive to the airport Detective Johnson again advised appellant of his *Miranda* rights. (5 RT 1379, 1440-1441.)

Approximately seven to eight hours later, after arriving in Bakersfield, appellant began asking questions of Sergeant Wahl relating to booking and court. (5 RT 1418-14719.) In Bakersfield, before resuming questioning, Detective Johnson reminded appellant of the earlier *Miranda* advisements and asked appellant if he wished to tell them about the crime. (14 CT 4142.) Appellant responded "yeah" and Detective Johnson then asked him what happened at "Bonkers" house. (14 CT 4142-4143.) Appellant then confessed to the crime.

Appellant's response "yeah" after he was re-advised of his *Miranda* rights and asked whether he wished to speak to the detectives about the crime was an express waiver of those rights. (*People v. Williams, supra,* 49 Cal.4th at p. 426.) Even if this was not deemed an express waiver, appellant's subsequent actions of answering the detectives open-ended questions was an implied waiver. (*Berghuis v. Thompkins, supra,* 560 U.S. at pp. 387-388; *People v. Whitson, supra,* 17 Cal.4th at p. 250.)

The fact that his full *Miranda* rights were read to him seven to eight hours earlier in the car does render the confession inadmissible under *Miranda.*

> The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights.

(*People v. Mickle, supra,* 54 Cal.3d at p. 170 [re-advisement of *Miranda* rights unnecessary after 36 hours].)

Here, the interview at Kern County Sheriff's Department on July 24, 1998, occurred only seven to eight hours after appellant was read his *Miranda* rights, and approximately five days after he was read and waived his *Miranda* rights in El Paso, Texas. Appellant had been advised

numerous times that statements he made could be used against him in court. (4 RT 1414, 5 RT 1379, 1440-1441; 14 CT 4138, 4142.) The interviews on both July 19 and July 24 were by the same detectives. In the latter interview in Bakersfield, Detective Johnson reminded appellant of the earlier advisements and specifically reminded him of his right to speak with an attorney, his right to have an attorney appointed to him, and that anything he said in the course of the interview may be used against him in court. Nothing in the record indicates that appellant was unaware or incapable of recalling the prior advisement when he decided to speak to the detectives.

Moreover, appellant's silence after being re-advised of his Miranda rights in the car in El Paso was not an invocation of his right to remain silent. (*Berghuis v. Thompkins*, supra, 560 U.S. at pp. 382-383 [defendant's silence during interrogation was not an invocation].)

Under the totality of the circumstances appellant's statement to the police on July 24, 1998, was not obtained in violation of *Miranda.*

C. Appellant's Confession Was Voluntary

Appellant asserts, without any citation to the record, that his confession was involuntary because "of the promises of leniency in a context of coercion and isolation for several hours . . . ." (AOB 334-336.) Respondent submits that appellant's statement to law enforcement was voluntary.

Appellant filed a motion to suppress his July 24, 1998 statement on June 5, 2000. (8 CT 2385.) He argued that appellant's statement was involuntary because it was induced by a promise of leniency and the threat of the death penalty. (9 CT 2401-2407.) The trial court found that there was no coercive conduct, no promise of leniency, or threat by law enforcement that would have made the confession involuntary. (5 RT 1497.)

A statement is voluntary when it is made freely by the suspect and without any form of compulsion or reward. (*People v. Tully* (2012) 54 Cal.4th 952, 993.) A statement is deemed involuntary when there is coercive police conduct which causes the suspect's will to be "overborne," so that the statement is no longer "the product of a rational intellect and a free will." (*Blackburn v. Alabama* (1960) 361 U.S. 199, 208; *People v. Williams, supra*, 49 Cal.4th at pp. 436-437.) It is permissible for law enforcement to urge a suspect to tell the truth and point out the benefits that may be derived from his truthful confession. (*People v. Tully, supra*, 54 Cal.4th at p. 996.) This Court has found a constitutional violation where officers extract incriminating information through express or implied threats and promises. (*People v. Ray* (1996) 13 Cal.4th 313, 339-340.) Courts determine whether a statement was voluntary on the totality of the circumstances. (*People v. Williams, supra*, 49 Cal.4th at p. 436.) The prosecution must establish voluntariness by a preponderance of the evidence. (*People v. Tully, supra*, 54 Cal.4th at p. 993.)

> [W]hen a reviewing court considers a claim that a confession has been improperly coerced, if the evidence conflicts, the version most favorable to the People must be relied upon if supported by the record. [Citations.]

(*People v. McWhorter* (2009) 47 Cal.4th 318, 357.)

At the outset, respondent submits that appellant has failed to cite to the record on appeal to support this argument, and thus, the argument should be deemed forfeited. (Cal. Rules of Court, rule 8.204 (a)(1)(C); *Sky River LLC v. County of Kern* (2013) 214 Cal.App.4th 720, 741.) Even assuming the argument is not forfeited it lacks merit.

Appellant makes a cursory argument that there was a promise of leniency. (AOB 336.) The detectives told appellant that his statement may be important in later court proceedings, but Detective Johnson immediately reminded appellant that whatever he said would be used in court against

him, and made him no promises regarding leniency. (14 RT 4137-4138.) Detective Johnson explained to appellant that they had evidence against him and Efrain Garza and that without knowing the "exact truth of what happened" they may be found equally guilty. (14 CT 4141.) Detective Johnson told appellant that sometimes the truth makes a difference and Sergeant Wahl said it would make a difference with how appellant felt inside. (14 CT 4141.)

Detective Johnson's and Sergeant Wahl's statements merely urged appellant to tell the truth and made the obvious point that appellant may benefit emotionally, or that he may benefit at sentencing, if his side of the story was heard. (*People v. Tully, supra*, 54 Cal.4th at p. 994.) Here, there was no evidence that appellant was frightened by his contact with law enforcement or that he falsely confessed to avoid a harsher punishment. Neither detective promised or threatened appellant in any manner. Instead, appellant's motivation to confess appeared to be a desire to "atone for his life of crime." (*People v. Ray, supra*, 13 Cal.4th at p. 341; 14 CT 4140-4141.) Thus, the trial court had substantial evidence to support its ruling that appellant's confession was not the product of police coercion.

D. Appellant Cannot Demonstrate Prejudice

Assuming appellant's confession was obtained in violation of *Miranda*, appellant cannot demonstrate that the admission of his statement was prejudicial.

Harmless error analysis applies to confessions obtained in violation of *Miranda*. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 1257; *People v. Neal* (2003) 31 Cal.4th 63, 86-87.) The test for excusing an error as harmless is whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Absent the confession the People had overwhelming evidence of appellant's guilt. Numerous witnesses identified appellant as being one of the men who flagged down Yarbrough and abducted him several hours before he was murdered. (33 RT 7867, 7878-7879; 35 RT 8227; 8230.) Yarbrough's brother, Brent, identified appellant as one of the men who forced him out of his brother's truck and left with Yarbrough at gunpoint. (33 RT 7782; 36 RT 8281-8286.) Appellant's cousin, Isabel Garcia, witnessed appellant driving Yarbrough's truck at 11:00 p.m. that evening, after Yarbrough had been murdered. (36 RT 8307-8308.) Joamy Garza saw appellant and Garza the night of Yarbrough's murder in a white truck. (36 RT 8434; 36 RT 8441-8452.) Susan Villa, appellant's aunt, testified that appellant was living with her in October 1997. (39 RT 8905.) Susan Villa saw appellant between 10:00 and 10:30 p.m. on October 14, 1997. (39 RT 8938.) Appellant changed clothes, asked to borrow money, made several phone calls and then left the residence by taxi. (39 RT 8938.) Yarbrough's uncle, Samuel Handel, located Yarbrough's body in an orchard at approximately 1:30 a.m. (37 RT 8536.) Yarbrough's hands were bound behind his back with shoelaces tied at the wrists, and black electrical tape was around his eyes and part of his nose. (39 RT 9028-9029.) The cause of Yarbrough's death was gunshot wounds to his head. (39 RT 9030.)

Several days later appellant telephoned Susan Villa. Susan Villa asked appellant if he committed the murder. He did not answer. Appellant asked her for money and when she told him she could not loan him money he hung-up. (39 RT 8916-8917, 8940.)

Police conducted a search of Cipriano Ramirez's apartment in Arizona on November 6, 1997, and located a black plastic case for an Intratec handgun and live 9 millimeter ammunition. Paperwork with appellant's name on it was located at the same residence. Several weeks

before Yarbrough's murder Rosales saw appellant with a Tec-9. (33 RT 7850-7852.)

Appellant's testimony at trial was substantially the same as his confession. (*People v. Davis* (2009) 46 Cal.4th 539, 598-599.) At trial, appellant admitted to abducting Yarbrough at gunpoint. (47 RT 10410-10412.) Appellant testified that Garza tied Yarbrough's hands and taped his eyes. (47 RT 10420, 40433.) Appellant obtained his Tec-9 so that he could scare Yarbrough. However, he testified when he put the clip in the gun it accidently discharged, killing Yarbrough. (47 RT 10420-10424.) Appellant and Garza then fled the scene. (47 RT 10427.)

Thus, even if the trial court erred in admitting appellant's statement made to law enforcement on July 24, 1998, the error was harmless because the error did not contribute to the verdict in light of the overwhelming evidence against appellant at trial.

XI. THE TRIAL COURT PROPERLY ADMITTED THE RECORDED STATEMENT OF CARLOS ROSALES

Appellant asserts that the trial court prejudicially erred by admitting the recorded statement of Carlos Rosales because it was "unreliable, prejudicial and impermissible material . . . ." (AOB 341.) He further argues that the statement violated his constitutional rights to the assistance of counsel, confrontation and due process. (AOB 341.) Respondent submits that the trial court properly admitted the statements to demonstrate Rosales's state of mind at the time he gave the statement, to impeach his testimony at trial, and to rebut appellant's assertion that Rosales was coerced or pressured into giving a statement. As to appellant's constitutional claims, respondent submits that these arguments are forfeited. Even if considered on the merits, they still fail because the statement was properly admitted and Rosales testified at trial and was subject to cross-examination.

A. Background

Carlos Rosales testified at appellant's trial. Rosales had an agreement with the District Attorney's Office that he would plead guilty to one count of robbery in exchange for his truthful testimony at trial. (33 RT 7882.) At appellant's trial, Rosales described the carjacking and robbery of Juan Carlos Ramirez, and implicated appellant in that crime. He also testified that, on the night of Yarbrough's murder, he witnessed appellant and Garza approach Yarbrough's truck, and saw appellant and Garza drive away with Yarbrough. (33 RT 7823-7828, 7854-7855, 7867, 7878-7879.)

During cross-examination, Rosales testified that he was arrested on October 22, 1997. (33 RT 7896.) Rosales claimed that when he was arrested he was beaten by the officers. (33 RT 7896.) He described Officers Contreras and Studer picking him up and throwing him into a wall during the questioning. He claimed that they would stop the tape recording when they beat him. (33 RT 7898.) He further claimed that he requested an attorney but his request was not on the October 22 tape because they had stopped the tape at that point. He asserted that the officers "Started, telling me I was stupid because I'm going to prison for the rest of my life, and all this and that. . . ." (33 RT 7903.)

During cross-examination defense counsel asked about the officers' conduct on October 22 and its effect on Rosales's state of mind. Rosales stated that on October 22 he told officers he did not know anything about the crimes committed on October 14, 1997. Rosales testified that when he told the officers that he did not know anything, they threatened him and told him to think about it because if the jury found out he was telling a lie "the jury is going to send you from here to kingdom come." (33 RT 7916.) Rosales testified that the police told him on October 22 that they wanted his statement to be the same as Daniel Quintana's, and that the officers were mad. (33 RT 7918, 7920.) He specifically stated that Officer Jim

Christopherson was pressuring him and trying to get him to change his statement. (34 RT 7951.)

Rosales made a second statement to police on January 2, 1998, in connection with his plea agreement. (33 RT 7882.) In response to questioning from defense counsel, Rosales claimed that his subsequent statement on January 2 was made while he was under stress. Specifically, Rosales stated, "they are at you and at you . . . trick questions. And I mean, it's hard." (34 RT 7982.) Rosales could not recall if he made certain statements to the police on January 2, 1998. (33 RT 7827, 7834-7835, 7840.) When asked if his memory was better on January 2, 1998 or the date he testified, he responded that his memory was probably better now because he was "drugged-up" back then. (33 RT 7836.)

The prosecutor informed the court and defense counsel that based on the cross-examination of Rosales he intended to introduce the recording of the police interview of Rosales on January 2, 1998. Appellant objected that portions of the tape were speculative, prejudicial, contained hearsay and were irrelevant. (34 RT 8037) The prosecutor responded that the tape was relevant for the jury to hear the tone and manner of questioning to show that Rosales's January 2 statement was not the result of police pressure or coercion. He explained that portions of the tape were impeachment evidence and that he was entitled to have the tape admitted under Evidence Code section 356 to put the statement in context. (34 RT 8041-8043.)

The court ruled that the tape recording was admissible and that the prejudicial effect did not substantially outweigh the probative value under Evidence Code section 352. (34 RT 8045.) The court stated that it would admonish the jury that the questions of the officers were not being admitted for the truth but for the purpose of showing Rosales's state of mind and to explain subsequent conduct. (34 RT 8046.) The court stated that the recording was relevant:

> because of the allegations that the witness said he was being pressured, I think it's appropriate for the jury to hear the tone of voice that was used, the manner of speech, those kinds of things are relevant and probative.

(34 RT 8046.)

As to the January 2, 1998, recording, the court admonished the jury as follows:

> Ladies and Gentlemen of the jury, this admonition I'm going to give to you applies to this entire tape recorded statement, Exhibit 37 A, 37 B that's now being played to you.
>
> My admonition is that this evidence is not being admitted for the truth of what any police officers or -- actually in this case, Sheriff's Department detectives are saying.
>
> It is not offered for the truth of what they're saying.
>
> Anything that they said to the witness is limited to explain this witness's answer, his state of mind, his subsequent conduct.
>
> So don't consider the detective's statement for the truth of what was stated.
>
> Keep that in mind.

(34 RT 8083-8084.)

B. The January 2, 1998, Recording Was Properly Admitted By The Trial Court

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351; see Cal. Const., Art I, § 28, subd. (f)(2); Evid. Code, §350.)

> The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent or motive. [Citations.]

(*People v. Garceau, supra,* 6 Cal.4th at p. 177; see Evid. Code, § 210.) The decision to admit evidence is reviewed for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) This is:

> particularly true where, as here, underlying that determination [is a] question[] of . . . the state of mind exception to the hearsay rule [or nonhearsay circumstantial evidence of such state of mind]. [Citation.]

(*People v. Ortiz* (1995) 38 Cal.App.4th 377, 386, citing *Rowland*, at *id.*)

Evidence Code section 1250 provides in part:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or (2) The evidence is offered to prove or explain acts or conduct of the declarant.

A prerequisite to the state of mind exception to the hearsay rule is that the declarant's mental state or conduct be factually relevant. (*People v. Geier* (2007) 41 Cal.4th 555, 586, overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.)

Here, the taped interview of Rosales on January 2, 1998, was highly probative to show that he was not pressured or coerced into making the statement. At trial, appellant placed Rosales's state of mind at issue by eliciting from him an assertion that his testimony and statements implicating appellant were the products of coercion and thus, implicitly, not credible. (33 RT 7911.) As the trial court correctly noted, Rosales's tone of voice, the officers tone of voice, and the manner in which Rosales and the officers were speaking was relevant to both Rosales's credibility and to prove that he was not pressured or coerced when making the statement or when entering into his agreement with the District Attorney's Office. (34 RT 8045-8046.) The tape, showing that there was no impermissible coercion or pressure, was circumstantial evidence of his state of mind at the time he gave the statement, and relevant to whether he was actually

coerced. (*Rowland, supra*, 4 Cal.4th at p. 264; *Ortiz, supra*, 38 Cal.App.4th at p. 386.) Without the tape, the prosecutor would have been unable to adequately rebut Rosales's claim that the officers were pressuring him into entering the plea agreement and making the recorded statement on January 2, 1998.

Moreover, the trial court properly exercised its discretion to find the probative value of the recording was not substantially outweighed by any unduly prejudicial effect under Evidence Code section 352.

> The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." [Citation.]

(*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

As noted above, the evidence was highly relevant to demonstrate Rosales's state of mind when he gave his statement on January 2, 1998. It was not until appellant placed at issue the veracity of Rosales's testimony by his counsel's cross-examination that suggested Rosales's January 2 statement was the product of stress or coercion, that the People requested to admit the recording. Appellant argues that the recording contained evidence of burglaries, drug use, possession of weapons and alleged gang activity that would have been excluded. However, the trial court implicitly considered and rejected this in making the analysis under section 352. In any event, the only portion of the recording that arguably contained evidence of other "criminal activity" was Rosales's statement that the mother of appellant's children had "tried to set him up" because when appellant went to see his children, she called security and said appellant was trying to break in. (14 CT 3986.) However, appellant told Rosales that he was invited over and was going to take his children clothes and a

bracelet. (14 CT 3986.) Nothing about this portion of the recording was so prejudicial to warrant exclusion of the entire recording.

To the extent appellant argues that the tape contained inadmissible hearsay he is incorrect. Rosales's statements were not offered to prove the truth of what he said but instead was offered as circumstantial evidence of his state of mind. (See Evid. Code, §§ 1200, subd. (a), 1250.) Specifically, the recording was offered to prove that he was not pressured or coerced by the police when he made the statement or when he entered the plea agreement with the District Attorney. (*People v. Harris* (2013) 57 Cal.4th 804, 843 [victim's letters circumstantial evidence of state of mind]; *People v. Riccardi* (2012) 54 Cal.4th 758, 823 [indirect statements of the victim's state of mind were nonhearsay]; see *People v. Gurule* (2002) 28 Cal.4th 557, 621 [prior statement admissible to rebut claim of fabrication].)

Furthermore, the trial court gave a limiting instruction which admonished the jury that the questions asked by the officers were not being offered for their truth but instead were being offered to show Rosales's state of mind and his subsequent conduct. (34 RT 8083-8084.)

To the extent that the trial court's limiting instruction was vague or incomplete, the trial court had no sua sponte duty to give a limiting instruction, and appellant's counsel did not object to the one given or request that a further instruction be given. (*People v. Brown* (1994) 8 Cal.4th 746, 757.)

Finally, appellant argues, without any analysis, that the admission of the recording violated his right to due process, effective assistance to counsel, right to confrontation and cross-examination, and a fair trial. (AOB 341.) Respondent submits that appellant has waived his constitutional claims by failing to raise these objections in the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Partida* (2005)

37 Cal.4th 428, 433-434.) Even if the claims are not waived, they lack merit.

The Confrontation Clause of the Sixth Amendment gives a defendant the right "to be confronted with the witnesses against him." Encompassed within this right is the opportunity to cross-examine an adverse witness. (*United States v. Owens* (1988) 484 U.S. 554. 557.)

> [T]he Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." [Citations].

(*Id.* at p. 559.) Here, there was no violation of the Confrontation Clause because Rosales testified at trial and was subject to extensive cross-examination by appellant.

Appellant argues the admission of Rosales's taped statement violated his right to due process and to a fair trial. Not so. The admission of evidence, even if error under state law, results in a violation of due process only if it renders the defendant's trial fundamentally unfair. (*People v. Partida, supra*, 37 Cal.4th at p. 436.)

As explained above, the trial court properly concluded the statement was relevant and admissible. However, even if the court erred, the error did not deprive appellant of a fair trial. Because Rosales testified and was subject to cross-examination, the taped statements were admissible to impeach Rosales's claim that his testimony and statements were coerced. The trial court gave a limiting instruction, and the remainder of the tape contained statements that came into evidence through other witnesses.

Furthermore, the tape was also admissible under Evidence Code sections 1235 and 356, thus, any error in admitting it pursuant to Evidence Code section 1250 is harmless. (*Watson, supra*, 46 Cal.2d at p. 836.)

Some of the statement made by Rosales in the recording impeached Rosales's trial testimony. Evidence Code section 1235 states,

> Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.
>
> Evidence Code section 770 provides,
>
> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
>
> (b) The witness has not been excused from giving further testimony in the action.

(Evid. Code, § 770.)

At trial, Rosales testified that appellant "could have" hit Juan Carlos Ramirez, that Hector hit Juan Carlos Ramirez with the belt, and that Rosales did not remember telling officers that appellant tied up the victim. However, the recording impeached this testimony. (14 CT 3912-3915 [Rosales stated appellant beat Juan Carlos Ramirez, that either appellant or Hector hit Juan Carlos Ramirez with the belt, and that appellant and Shadow tied him up.]) Rosales also testified that he did not recall appellant or Hector telling him not to "rat on [them]." (33 RT 7840.) But the recording demonstrated that Rosales told officers that appellant or Juan told him not to "rat" on anybody. (14 CT 3931-3932.) Several times during his trial testimony Rosales was equivocal in answering specific questions regarding the details from the night of Yarbrough's murder. (33 RT 7869; 34 RT 7998.) Rosales's prior statement impeached and clarified these equivocal responses. (*People v. Ledesma* (2006) 39 Cal.4th 641, 711-712, citing *People v. Green* (1971) 3 Cal.3d 981, 985-989; 14 CT 3848, 3951-3954.)

Finally, the tape was admissible under Evidence Code section 356 which states,

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

(Evid. Code, § 356.)

> In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. "In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. . . .." [Citations.]

(*People v. Zapien* (1993) 4 Cal.4th 929, 959-960.)

Here, as noted above, appellant called into question the veracity of portions of Rosales's statement made on January 2 to law enforcement. (34 RT 7961-7963, 7982; 8001 [prosecutor argues Rosales's statement was taken out of context].) Once portions of Rosales's January 2 statement were admitted by appellant, the People had a right to introduce the whole statement to put it in context and dispel appellant's theory that the statement was made under pressure and coercion from the police.

Moreover, absent the taped interview, the evidence produced against appellant at trial was strong. At trial, numerous witnesses testified appellant flagged Yarbrough down and left with Yarbrough at gunpoint. (33 RT 7867, 7878-7879; 35 RT 8227; 8230.) Appellant admitted to abducting Yarbrough at gunpoint and discharging the gun that killed Yarbrough. (47 RT 10410-10412, 10420-10424.) Thus, even if the trial court erred in

admitting Rosales's taped statement, the error did not render appellant's trial fundamentally unfair or violate his due process rights.

For the same reasons, any erroneous admission of Rosales's taped statement did not result in a miscarriage of justice because the jury would not have reached a verdict that was more favorable to appellant but for the admission of Rosales's recorded statement. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

XII. APPELLANT'S CONVICTION FOR HIS CRIMES AGAINST PARADES AND JUAN CARLOS RAMIREZ ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant claims there is insufficient evidence to support his convictions for counts 4, 5, 6, 7, 8, and 9. (AOB 343-346.) Respondent disagrees.

A. Standard of Review

To determine sufficiency of the evidence, the appellate court must determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Staten* (2000) 24 Cal.4th 434, 460.) The court reviews the whole record in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) Substantial evidence is that evidence which is reasonable, credible, and of solid value. (*Id.* at p. 578.)

> "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict. [Citation.]

(*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. Substantial Evidence Supports a Finding That Appellant Was Guilty of the Crimes Against Leonel Paredes (Counts 7, 8, 9)

Appellant contends there is insufficient evidence to support his convictions for kidnapping (count 7), kidnapping during the commission of a carjacking (count 8) and robbery (count 9), because Paredes's identification of appellant was not reliable. (AOB 344-345.) Appellant is incorrect.

It is well settled that, unless the testimony is physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Boyer* (2006) 38 Cal.4th 412, 480 [single eyewitness sufficient to prove identity].) To the extent appellant argues that Paredes's identification was weak or tainted by others, the weight to be given to the witness's testimony was for the jury to determine. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372.)

The jury heard Paredes's testimony regarding his identification of appellant as the person who carjacked, kidnapped, and robbed him. Paredes initially told police on October 5, 1997, that there were three Hispanic male kidnappers. (31 RT 7325-7326, 7337-7338, 7324-7330.) When Paredes was interviewed a second time on October 21, 1997, he stated that "Little Loco" was one of the three who kidnapped him. (37 RT 8600-8601.) Paredes then identified appellant in a six-pack photographic line-up. (37 RT 8559-8600, 8602-8603.) At trial, Paredes identified appellant in court as the person who held the gun when he was carjacked on October 4, 1997. He explained he had the opportunity to see appellant's face for 30 to 45 seconds when he was initially approached in the parking lot. (30 RT 7122.)

Appellant cross-examined Paredes at length regarding his identification of appellant. (30 RT 7162-7190, 7205-7206, 7223-7228.) Appellant also presented eyewitness identification expert Scott Fraser who testified regarding the inaccuracies of eyewitness identification and factors that can affect an individual's identification. (43 RT 9591-9594, 9608-9609, 9627, 9632.)

Despite the cross-examination of Paredes and the testimony of Scott Fraser, the jury concluded that appellant committed the offenses against Paredes on October 4, 1997. Paredes's in-court identification of appellant and his pretrial identification of appellant from a six-pack photographic line up were sufficient evidence from which a rational trier of fact could have found appellant guilty beyond a reasonable doubt for counts 7, 8 and 9. (*People v. Staten, supra*, 24 Cal.4th at p. 460.)

C. Substantial Evidence Supports a Finding That Appellant Was Guilty of the Crimes Against Juan Carlos Ramirez (Counts 4 and 6)

Appellant contends there was insufficient evidence to support his conviction for count 4 (kidnapping during the commission of a carjacking) and count 6 (robbery). Respondent submits there was sufficient evidence presented at trial to sustain both convictions.[31]

1. Sufficient Evidence Supports Appellant's Conviction for Kidnapping During the Commission of a Carjacking

Section 209.5, subdivision (a) provides:

> Any person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the

[31] In his argument, appellant asserts there was insufficient evidence to convict him as to count 5 (carjacking). (AOB at 345-346.) Respondent notes the jury found appellant not guilty on that count. (17 CT 4828.)

> carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole.

For section 209.5, subdivision (a) to apply, the victim must be moved "beyond [what is] merely incidental to the commission of the carjacking" and "a substantial distance from the vicinity of the carjacking," and "the movement of the victim increases the risk of harm to the victim over and above that necessarily present in the crime of carjacking itself." (§ 209.5, subd. (b).)

The law does not require that carjacking be the only intent of the kidnapping during the commission of a carjacking other that the intent must be present when the kidnapping commenced. (See *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1365, citing *People v. Laursen* (1972) 8 Cal.3d 192, 198 ["specific intention" to commit target offense must be "present at the time of the original asportation"].)

"Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Ortiz, supra*, 208 Cal.App.4th at p. 1365 citing *People v. Pre* (2004) 117 Cal.App.4th 413, 420; *People v. Beeman* (1984) 35 Cal.3d 547, 558-560 [proof of intent based on inference from volitional acts].)

> [I]f there is substantial evidence that appellant intended the kidnapping to effect an escape or prevent an alarm from being sounded, his conviction for kidnapping during the commission of a carjacking must stand.

(*People v. Perez* (2000) 84 Cal.App.4th 856, 861.)

> A person aids and abets a crime if
>
> he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging the commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.

(*People v. Hill* (1998) 17 Cal.4th 800, 851.) In determining whether the defendant shared in the criminal purpose of the actual perpetrator, relevant factors include his presence at the scene, acts assisting or facilitating the criminal act, and his conduct and companionship with the direct perpetrator before and after the offense, including flight. (See *People v. Mitchell* (1986) 183 Cal.App.3d 325, 330; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

Here, there was sufficient evidence that appellant had the specific intent to aid and abet Valenzuela and De La Rosa in kidnapping Juan Carlos Ramirez in order to facilitate the carjacking. Juan Carlos Ramirez was kidnapped at gunpoint. Although appellant was not the one holding the gun, Valenzuela was pointing it at Juan Carlos Ramirez when appellant got into the vehicle, and the jury could reasonably infer that appellant saw the weapon and was aiding the others in the commission of the kidnapping to facilitate the carjacking. (33 RT 7823 [Rosales could see Valenzuela had a gun in the cab of the truck], 7390 [victim stated gun was out when they picked up appellant], 7409 [Valenzuela had the pistol when the others entered the vehicle].)

The jury could also infer appellant shared in Valenzuela and De La Rosa's criminal purpose based on the circumstances surrounding the crime. Appellant and his accomplices were hanging out together moments before the crime occurred. They took Juan Carlos Ramirez to a secluded area approximately a mile and a half away, where they held him at gunpoint. (31 RT 7376; 33 RT 7823.) At the orchard appellant immediately began beating Juan Carlos Ramirez. (AOB 346; 31 RT 7376, 7378-7381, 32 RT 7579, 7587.) The victim testified that shortly after arriving in the orchard, appellant hit him, told him that he was the devil and that appellant would cut off his body parts. (31 RT 7380.) Appellant had a knife in his hand and the victim asked appellant not to do anything to him with the knife. (31 RT

7835-7836.) Appellant then tied Juan Carlos Ramirez up with rope that was inside the truck. (31 RT 7381.) Juan Carlos Ramirez was left in the orchard while appellant and his friends fled the scene in the victim's truck. (32 RT 7585, 33 RT 7838.)

Based on the above facts, there was sufficient evidence from which a reasonable jury could find that appellant was aiding and abetting in the kidnapping of Juan Carlos Ramirez to facilitate the carjacking. (*People v. Staten, supra*, 24 Cal.4th at p. 460.)

2. There was Sufficient Evidence to Support the Conviction of Count 6

Appellant contends there was insufficient evidence to support the jury's verdict of robbery as charged in count 6. (AOB 346.) Not so.

> Robbery is
>
> the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

(§ 211.)

Here, there was substantial evidence that appellant either directly committed the robbery or aided and abetted Valenzuela and De La Rosa in the robbery. As noted above, appellant was in the company of Valenzuela and De La Rosa before the carjacking, kidnapping and robbery. When appellant got into the victim's truck, Valenzuela had a gun. Upon arriving at the orchard someone asked the victim if he had money. Juan Carlos Ramirez told them no, but when they searched his wallet they found money; appellant and two others immediately began beating the victim with their fists and a belt. (31 RT 7377-7381.) After beating Juan Carlos Ramirez, appellant tied him up with rope, and the men took his wallet, pager, sunglasses, and gold chain. (31 RT 7382-7383.) Juan Carlos Ramirez could not recall which person took these items. (31 RT 7383.)

Appellant and his accomplices fled in the vehicle, they split up the money that they had taken from Juan Carlos Ramirez, and appellant was given the gold charm with the name "Juan" on it. (33 RT 7585, 7828.)

From the evidence presented at trial, a reasonable jury could have found that appellant was guilty of robbery as a direct perpetrator or under an aiding and abetting theory.

XIII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DIRECT THAT MOTIONS BASED ON PROSECUTORIAL MISCONDUCT BE ASKED AT SIDEBAR

Appellant claims that the trial court prejudicially erred by requiring his counsel to make mistrial motions based on prosecutorial misconduct outside the presence of the jury. (AOB 347-352.) Respondent submits that the trial court properly exercised its discretion by its ruling that mistrial motions based on prosecutorial misconduct be made outside the presence of the jury. The ruling did not prevent counsel from objecting and requesting an immediate admonition.

A. Relevant Facts

During the cross-examination of defense witness Francisco Gomez, appellant objected to the prosecutor's question regarding whether Dr. Gomez evaluated defendants "in terms of their guilt, or their action demonstrating guilt." (46 RT 10291.) Appellant's counsel objected that this question was "prosecutorial misconduct." (46 RT 10291.) The court asked the prosecutor to rephrase the question, and the prosecutor rephrased the questions with no further objection. (46 RT 10291-10292.)

During a break, outside the presence of the jury, the prosecutor requested that further objections on the basis of prosecutorial misconduct be made but taken up outside the presence of the jury. (46 RT 10294-10295.) The court responded:

> I will admonish in the future, if there is a motion based on prosecutorial misconduct, you can ask for a side bar. [P] That's not a motion to state in the presence of the jury, because it does have a prejudicial effect if the Court denied it.

(46 RT 10295.) Appellant responded to the court's admonition by stating, "Your Honor, in addition, we want to preserve a motion for mistrial based on that line of questioning by [the prosecutor]." (46 RT 10295.)

Later, during trial, the following occurred when appellant was arguing a mistrial motion based on prosecutorial misconduct:

> [Appellant's counsel]: . . . We were ordered by the Court not to put prosecutorial misconduct on the record.
>
> THE COURT: When you say on the record –
>
> MR. GARDINA [Appellant's counsel]: On the record in front of the jury at the time.
>
> The Court told us to reserve it for a side bar conference, which is clear.

(47 RT 10554.)

The court further stated:

> [THE COURT]: The Court will confirm that the practice that I asked counsel throughout the case to follow is to state the legal basis for an objection on the record, without having speaking objections.
>
> I've always allowed counsel to state the legal basis for any objection, but I did in response to Mr. Barton's argument about prosecutorial misconduct, I did agree that that is an objection that could be preserved by stating it for the record and then arguing it outside the presence of the jury.
>
> What I have not done is made some blanket order that defense counsel cannot ask for side bars, and in fact, we have had numerous side bars at the request of defense counsel, and a number of those side bars addressed either the subject of a motion for mistrial or an objection based upon prosecutorial misconduct.

I appreciate that not every time that you make a motion do you ask for a side bar.

And again consistent with whatever experienced judges do, we don't just have side bars for every objection.

It becomes very disruptive to do so.

That's why we frequently allow counsel to reserve a motion, have the court rule on an objection, and then counsel can reserve a motion, whether it be for mistrial or prosecutorial misconduct.

And unfortunately at the end of the day on Friday, we had no time, based on the court's schedule, to argue the matters.

There's no prejudice to now arguing them and if there's a need to admonish the jury, make any curative admonitions or instructions, we can still do that and avoid prejudice.

I don't find there is any delay that is going to inure to the prejudice of the defendant, by taking up the matter now.

(47 RT 10591-10592.)

At the conclusion of the guilt phase of the trial, the jury was instructed as follows:

Statements made by the attorneys during the trial are not evidence. However, if the attorneys have stipulated or agreed to a fact, you must regard that fact as proven.

If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection. Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer.

Do not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the Court. Treat it as though you had never heard of it.

It is the duty of the attorneys on each side of a case to object when another side offers testimony or other evidence that the attorney believes is not properly admissible. You must not be

> prejudiced against any party because an attorney has made objections during the course of the trial.
>
> By allowing the testimony or other evidence to be introduced over the objection of an attorney, the Court does not state any opinion as to the weight or effect of such evidence. As stated before, you are the sole judges of the credibility of all witnesses and the weight and effect to be given to all the evidence.

(52 RT 11530-11531; CALJIC 1.02 [16 CT 4528], Jury Instruction No. 26 [16 CT 4529; 51 RT 11493 (given at the request of appellant, no objection by prosecutor)].)

B. The Trial Court Properly Exercised Its Discretion By Ruling That Motions Based on Prosecutorial Misconduct Be Addressed Outside the Presence of the Jury

Appellant contends that the trial court's ruling regarding the procedure for raising claims of prosecutorial misconduct prejudiced him because "it rendered defense counsel necessarily ineffective" in terms of making timely objections and eliminated any admonition the trial court would give to the jury. (AOB 348-352.) Not so.

Every court has the power to "provide for the orderly conduct of proceedings before it," and

> [t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

(Cal. Code Civ. Proc., § 128, subds. (a)(3), (5).)

"To preserve a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition . . . ." (*People v. Price* (1991) 1 Cal.4th 324, 447.) However, the basis of the objection need not be "prosecutorial misconduct." (See *People v. Samayoa* (1997) 15 Cal.4th 795, 842 [prosecutorial misconduct claim based on objection at trial that argument was improper]; *People v. Green* (1980) 27 Cal.3d 1, 35

[prosecutorial misconduct claim preserved when objection based on "improper argument" was made at trial.]) If the trial court immediately overrules the defendant's objection and the defendant has no opportunity to ask for an admonition his failure to request the admonition does not forfeit the issue on appeal. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)

The trial court did not abuse its discretion in adopting a procedure for the presentation of mistrial motions based on prosecutorial misconduct. The court has a duty to see that both the prosecution and the defense receive a fair trial, and the trial court has the power to make such orders. (See *People v. Bowman* (1966) 240 Cal.App.2d 358, 382; Cal. Code Civ. Proc., § 128, subds. (a)(3), (5).)

Appellant argues that the trial court's ruling "insured that no prosecutorial misdeeds would be identified as misconduct." (AOB 352.) At the outset, the trial court instructed the jury that the questions of the attorneys were not evidence, and that the jury was not to speculate as to why an objection was made or sustained. (CALJIC No. 1.02; 16 CT 4528.) The court further instructed the jury that it should not be prejudiced against either party because they made objections during trial. (16 CT 4529.) Thus, appellant is correct that the jury would not know that a motion based on prosecutorial misconduct was made by appellant; however, this was not something for the jury to consider, particularly in light of the jury instructions given. The jury instead would receive an admonition or a curative instruction if the trial court found that there was a valid objection or claim of prosecutorial misconduct. (47 RT 10592)

Here, contrary to appellant's contention, his counsel was not rendered ineffective by the trial court's ruling that any motion based on prosecutorial misconduct be taken up at a side bar and outside the presence of the jury. Appellant was still able to object and could have stated the legal basis for his objections (i.e., improper argument, speculation, argumentative) on the

record. The only limitation placed upon defense counsel was that the court did not want an objection or motion using the words "prosecutorial misconduct" made in front of the jury because of its prejudicial effect.

Appellant also cannot demonstrate that the trial court's ruling had any prejudicial effect on him or that it rendered trial counsel ineffective. Appellant has failed to cite to any portion of the record where he was precluded from making an objection or requesting a side bar. He merely asserts that due to the trial court's method of addressing claims of prosecutorial misconduct that he was prevented from a timely admonition to cure the harm. (AOB 352.) However, the trial court allowed legal objections to be made and any claims of prosecutorial misconduct be taken up immediately at a side bar conference. The fact that appellant could not use the words "prosecutorial misconduct" to characterize the objection in the jury's presence did not prevent him from requesting an immediate admonition. In fact, as shown in Argument XIV, post, appellant made numerous objections and had numerous hearings regarding his claims of prosecutorial misconduct both before and after the trial court made this ruling. These objections were either overruled or the prosecutor withdrew or rephrased the question asked. (See Argument XIV, post.) Thus, appellant fails to establish that counsel rendered deficient performance or that he suffered prejudice from any alleged deficiency as a result of the court's order. Assuming the trial court erred under state law by requiring such objections to be made outside the jury's presence, it was harmless under either *Chapman* or *Watson*.

XIV. APPELLANT FAILS TO ESTABLISH THAT THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT

Appellant contends that the prosecutor engaged in prejudicial misconduct on numerous occasions throughout the trial violating his federal

Constitutional right to due process and a fair trial. (AOB 353-369.) Respondent submits that no prejudicial misconduct occurred.

A. Relevant Law

> A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." [Citations.] [Citations.]

(*People v. Clark* (2011) 52 Cal. 4th 856, 960-961.) The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427-432.) When the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) A judgment will not be reversed unless upon consideration of the entire record, the misconduct resulted in prejudice amounting to a miscarriage of justice. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) The decision of whether such misconduct warrants granting a mistrial is within the sound discretion of the trial court. (*People v. Price* (1991) 1 Cal.4th 324, 430.)

To preserve a claim of prosecutorial misconduct, "a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.) A defendant's failure to make a timely objection and request an admonition by the trial court will be

excused if doing either would be futile or if the admonition would not cure the harm. (*Ibid.*; *People v. Hill, supra*, 17 Cal.4th at p. 820.)

B. Analysis

1. The Questioning of Daniel Quintana Did Not Amount to Prosecutorial Misconduct

Appellant contends that the prosecutor improperly argued his theory of the case to the jury through his questioning of Daniel Quintana. (AOB 355-358.) Not so.

During cross-examination, Quintana testified that he always had problems with people from Arvin because he was from Lamont. (32 RT 7652.) He described how Carlos Rosales, who was also from Lamont, was threatened by the "Arvinas" every time he went to school. (32 RT 7657-7658.) Quintana testified that he was aware of the incident involving Yarbrough, Louis Gomez and Freddie Gomez at the Rosales home. (32 RT 7654-7656.)

On re-direct, Quintana testified that he also had problems with "Arvina Guys." (32 RT 7661.) He was then asked, did he "take a Tec-9 and ever shoot anybody from Arvin three times in the back of the head because of that?" (32 RT 7661.) Appellant's counsel objected on the basis of prosecutorial misconduct, and moved to strike before the witness could answer. (32 RT 7661.)

Out of the presence of the jury, the prosecutor explained that he asked the question, "because the defense is putting forth the theory, through this witness, that a justifiable explanation for the defendant's actions is because he's from Lamont, and he had had hard times with Arvina kids and he was somehow upset about what happened at the aunt's house." The court stated that he viewed the prosecutor's question as "argumentative" and would sustain the defense objection to the question. (32 RT 7663-7664.) The trial

court denied the motion for mistrial based on prosecutorial misconduct. (32 RT 7666.) In the presence of the jury the trial court admonished the jury,

> Ladies and Gentleman of the jury, I'm going to confirm that I sustained the objection to the last question of the prosecutor, and I'm going to remind the jurors . . . What the attorneys say is not evidence, and also questions are not evidence. Questions are only evidence to the extent that they are incorporated by an answer. So if there is an objection made to a question, if I sustain the objection to the question, that means you disregard the question, you never treat a question as evidence, if the Court has sustained an objection to a question.

(32 RT 7670-7671.)

Here, the court found the prosecutor's question to Quintana argumentative and sustained the objection, but this did not render appellant's trial unfair. The defense's theory of the case was that appellant was upset about Yarbrough's "attack" on the Rosales home. Appellant argued he kidnapped Yarbrough to scare him but accidently shot him. (52 RT 11741-11745, 11764.) During closing argument, the prosecutor argued that the shooting was not an accident, in part, because the gun was discharged three times. (52 RT 11849.) As a result, the jury eventually heard the prosecutor's theory of the case and the question could not have caused any irreparable harm to appellant.

Moreover, the trial court admonished the jury that the objection to the question was sustained, and that they were to disregard the question. It is presumed the jury followed that instruction. (*People v. Avila* (2006) 38 Cal.4th 491, 574.) Under these circumstances, even assuming the prosecutor committed misconduct by asking the question, no prejudice was possible under any standard. (*People v. Pinholster* (1992) 1 Cal.4th 865, 943 [no prejudice where objection was sustained, the witness did not answer, and the jury instructed to disregard the question].)

2. The Prosecutor Did Not Commit Prosecutorial Misconduct By His Reference To Chinese-Manufactured Ammunition Or In His Questioning Of Appellant Regarding His Purchase of Guns

Appellant contends that the prosecutor committed misconduct by referencing Chinese ammunition, and by asking appellant if he had purchased "guns." (AOB 358-360.) Not so.

During the testimony of Lieutenant Tom Hodgson, the prosecutor showed him a photograph of ammunition, later described as Chinese-manufactured ammunition, asking if it depicted the ammunition that was seized from Cipriano Ramirez's apartment in Arizona. (38 RT 8726.) Appellant objected on the ground that the question was irrelevant. (38 RT 8727.) Shortly thereafter, outside the presence of the jury at a sidebar, appellant's counsel stated, "[T]hese highly prejudicial photographs and items seized have no relation to the defendant whatsoever." (38 RT 8731-8732.) The prosecutor explained he was not attempting to introduce into evidence the images of the ammunition at the time of the objection. (38 RT 8736.)

Appellant's counsel did not object that the prosecutor's use of the photograph or question of Lieutenant Hodgson constituted prosecutorial misconduct, instead he only objected on relevancy grounds. Nor did appellant ask for an admonition. As such, his claim on this ground has been waived. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1201.)

Appellant later moved for a mistrial based upon the reference to, and photograph of, the "Chinese ammunition." (40 RT 9095-9096.) The prosecutor agreed that the photograph of the Chinese-made ammunition should not have been shown to the jury, and explained that he was not attempting to introduce the photograph into evidence. But the prosecutor argued there was no prejudice to appellant. (40 RT 9105-9106.) The trial

court denied the mistrial motion finding it was error to admit evidence of the Chinese ammunition but that the error was not prejudicial and that the photograph of the ammunition would not be introduced into evidence. (40 RT 9117-9119.)

Assuming arguendo that appellant has not waived his claim of prosecutorial misconduct, it fails. Any error in referencing the inadmissible ammunition was brief. In light of the evidence concerning the nine-millimeter ammunition that was properly admitted and appellant's testimony that he possessed a Tec-9 weapon and shot Yarbrough, the prosecutor's brief reference to the Chinese ammunition would not have rendered appellant's trial fundamentally unfair. (*People v. Riser* (1956) 47 Cal.2d 566, 577-578 [introduction of gun, holsters, belts and shells from a different gun]; *People v. Ramos* (1982) 30 Cal.3d 553, 580 [testimony regarding gun not used in robbery not prejudicial in light of evidence that defendant used a gun during the robbery].)

Appellant next argues that the prosecutor committed misconduct during his cross-examination of appellant. (AOB 359-360.) He argues that the prosecutor inquired whether appellant had purchased "other guns" and referenced evidence of other guns and ammunition. (AOB 360.) Appellant does not cite the exact questions he claims were improper, but it appears he is referencing the following questions asked by the prosecutor:

> Q.: So you went to Arizona and you said you weren't acting like a gang member there, were you?
>
> A.: No.
>
> Q.: But you were using marijuana and buying guns, correct?
>
> A.: Bought one gun.
>
> MR. GARDINA: Objection, would like to reserve a motion at this time, your Honor.

THE COURT: You may.

(47 RT 10458.)

Q.: And the ammunition that was in the gun when you shot Chad and the S&B ammunition, that was ammunition that was brought in the gun from Arizona, correct?

A.: The one in the clip, yes. I didn't bring it from Arizona. When I got it from Visalia, that's the ammunition that was in it.

Q.: When you bought the gun, did you buy ammunition?

A.: It had some in the clip.

Q.: You didn't buy the boxes that we saw, that were taken?

MR. GARDINA: Objection, argumentative.

THE COURT: Overruled.

MR. GARDINA: We're going to reserve a motion at this time, your Honor.

THE COURT: You may.

MR. GARDINA: Thank you.

BY MR. BARTON:
Q.: Specifically, I'm talking about the S&B ammunition that was in the gun -- remember -- you were here for all the testimony of Mr. Laskowski, right?

A.: Yes.

Q.: And Mr. Hodgson?

A.: Yes.

Q.: And the testimony that the rounds that killed Chad had the S&B on them, correct?

A.: Yes.

Q.: And the rounds that were seized from your brother's apartment had the same base marks, correct?

A.: Yeah.

Q.: Is that the same ammunition that you would shoot with when you were back in Arizona?

A.: No, I didn't buy that ammunition.

Q.: So there was ammunition that you used in Arizona, that it's your testimony now was in the gun when you bought it, period?

A.: Yes. There was some in it.

Q.: Do you know what kind it was?

A.: No. I didn't look.

Q.: Well, was there only a few rounds or was it a full clip or what?

A.: It was a full clip.

(47 RT 10468-10469.)

Appellant's motion based on prosecutorial misconduct was denied by the trial court. (47 RT 10594.)

At the outset, the prosecutor's questions were not in conflict with the trial court's prior ruling excluding the Chinese ammunition.

Appellant had admitted that he purchased the Tec-9 while he lived in Arizona. The prosecutor's question did not insinuate that appellant had purchased a gun other than the Tec-9. In fact, in response to the questions asked, appellant simply stated that he purchased one gun, a Tec-9. The prosecutor did not ask him about any other weapons he may have purchased. Thus, there was simply no objectionable question asked that would render appellant's trial unfair.

The same is true of the question regarding the ammunition that had previously been shown to Lieutenant Hodgson. The prosecutor did not reference the Chinese ammunition and the prosecutor made it clear that he was referring to the 9 millimeter ammunition. Appellant's assertion that

the prosecutor gestured his head in the direction of the television to reference the other ammunition is unsupported by the record. (47 RT 10576 [television was off at the time]; 47 RT 10593 [trial court confirms there was no picture on the monitor at the time the question was asked].) Appellant had testified that he had purchased the Tec-9 in Arizona. He further testified that he had left it in Arizona but retrieved it later. How and where he obtained the ammunition that was used to kill Yarbrough was a proper subject for cross-examination.

A prosecutor may amplify a defendant's testimony by inquiring into the facts and circumstances surrounding his assertions. (See *People v. Humiston* (1993) 20 Cal.App.4th 460, 470.) There was nothing improper about the prosecutor's cross-examination of appellant regarding ammunition. ["])

3. The Prosecutor's Cross-Examination of Defense Investigator Mosley Did Not Amount to Prosecutorial Misconduct; and Appellant Suffered No Prejudice

Appellant argues that prosecutor's cross-examination of Defense Investigator Mosley resulted in prosecutorial misconduct. (AOB 360-363.) Respondent submits that the prosecutor's brief, unanswered question did not result in prejudice to appellant.

During cross-examination of Investigator Mosley, the prosecutor asked, "Mr. Mosley, you left the BPD [Bakersfield Police Department] under accusation of dishonesty; correct?" (43 RT 9561.) Appellant objected that this question was prosecutorial misconduct and requested a mistrial. (43 RT 9561.) Out of the presence of the jury the trial court ruled that the question did not result in prosecutorial misconduct but that the prosecutor was limited to asking Investigator Mosley if he had resigned from Bakersfield Police Department. (43 RT 9573.) In the presence of the

jury the court sustained the objection to the question and admonished the jury that questions are not evidence. (43 RT 9573.)

Here, the prosecutor's question remained unanswered and the trial court promptly admonished the jury to disregard the question. Thus, there could be no prejudice to appellant by the question asked. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 943.) Moreover, it is not reasonably probable that the jury would have reached a result more favorable to appellant absent the question. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) The evidence adduced by Investigator Mosley did not relate to the Yarbrough murder, but to the Juan Carlos Ramirez kidnapping and carjacking. (43 RT 9557-9559.) The purpose of Mosley's testimony was to establish that Juan Carlos Ramirez had driven to the location where the carjacking occurred in order to participate in a narcotics transaction. (*Id.*) Mosley's testimony was short and there was no reasonable probability that the prosecutor's question would have affected the result of the verdicts in this case in light of the overwhelming amount of evidence against appellant.

4. The Prosecutor's Cross-Examination of Appellant Regarding Lamont and Arvina Gang Members Was Proper

Appellant contends that the prosecutor committed misconduct during cross-examination by asking him whether he had ever harmed any Arvina 13 members. (AOB 363-365.) Not so.

To the extent appellant is arguing the question was asked in bad faith, a review of the entire questioning of appellant reflects otherwise. Appellant was asked if an Arvina was in Lamont after dark and was caught by a member of Lamont 13, including appellant himself, would he be in trouble. (47 RT 10450.) Appellant responded that an Arvina may be in trouble if he was caught by someone else. (47 RT 10450.) The prosecutor asked

appellant on cross-examination, "You've never caused any harm to any Arvina 13 member?" (47 RT 10450.) Appellant objected that it was improper impeachment and reserved a motion based on prosecutorial misconduct. The trial court sustained the objection and asked the prosecutor to rephrase the questions. (47 RT 10450-14051.) The prosecutor then asked if appellant would protect an Arvina 13 member in Lamont. (47 RT 10450-10451.) Clearly, the prosecutor's point in asking these questions was to demonstrate that there was animosity between the two gangs and to refute appellant's contention that he was not involved in gangs at the time of the murder. Once appellant suggested that he would not be the one to act against rival gang members, he implied that he did not harbor any malice towards Arvinas or Yarbrough. This inference was contradicted by appellant's own testimony that he had problems with Arvinas, that Yarbrough should not be playing around with gangbangers, and that he wanted to scare Yarbrough on the night of the murder.

Any prejudice that may have resulted from the questions was minimal, if it existed at all. The question, as phrased, added very little to the case. Numerous witnesses had testified regarding the animosity between the Lamont and Arvin gangs. Witnesses had also testified regarding appellant's membership in Lamont 13. Appellant had admitted in a police interview that he had slapped Yarbrough, had told him it was not a game to play around with gangbangers, and that Yarbrough was "banging with Arvin." (14 CT 4147, 4152, 4176.) Furthermore, on direct examination appellant testified that he had problems with "Arvinas." (47 RT 10389-10390.) Thus, there is no reasonable probability that this question would have affected the result of appellant's trial in light of the evidence presented at trial.

5. The Prosecutor's Cross-Examination Of Appellant Regarding His Arrest, Drug Use and Posting of Bail Was Proper

Appellant contends that the prosecutor committed misconduct on three different occasions during the cross-examination of appellant by asking about his 1997 arrest, his drug use, and by asking who posted his bond. (AOB 366-368.) The People submit that the cross-examination of appellant was proper.

a. August 22, 1997

Appellant argues that the prosecutor committed misconduct by asking appellant,

> [W]hen you were arrested in 1997, specifically August 22, 1997, that wasn't for just possessing drugs. That was for furnishing them as well to the girls whose apartment you were in?

(47 RT 10445.) Appellant responded that he was not arrested for furnishing drugs to the girls. (47 RT 10445.)

The trial court overruled appellant's objection to the question and denied his mistrial motion based on prosecutorial misconduct. (47 RT 10536-10543, 10551-10552.) The court noted that it had previously ruled that this line of questioning would be admissible if appellant testified and that the court had previously determined that it was relevant and admissible under Evidence Code section 352. (47 RT 10551-10552.)

Appellant's direct examination addressed his drug use and arrest. (47 RT 10388, 10385-10386, 10401-10402). Although appellant claimed he was arrested merely for possessing methamphetamine, the prosecutor had a right to cross-examine him regarding his credibility and the facts of that arrest since appellant opened the door by minimizing his culpability regarding his possession of methamphetamine. Contrary to appellant's assertion, the prosecutor had a basis for asking this question: Specifically,

he relied on the police reports which indicated that appellant had been furnishing the drugs to the girls in the apartment. (47 RT 10537.) Thus, based on the trial court's prior ruling and the impeachment value of the question, the prosecutor did not commit misconduct by asking appellant this question.

Even if the question was improper, appellant cannot establish prejudice. Appellant denied that he furnished drugs to the girls in the apartment but admitted on direct that he was doing drugs during this time period. Any prejudice resulting from the question would have been slight in light of the evidence of his drug use and appellant's admission to kidnapping, carjacking and shooting the victim.

b. Whether Appellant Lost His Job Due to Drug Use

Appellant asserts that it was improper for the prosecutor to ask appellant if he lost his job because he missed work from his drug use. (AOB 366-367.) Respondent submits that there was no misconduct.

Appellant reserved, and later brought, a prosecutorial misconduct motion based on the prosecutor's question, "Isn't it true that you lost your jobs because you would miss work from drug-use?" Appellant responded "no." (47 RT 10462, 10597-10599.) Out of the presence of the jury, the trial court ruled that the question was within the scope of direct examination and denied the motion based on prosecutorial misconduct. (47 RT 10599.)

The prosecutor did not commit misconduct by asking this question. Based on appellant's direct examination that he had been leading a clean life in Arizona, going to school and working, the prosecutor had a right to ask if appellant had lost his job because of drug use since appellant admitted that he was a heavy drug user at the time of the murder. The prosecutor did not use a "reprehensible method" to persuade the jury that

appellant was not a credible witness. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) As noted above (Arg. XIV, B, 5, a), even assuming the prosecutor's question was misconduct, appellant denied that he lost his job for this reason, the prosecutor did not explore it further, and any prejudice that may have resulted from the question was minimal in light of the evidence presented at trial.

c. Bail

Appellant finally contends that the prosecutor committed misconduct by asking who paid his bail after appellant was arrested for possession of methamphetamine. (AOB 367-368.) The trial court overruled appellant's relevancy objection and appellant asked to reserve a motion based on prosecutorial misconduct. (47 RT 10473-10474.) Respondent submits there was no misconduct.

Appellant does not identify, and respondent has not found, where in the record appellant's claim of prosecutorial misconduct was actually raised and addressed outside the presence of the jury. Accordingly, any claim of misconduct on this basis is forfeited.

Even if not forfeited, respondent submits that this question was not improper in light of the direct examination of appellant. On direct examination, appellant testified that he had been arrested for possession of methamphetamine and bailed out of jail prior to the Juan Carlos Ramirez carjacking and the Yarbrough murder. He testified that after bailing out of jail, he learned from his cousin, Alex, who picked him up at the jail, that Yarbrough and some friends had gone to appellant's aunt's house, hit his aunt, and had thrown sandbags on her vehicle. (47 RT 10386, 10463.)

The prosecutor was entitled to ask appellant who bailed him out of jail to establish who was providing him with financial support during this time period, and to rebut his direct testimony that he was living a clean, hard-working life in Arizona prior to the murder. This evidence was also

relevant to demonstrate that appellant had, in fact, returned to a lifestyle of drugs prior to the murder, and was relying on others for financial support. As noted above (Arg. XIV, B, 5, a), even assuming the question was improper, appellant's testimony that his brother bailed him out of jail was harmless in light of appellant's testimony that he shot Yarbrough, and that he had participated in the Juan Carlos Ramirez carjacking.

6. The Prosecutor's Request That Beatriz Garza Be Subject to Recall Was Not Prosecutorial Misconduct

Appellant contends that the prosecutor committed misconduct when he requested that Beatriz Garza be subject to recall at the penalty phase of the trial in front of the jury. (AOB 369.) Not so.

At the conclusion of Beatriz Garza's testimony, the People requested that she be subject to recall. (36 RT 7680.) The court asked, "Should we have a specific date or - -." The People responded in the presence of the jury, that "It would be penalty. Just subject to recall." (36 RT 7680.) The court then told Garza,

> Ma'am, I'm going to let you leave, but you're subject to recall, which means if either attorney contacts you and tells you you need to come back further, you need to come back. You understand that?

(36 RT 7680.) Appellant counsel stated that there would be a motion. (36 RT 7680-7681.) Later that day appellant stated he had a mistrial motion based on the prosecutors comments that the witness may be needed during the penalty phase of the trial. (36 RT 7705.) The trial court denied appellant's mistrial motion stating:

> I don't find the reference by Mr. Barton to the words penalty phase prejudice this jury, to the extent that he was making reference to when the witness might be needed.
>
> I don't think the jury assumes that means now that there will be, in fact, a penalty phase that Mr. Barton was somehow

conveying that. It's just a matter of the contingency, and I don't find there's been prejudice.

Motion for mistrial is denied.

(36 RT 7710.)

At the outset, appellant has forfeited this claim by failing to specifically object and by failing to ask the trial court for an admonition. (*People v. Cole, supra*, 33 Cal.4th at p. 1201.) Appellant asked to reserve a motion, and subsequently, when the parties and the court were outside the presence of the jury, appellant's counsel stated he was bringing a mistrial motion based on the prosecutor's statement that the witness may be needed at the penalty phase of the trial. He never specifically articulated the grounds for his objection and he did not request that the trial court admonish the jury to disregard the comment made by the prosecutor. As such he has forfeited the claim.

Assuming that his claim is not forfeited, it lacks merit. Appellant's argument that the prosecutor intentionally made the request to have Beatriz Garza subject to recall at the penalty phase of the trial to prejudice appellant is unavailing. The prosecutor's statement "It would be penalty" could not have infected the trial with such unfairness that appellant did not receive a fair trial. As the trial court noted, there is no reason that the jury would presume that there was automatically going to be a penalty phase because of that statement. The jury was instructed that they were to consider only the evidence presented at trial and that the statements made by the attorneys were not evidence. There is no reason to believe the jury did not follow this instruction.

Based on the above, appellant fails to establish any instances of misconduct. Even if there was misconduct, it did not comprise "a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as

to make the conviction a denial of due process.'" (*People v. Ayala, supra,* 23 Cal.4th at pp. 283-284.) The judgment should therefore be affirmed.

XV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO RECUSE THE KERN COUNTY DISTRICT ATTORNEY'S OFFICE

Appellant argues that the trial court abused its discretion when it denied his motion to recuse the Kern County District Attorney's Office. (AOB 370-374.) Appellant fails to show that the trial court abused its discretion in denying the motion.

A. Factual Background

On June 5, 2000, appellant filed a motion to recuse the Kern County District Attorney's Office. (9 CT 2435-2655.) The motion argued two grounds for recusal: (1) the district attorney's office planned to argue inconsistent theories of the 1995 murder of Javier Ibarra at the penalty phase of the trial; and, (2) the victim's aunt, Diana Yarbrough, was a supervising clerk for the Kern County Superior Court and had a close working relationship with the district attorney's office. (9 CT 2438-2439.)

In support of his motion appellant filed the preliminary hearing transcripts from the cases against Cipriano Ramirez, as well as the transcript of Cipriano Ramirez's testimony in Cipriano's trial. (9 CT 2456-2655.)[32] In the trials involving Gabriel Flores and Cipriano Ramirez, the prosecutor had argued that Gabriel Flores was the individual who shot Ibarra in 1995. (9 CT 2438.) Appellant argued that the prosecutor's intention to present to the jury evidence that appellant was the shooter in the Ibarra murder at the penalty phase of appellant's trial created a conflict

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[32] At the hearing on the recusal motion, appellant offered two additional transcripts in support of his motion: the People's closing argument in *People v. Gabriel Flores,* and the People's closing argument in *People v. Cipriano Ramirez.* (RT 1294-1295.)

of interest because the prosecution would be arguing inconsistent theories. (9 CT 2438-2440.) Specifically, appellant argued that any use of Cipriano Ramirez's prior testimony regarding who the shooter was would require appellant's counsel to call each attorney and investigator with the Kern County District Attorney's Office who took part in the prosecution of Gabriel Flores and Cipriano Ramirez. (9 CT 2439.)

The People opposed the motion to recuse. (10 CT 2852-2857.) The People noted that two different prosecutors tried Gabriel Flores and Cipriano Ramirez for the murder of Ibarra. (10 CT 2854.) The People also noted that the prosecutor in the Gabriel Flores trial argued that Flores was the shooter based on the clothing description given by one witness. Alternatively, the prosecutor argued that Flores was liable under an aiding and abetting theory. The jury in Flores' trial found Flores guilty of second degree murder but found that he did not personally use a firearm. (10 CT 2854.) In the case against Cipriano Ramirez, the prosecutor had argued that appellant, Cipriano Ramirez, and Flores were all involved in the murder of Ibarra. Cipriano Ramirez had testified in his defense that appellant, his own brother, was the shooter. (10 CT 2855.) The People had argued that Flores was the shooter but that Cipriano was liable under an aiding and abetting theory regardless of whether Flores or appellant had fired the fatal shots. Citing *People v. Watts* (1999) 76 Cal.App.4th 1250, the People maintained that they could argue inconsistent theories in the separate trials so long as the evidence was subject to different interpretations. (10 CT 2855.)

On June 26, 2000, the court denied the recusal motion. (RT 1326-1327.)

B. The Trial Court's Ruling Denying the Recusal Motion Was Correct

Section 1424 provides that a motion to disqualify a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." A "conflict," under section 1424,

> exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.

(*People v. Eubanks* (1996) 14 Cal.4th 580, 592, quoting *People v. Conner* (1983) 34 Cal.3d 141, 148.) Thus, a conflict warrants recusal only if it is "'so grave as to render it unlikely that defendant will receive fair treatment.'" (*People v. Eubanks,* at p. 594, quoting *People v. Conner,* at p. 148.) Section 1424 articulates a two-prong test: "'(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?'" (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833, quoting *People v. Eubanks,* at p. 594.) The defendant bears the burden of proof. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 709.)

> [This Court] "review[s] the superior court's factual findings for substantial evidence and, based on those findings, determine[s] whether the trial court abused its discretion in denying the recusal motion."

(*Hambarian v. Superior Court, supra*, 27 Cal.4th at p. 834.) On appeal, the defendant must show actual prejudice from the denial of the recusal motion. (*People v. Vasquez* (2006) 39 Cal.4th 47, 68-70.)

Here, appellant fails to establish that the trial court abused its discretion in denying appellant's motion to recuse the Kern County District Attorney's Office. Appellant argues that the recusal motion should have been granted because the prosecutor planned to argue inconsistent theories

regarding who the shooter was in the Ibarra murder at the penalty phase of his trial. Appellant contends that because two different prosecutors had previously argued that Gabriel Flores was the shooter in the Ibarra murder, the prosecutor in this case could not argue that appellant was the shooter, and that the prosecutor's attempt to make this argument created a conflict of interest. (AOB 370-372.) Appellant, in part, based his motion on the premise that the prosecutor would seek to introduce a statement made by Cipriano Ramirez that appellant was the shooter. (9 CT 2439.) However, as appellant correctly notes, the prosecutor chose not to introduce Cipriano Ramirez's prior testimony. (AOB 373, 59 RT 13015 [prosecutor states he is not requesting to introduce Cipriano Ramirez's prior testimony].) Thus, there could be no conflict or prejudice based on the theory that Cipriano Ramirez's testimony was to be introduced at trial.

There was no conflict of interest based on the prosecutor's theory that appellant was the shooter in the Ibarra murder. First, the prosecutor noted that the jury in Gabriel Flores's trial did not find that Flores was personally armed in the commission of the crime. (10 CT 2855.) Second, whether appellant was the shooter or was liable under an aiding and abetting or conspiracy theory, the same evidence would be introduced at appellant's trial by the People. (10 CT 2853.) The evidence presented in appellant's trial, as well as the trial in Flores's and Cipriano Ramirez's trials, was consistent with either Flores or appellant having been the shooter. (See *People v. Watts*, *supra*, 76 Cal.App.4th at pp. 1260-1261 [no due process violation where prosecutor secured identical convictions in separate trials for crimes that could only have been committed by one person]; see Arg. XVI, post.) Whether the Kern County District Attorney prosecuted the case or a different agency prosecuted the case, the same evidence would likely have been presented to the jury in the penalty phase of appellant's trial. Moreover, as the prosecutor argued, recusal of the district attorney

was not the remedy if the court found that the prosecutor could not argue inconsistent theories. (4 RT 1309-1310.) Instead, the remedy would be to limit the People to an aiding and abetting theory; a theory that was not inconsistent from Gabriel Flores's and Cipriano Ramirez's trials. (4 RT 1310.)

Appellant further argues that the trial court erred in denying his recusal motion because the victim's aunt, Diana Yarbrough, was a supervising clerk for the Kern County Superior Court. (AOB 370, 374.) There is simply no evidence in the record to support his contention that this created a disabling conflict.

The evidence presented at the recusal hearing established that Diana Yarbrough was the victim's aunt and a clerk for the Kern County Superior Court. (4 RT 1315-1316; 10 CT 2853.) Diana Yarbrough was not an employee of the Kern County District Attorney's Office nor had she ever worked in that office. She did not have a close relationship with the Kern County District Attorney's Office and was not employed on the same floor. (10 CT 2853.) Appellant offered no evidence at the recusal hearing that Diana Yarbrough was closely connected to the district attorney's office or that appellant would be treated in an unfair manner because of Diana Yarbrough's job as a court clerk. (4 RT 1315-1316; see *People v. Gamache* (2010) 48 Cal.4th 347, 363-365; *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 107-108 citing *People v. Parmar* (2001) 86 Cal.App.4th 781, 800 ["'A motion to disqualify a prosecutor must be based upon a likelihood of unfairness and not upon mere speculation. '"].) As such, the trial court did not abuse its discretion in denying appellant's motion.

Assuming arguendo that the trial court erred by denying the motion to disqualify the district attorney, appellant fails to show any prejudice. (See *People v. Vasquez, supra,* 39 Cal.4th at pp. 68-70.) As noted above, the

prosecutor chose not to introduce Cipriano Ramirez's testimony at trial. Thus, whether another prosecutor in the same office had previously argued that Cipriano Ramirez's testimony was untruthful had no bearing on this case. The evidence regarding the Ibarra murder would have been introduced at trial under an aiding and abetting theory even if the prosecutor had been precluded from arguing that appellant was the actual shooter.

Moreover, the prosecutor's argument at the penalty phase did not focus on whether appellant was the shooter in the Ibarra murder or an accomplice. Instead, the prosecutor focused on the circumstances of the crime in the Yarbrough murder and the profound effect it had on his family. (62 RT 13745-13747, 13749-13752, 13773.) Specifically, the prosecutor argued that the brutality of the Yarbrough murder was demonstrated by the fact that Yarbrough's eyes had been taped shut, his hands were bound behind his back, and he had been forced onto his knees before being murdered. The prosecutor argued that appellant's actions subsequent to the murder showed little remorse for Yarbrough when appellant left Yarbrough dead, then partied with his friends and fled to Mexico. The prosecutor also focused on appellant's two convictions for the carjackings and kidnappings of Leonel Paredes and Juan Carlos Ramirez. (62 RT 13747-13748.) The prosecutor highlighted appellant's threats and brutal beating of Juan Carlos, and appellant's threats to Leonel Paredes when he shoved a gun in his mouth and threatened to fill the trunk with bullets. (62 RT 13748.) Thus, there is no reasonable probability that appellant would have received a more favorable verdict at the penalty phase absent the court's denial of his recusal motion.

Finally, there is no evidence that because Diana Yarbrough was a supervising clerk with the Kern County Superior Court the prosecution team treated appellant's case in an unfair manner. (*People v. Gamache,*

supra, 48 Cal.4th at pp. 363-365.) There is no reasonable probability that appellant would have obtained a more favorable result but for the trial court's denial of the motion to disqualify the district attorney. (*People v. Vasquez, supra*, 39 Cal.4th at p. 70.)

XVI. APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PROSECUTOR'S PENALTY PHASE ARGUMENT REGARDING THE JAVIER IBARRA MURDER

Appellant claims that his federal constitutional rights to present a defense and due process were violated by 1) the prosecutor arguing that appellant was the actual shooter in the Ibarra murder, 2) the trial court denying his request to introduce as evidence the prosecutors' two prior closing arguments, and 3) by the introduction of evidence that appellant was the shooter in the Ibarra murder. (AOB 375-407.) Respondent submits that appellant's due process rights and right to present a defense were not violated by the evidence and argument that appellant was the shooter, and his right to present a defense was not violated by the trial court's ruling excluding the transcripts from being introduced at trial.

A. Factual Background

On February 27, 2001, the People filed a motion to admit evidence of appellant's involvement in the 1995 murder of Javier Ibarra pursuant to section 190.3, subdivision (b). (15 CT 4324-4327.) The People stated in their motion that the degree of appellant's involvement in the murder would be up to the jury to decide and that

> the prosecution and the defense are entitled to put on any and all evidence regarding the event, and argue any reasonable inference that can be drawn by the jury.

(15 CT 4327.)

Appellant filed an opposition to the People's motion on February 28, 2001. (15 CT 4359-4363.) Appellant argued that the prosecutor should be

precluded from arguing that appellant was the shooter in the Ibarra murder because: (1) there was not substantial evidence that he was the shooter; and, (2) previously, in separate trials of Gabriel Flores and Cipriano Ramirez for Ibarra's murder, the prosecutor had argued that Flores had been the shooter. (15 CT 4361-4362.)

On March 7, 2001, the People argued that they should be allowed to admit evidence of appellant's involvement in the Ibarra murder on a number of theories, including: accomplice liability, principle liability, aiding and abetting, and conspiracy with a target crime of murder. (54 RT 12178-12179.) The People acknowledged that the prosecutors in the Flores and Cipriano Ramirez trials had argued that Flores was the shooter. (10 CT 2854; 15 CT 4327.) The People observed, however, that Flores' jury had not found beyond a reasonable doubt that Flores personally fired the gun, thus, appellant's jury could determine whether appellant had been the shooter. (10 CT 2855-2856.) The prosecutor noted that Flores and Cipriano Ramirez had been prosecuted under an aiding and abetting theory. (10 CT 2854-2855.[33])

The trial court ruled that the People could introduce evidence of appellant's involvement in the Ibarra murder stating:

> I'm going to find that there is substantial evidence, based upon the offer of proof that the defendant engaged in criminal activity, which is violent, within the meaning of the Penal Code subdivision that we're talking about here.
>
> And I will find that that does include the theories that counsel has just recited, based upon my request, different crimes and legal basis for being charged are considered under those crimes, either as an aider and abettor or principle.

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[33] From the record it is unclear whether appellant was charged with the Ibarra murder. (10 CT 2853, 2855 [prosecutor states "if charges are filed against Juan Ramirez for the 1995 murder of Mr. Ibarra"]; 54 RT 12178 [prosecutor states defendant was held to answer on Ibarra murder.)

> So I'm going to deny the defense motion number 18, evidence regarding the incidents involving Javier Ybarra (sic) will be admissible under 190.3 subdivision B, as an aggravator, and the Court will instruct the jury as to the burden of proof and the elements that must be met.

(54 RT 12188-12189.)

On March 14, 2001, the prosecutor requested that the trial court prohibit appellant from asking witnesses about the dispositions in the Cipriano Ramirez or Flores trials. The prosecutor stated that the disposition of those cases was irrelevant unless it was offered to impeach Flores or Cipriano Ramirez if either testified.[34] (57 RT 12682-12683.) Appellant's counsel stated that if either Flores or Cipriano Ramirez testified, he should be able to bring in evidence of the prior trials to demonstrate their reason for "misrepresenting their participation to achieve a better appeal or resentencing result down the road." (57 RT 12684.) Appellant's counsel stated that even if they did not testify, the jury should still be made aware of the prior prosecutions, including the prosecution's earlier theory that Flores was the shooter. (57 RT 12684.) The trial court ruled:

> My tentative, then, is to allow a witness who is facing potential retrial or facing further criminal proceedings to be questioned as to possible bias in an effort to somehow help his own position with regard to the prosecution.
>
> If the witness is not facing any further proceedings, if his case is final -- and that may be the case with Cipriano -- then it would not be relevant to ask him if he is testifying in a manner which may be helpful to the prosecution, for some reason related to bias. Moral turpitude is still an issue that may be raised, and we will address it with each witness.

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[34] The prosecutor noted that Cipriano Ramirez's conviction for second degree murder and conspiracy to commit murder had been overturned, and that Cipriano had subsequently entered a plea to involuntary manslaughter. (57 RT 12685-12686.)

(57 RT 12687.)

Both Cipriano Ramirez and Gabriel Flores invoked their Fifth Amendment right not to testify at appellant's trial. (57 RT 12849, 61 RT 13575.) Alma Mosqueda, Deputy Contreras, Sergeant Fuqua, Gerardo Soto, Jesse Ibarra and Isela Nunez each testified at the penalty phase of appellant's trial regarding the Ibarra murder. (57 RT 12771-12978; 60 RT 13187-13198.)

Appellant filed a motion for mistrial alleging prosecutorial misconduct because the prosecutor argued and introduced evidence that appellant had been the shooter in the Ibarra murder, which, according to appellant, was not a theory that the trial court had allowed the prosecutor to go forward on at appellant's trial. (17 CT 5025, 5031-5033.) Additionally, appellant argued for a mistrial because there was insufficient evidence that there had been a conspiracy to murder Ibarra, and because of the use of hearsay statements in the penalty phase of the trial. (17 CT 5025-5031; see 17 CT 5048-5056 [People's Opposition].)

On March 22, 2001, after hearing appellant's argument, the trial court noted:

> [L]et me first confirm that having heard the citations you've referred to with regard to my prior ruling, having looked back at my notes, to refresh my memory, let me now confirm that my prior ruling was that I did find there was substantial evidence, which would support and allow the People to present evidence to the jury, under Penal Code Section 190.3, subdivision B, that the defendant committed the crime of murder under Penal Code Section 187 as an aider and abettor.
>
> I never said that the People were precluded from presenting evidence that the defendant was involved to any greater degree than an aider and abettor.
>
> I merely said they met that threshold showing of substantial evidence to pursue the crime of murder as an aider and abettor, and my ruling was never either expressly stated or intended by

me to preclude them from putting on whatever evidence -- putting on evidence of whatever happened, whether the defendant was an aider and abettor, or some other principle (sic) theory.

Again, an aider and abettor is a principle (sic) under the law. . . .

I'm specifically going to find that the People did not violate my ruling.

(RT 13580-13582.) Appellant argued that the trial court should have explained that it was allowing the prosecutor to argue that appellant was the shooter. (RT 13593-13594.) The court ruled:

The Court is denying the motion for mistrial.

The Court does find that there is substantial evidence to support the jury considering whether the defendant committed the crime -- there is substantial evidence to support a conviction for conspiracy within the meaning of 1118.1 type of review or sufficiency of evidence upon appellate review standard, and the Court does find that the -- the claim of prosecutorial misconduct is not supported.

And I've already indicated my tentative with regard to the ruling of the Court.

I find the People did not violate this court's ruling with regard to putting on the evidence in violation of the Court's ruling.

With regard to the other grounds that are raised, again, I'm denying the motion for mistrial.

I do not find there's been denial of a fair trial, or the other grounds that are raised in the motion, I find that those grounds have not been met, which would warrant granting a new trial.

Motion's denied.

(RT 13617.)

B. Appellant's Due Process Rights Were Not Violated By The Prosecutor's Argument That Appellant Was the Shooter in the Ibarra Murder

Appellant claims that his due process rights were violated by the inconsistent arguments advanced in the trials of appellant, Cipriano Ramirez and Gabriel Flores. (AOB 393-398.)

Appellant's due process rights were not violated. This Court recognized in *In re Sakarias* (2005) 35 Cal.4th 140 that in certain limited circumstances a prosecutor commits misconduct by

> intentionally and without good faith advanc[ing] inconsistent and irreconcilable factual theories in two trials, attributing to each defendant in turn culpable acts that could have been committed by only one person.

(*Id.* at p. 145.) *Sakarias*, however, involved egregious misconduct by a prosecutor who manipulated evidence to support inconsistent theories of guilt, and, as a result, painted a false picture of the facts directly related to the penalty-phase verdict resulting in the jury imposing death verdicts on both of the defendants. No such misconduct occurred here.

In *Sakarias*, the defendant and codefendant Waidla broke into the victim's residence and waited for her return. (*In re Sakarias, supra*, 35 Cal.4th at p. 146.) As the victim entered the home, they attacked her using a knife and a hatchet, inflicting multiple injuries to her head and chest. (*Ibid.*) The victim suffered three chopping wounds to her head, one of which was inflicted before death and penetrated her skull, the other two which were inflicted after or around the time of death. (*Ibid.*) At some point the victim was dragged down the hall to a bedroom. (*Ibid.*) Sakarias confessed to police that he had wielded a knife during the initial attack, and that Waidla had used the hatchet. (*Id.* at pp. 146-147.) Sometime later, at Waidla's direction, he had gone into the bedroom and chopped the victim's head twice with the hatchet. (*Ibid.*) Waidla confessed to police that he

inflicted one blow with the hatchet, and maintained that he remembered nothing thereafter. (*Ibid.*) Thus, the evidence introduced in the defendants' separate trials strongly suggested that Waidla struck the first and fatal chopping blow with the hatchet, and that Sakarias inflicted two postmortem chopping blows. (*Ibid.*)

In separate trials, the prosecutor argued that each defendant had wielded all three blows with the hatchet, including the first and fatal blow. (*In re Sakarias, supra*, 35 Cal.4th. at p. 148.) In Waidla's trial, the prosecutor introduced testimony from the medical examiner that an abrasion on the victim's back indicated that she had been dragged, postmortem, into the bedroom. (*Ibid.*) This evidence suggested that the victim was killed during the initial attack when Waidla struck her with the hatchet. (*Ibid.*) In Sakarias's trial, however, the prosecution did not introduce the medical examiner's testimony, suggesting that the victim may have still been alive when Sakarias admittedly struck her twice in the bedroom with the hatchet. (*Ibid.*) The prosecutor argued that Sakarias delivered all three hatchet blade blows, including the fatal one, in the bedroom. (*Ibid.*) This Court found that the prosecutor's manipulation of the evidence to support his inconsistent theories of the case violated due process:

> Fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth. At least where, as in Sakarias's case, the change in theories between the two trials is achieved partly through deliberate manipulation of the evidence put before the jury, the use of such inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained.

(*In re Sakarias, supra*, 35 Cal.4th at pp. 155-156.) The Court further held that reversal was required only where the prosecutor's misconduct resulted in prejudice to the defendant. The Court set forth a two-pronged inquiry for prejudice:

> [F]or each [defendant] we must ask, first, whether the People's attribution of the act to the [defendant] is, according to all the available evidence, probably false or probably true, and, second, whether any probably false attribution of a culpability-increasing act to the petitioner could reasonably have affected the penalty verdict.

(*Id.* at p. 165.)

This Court recognized several limitations to its holding. First, the prosecutor may be found to have acted in good faith where a significant change in the available evidence comes to light in the second trial, warranting a change in the prosecutor's factual theory. (*In re Sakarias, supra*, 35 Cal.4th at p. 162.) Second, the prosecutor's argument will be deemed fundamentally consistent where the variation in theory between the two trials does not concern a fact used to convict the defendant or to increase his punishment. (*Id.* at p. 161.) The prosecutor's use of alternative theories may be justified where the evidence is "highly ambiguous" as to each defendant's role in the crimes. (*Id.* at p. 164, fn. 8.)

Here, the Kern County District Attorney's Office attributed the act of shooting Ibarra, which could have been committed by only one defendant, to both Flores and appellant in separate trials. The prosecutor's argument did not offend the principles set forth in *Sakarias*, however, for several reasons. First, the prosecutor's variation in argument did not concern a fact used to convict appellant or increase his punishment. (*In re Sakarias, supra*, 35 Cal.4th at p. 161.) Appellant had already been convicted of murder with special circumstances, and his penalty was not dependent upon his role as the Ibarra shooter. (*Id.* at p. 160.) Rather, appellant's culpability

was predicated on his direct participation in the assault on Ibarra. This was also true in Flores's and Cipriano Ramirez's trials. The prosecutor in each case argued that the defendants were liable whether they were the direct perpetrator or an aider and abettor. (10 CT 2721; 2854-2855; 54 RT 12158.) Thus, the prosecutor pursued the same "underlying theory" in each case, namely that each defendant was equally responsible for the death no matter who pulled the trigger. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 186-187 [prosecutor's inconsistent positions about which of two defendants was the shooter did not warrant voiding defendant's guilty plea where the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder].)

Second, the prosecutor did not act in bad faith by arguing that appellant was the shooter given the ambiguity in the evidence as to who fired the weapon at Ibarra.

> Where the evidence is highly ambiguous as to each accused perpetrator's role, some courts have relied on "the uncertainty of the evidence" to justify the prosecutor's use of "alternate theories" in separate cases.

(*In re Sakarias, supra*, 35 Cal.4th at p. 164, fn. 8.) In *Sakarias*, the great weight of the evidence pointed to the codefendant Waidla having inflicted the antemortem hatchet blow. Nonetheless, the prosecutor argued that Sakarias had inflicted that blow, and deliberately excluded evidence used in in Waidla's trial suggesting otherwise. Here, by contrast, the evidence was ambiguous as to who shot Ibarra. The only eyewitness to the shooting said the shooter wore a white hat and a Pendleton. (60 RT 13194-13194.) The codefendants had pointed the finger at appellant and stated that he was the shooter. (9 CT 2639.) The other witness gave differing accounts of who was wearing the white hat on the night of the murder. (57 RT 12807, 58 RT 12975-12978.) The jury in Flores's trial did not find that Flores was

personally armed in the commission of Ibarra's murder, and found him guilty of second degree murder. (10 CT 2854-2856.)

Given the uncertainty in the evidence regarding who shot Ibarra, and the fact that there had been no conclusive determination of that fact, it was proper for the prosecutor to argue the extent of appellant's culpability consistent with the state of the evidence.

Third, there was no claim in this case that the prosecutor intentionally manipulated the evidence in either trial to the detriment of appellant in order to secure a death judgment. Rather, based on what was before the trial court, the evidence adduced at both trials was substantially the same, and the prosecutor simply argued different inferences from that evidence. In *Sakarias*, it was not simply the prosecutor's act of arguing inconsistent theories based on the same evidence, but rather his decision to present different evidence in the separate trials in a manner designed to deceive the jury that constituted misconduct. (*In re Sakarias, supra*, 35 Cal.4th at pp. 155-156.) Such conduct demonstrated bad faith by the prosecutor, and created a reasonable likelihood that Sakarias had been convicted or sentenced by use of a factually false theory. (*Id.* at p. 162.) Here, there was no evidence of inconsistent verdicts, and it cannot be said that one verdict is false. (*Id.* at pp. 159-160.) Likewise, appellant has failed to show that the prosecutor acted in bad faith or sought to intentionally deceive. (*Ibid.*) It was permissible for the prosecutor to advance different theories about who actually shot Ibarra where the evidence was ambiguous on that point, the prosecutor's inferences were consistent with the facts surrounding the crimes, and no codefendant had been found to have personally discharged the firearm in the commission of that murder. Accordingly, appellant has failed to demonstrate that the prosecutor's argument violated his right to due process.

C. Appellant's Due Process Right and Right to Present a Defense Were Not Violated By The Trial Court's Ruling That Appellant Could Not Introduce Evidence Concerning The People's Two Prior Closing Arguments

Appellant claims that his right to present a defense was violated when the trial court precluded him from presenting evidence of the two prior closing arguments made by the People at his trial. (AOB 398-402.) Appellant further argues that under Evidence Code section 1220 the trial court should have allowed him to make the jury aware of the prosecutor's closing arguments in Gabriel Flores's and Cipriano Ramirez's trials. Respondent submits that the trial court did not abuse its discretion in refusing to admit this evidence.

Appellant cites no authority that applies the doctrine of party admissions pursuant to Evidence Code section 1220 to a prosecutor's closing argument in a criminal case. In any event, the argument is without merit.

An attorney's closing argument is not an admission. It is advocacy regarding the inferences to be drawn from the evidence presented at trial.

> The prosecutor, after all, [is] neither a participant nor a witness, and has no knowledge of the facts other than those gleaned from the witnesses and other available evidence. Thus, the prosecutor's argument is not that a particular set of facts is the true set of facts, but that the *evidence shows* that a particular set of facts is the true set of fact.

(*People v. Watts, supra,* 76 Cal.App.4th at p. 1263, emphasis in original.) Evidence Code section 140 provides:

> "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or non-existence of a fact.

Juries are instructed that statements made by the attorneys during the trial are not evidence. (CALJIC No. 1.02; CALCRIM No. 104.) Since the

arguments are not evidence establishing any fact, logically an attorney's closing arguments would not be admissible as evidence of any fact in a subsequent trial.

The attorney's prior arguments also would be irrelevant. Contrary to appellant assertion, the prior jury in the Flores trial did not find that he personally discharged a firearm in the commission of the murder. Instead, he was found guilty of second degree murder. (10 CT 2854-2856.) Cipriano Ramirez's liability was never premised on a theory that Cipriano was the shooter and prior to appellant's trial, Cipriano Ramirez's convictions for the Ibarra murder were overturned, and he entered a plea to involuntary manslaughter. (54 RT 12158; 57 RT 12685-12686.) Thus, what the prosecutors in the codefendants' trials argued would have no bearing on appellant's penalty phase trial since neither Flores nor Cipriano were convicted based on the theory that they were the shooter in the Ibarra murder.

Furthermore, nothing prevented appellant from introducing evidence showing that Flores was the shooter to minimize appellant's culpability as to this penalty phase evidence. Thus, nothing in the trial court's ruling prevented appellant from presenting a defense and the trial court did not abuse its discretion in ruling that the prosecutor's closing arguments from Flores' and Cipriano Ramirez's trials were inadmissible

D. The Prosecutor Did Not Commit Prejudicial Misconduct By Presenting Evidence That Appellant Was the Shooter in the Javier Ibarra Murder

Appellant contends that the prosecutor's questioning of witnesses and closing argument regarding the Ibarra murder amounted to prosecutorial misconduct. (AOB 403-406.) This contention is meritless.

No objection on the grounds of prosecutorial misconduct was made during the examination of the witnesses appellant now claims were asked

improper questions, and no objection was made on this ground during closing argument in the penalty phase of appellant's trial. (58 RT 12921, 12941-12946, 12953, 12977.) Since no objection was made and no admonition requested, appellant's claim has been forfeited on appeal. (*People v. Mitchell* (1966) 63 Cal.2d 805, 809.)

Even assuming the claim has not been forfeited, it lacks merit. This Court has stated in *People v. Beivelman* (1968) 70 Cal.2d 60:

> "'It is the province of a district attorney to state to a jury the various conclusions that he draws from the evidence, and to make it clear to the jury what conclusions in his opinion should be drawn from the evidence introduced, so long as he keeps within the scope of conclusions which may properly be drawn.' [Citation.] 'The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.' [Citation.] In the argument before the jury, any reasonable inference may be drawn from the evidence . . . ."

(*Id.* at pp. 76-77.)

Here, the prosecutor's argument that there was a reasonable inference that appellant was the shooter in the Ibarra murder did not amount to prosecutorial misconduct. The argument was based on the evidence presented at trial. The prosecutor's examination of Mosqueda, Deputy Fuqua and Gerald Soto was proper. Contrary to appellant's assertions, the prosecutor's questions regarding Mosqueda's statements to Jesse Ibarra concerning who wore the white hat on the night of the murder was proper impeachment evidence concerning her prior inconsistent statements. The questions of Geraldo Soto and Deputy Fuqua were relevant to show that, at the time he was apprehended, appellant was wearing a shirt and hat consistent with the clothing worn by the person who shot Ibarra. The prosecutor's examination and argument were not "dishonest [acts] or

[attempts] to persuade the court or jury, by use of deceptive or reprehensible methods . . ." (*People v. Beivelman, supra*, 70 Cal.2d at p. 75.)

There was no prosecutorial misconduct.

E. The Prosecutor's Argument Was Not Prejudicial Error

Appellant asserts that the prosecutor's improper argument caused prejudice. (AOB 406-407.) Assuming that the argument was improper and that appellant has preserved any objection, appellant fails to demonstrate prejudice.

Prejudice is shown where both: (1) the People's attribution of the act to the defendant is, according to all the available evidence, probably false; and (2) the false attribution of a criminal act to the defendant was reasonably likely to have affected the guilt or penalty verdicts. (*In re Sakarias, supra*, 35 Cal.4th at p. 165.)

Appellant has not demonstrated that the evidence and argument that he was the shooter was probably false. The record here shows that, at Flores's trial, there was no finding that Flores personally discharged the gun leaving unsettled the question of who shot Ibarra. The evidence established that the person who shot Ibarra had been wearing a white cap. Mosqueda gave inconsistent statements regarding who was wearing the white cap, and initially named only appellant and Cipriano as being present when Ibarra was shot. (57 RT 12807, 12829, 12831; 58 RT 12975-12978.) When Sergeant Fuqua took appellant into custody two days later, Fuqua seized a white baseball cap from appellant. (58 RT 12920-12921.) Appellant told Deputy Hall that he had been wearing a mustard color baseball cap at the time of the Ibarra murder. (58 RT 12933.) The evidence presented at trial was not false and the jury could reasonably conclude that appellant was the shooter.

Even if this Court assumes the evidence that appellant was the actual shooter was probably false, appellant was at the scene of the Ibarra murder. Appellant arrived, participated in the assault, and departed with Cipriano and Flores, and so was liable as an aider and abettor. As a result, even if the prosecutor's argument that appellant was the shooter was false, there is no reasonable likelihood it affected his penalty verdict because he still would have been liable under an aiding and abetting theory. (See *People v. Thomas* (2012) 53 Cal.4th 771, 821 [harmless error].)

Appellant argues that the prejudicial impact from evidence and argument that he was the person who shot Ibarra was profound because it undermined his defense that the shooting of Yarbrough was accidental. (AOB 406.) Appellant's argument fails to recognize that at the time the evidence of the Ibarra murder was presented, the jury had rejected appellant's theory that Yarbrough had been killed by accident and it had convicted him of first degree murder.

Moreover, appellant's argument that the "heart" of the prosecutor's penalty phase argument was the Ibarra murder is also faulty. (AOB 406.) The "heart" of the prosecutor's penalty phase argument focused on the brutality of the Yarbrough murder. (62 RT 13743-13747.) The prosecutor argued that the circumstances of the Yarbrough murder, independent of any other aggravating factors, were enough to warrant death. (62 RT 13752.) Specifically, appellant and Garza kidnapped and carjacked Yarbrough at gunpoint, stripped off his clothes, tied his hands behind his back and taped over his eyes, and then appellant shot Yarbrough in the head multiple times. The prosecutor argued that appellant's actions subsequent to Yarbrough's murder showed little remorse for Yarbrough as appellant had left the victim dead, partied with friends, and then fled to Mexico. (62 RT 13743-13744.) The prosecutor presented evidence and argued that Yarbrough's death had a significant impact on his family. (59 RT 13037-13040.) Notably, Brent

Yarbrough, who had been in the truck with Yarbrough before the abduction, lived with nightmares and guilt over his brother's death and was unable to attend school for several months. (59 RT 13032-13034; 62 RT 13749.)

The prosecutor also focused on appellant's two prior convictions for the carjackings and kidnappings of Leonel Paredes and Juan Carlos Ramirez. (62 RT 13747-13748.) The prosecutor highlighted appellant's threats and the brutal beating of Juan Carlos, and appellant's kidnapping and carjacking of Leonel Paredes at gunpoint. (62 RT 13748.) As a result, the prosecutor's argument that appellant was the person who shot Ibarra, as opposed to an aider and abettor in Ibarra's murder, would not have affected appellant's penalty.

XVII. THE EVIDENCE WAS SUFFICIENT TO ALLOW ANY JUROR TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT MURDERED JAVIER IBARRA

Appellant contends that there was insufficient evidence presented from which the jury could have found that appellant murdered Javier Ibarra. (AOB 408-414.) Appellant's contention is without merit.

At the penalty phase, the People can introduce evidence of a defendant's criminal activity which involved the use of force or violence. (§ 190.3, factor (b).) Before a juror can consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (*People v. Foster* (2010) 50 Cal.4th 1301, 1364.) There is no requirement that the jury as a whole unanimously find the existence of the other criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. (*Ibid.*; *People v. Huggins* (2006) 38 Cal.4th 175, 239.)

Appellant argues that there was insufficient evidence to establish that appellant was part of a conspiracy to commit murder. (AOB 411-413.)

Conspiracy was withdrawn as a theory of culpability by the People. (61 RT 13552-13553, 13619, 13624.) Thus, the People did not argue this theory during the penalty phase of the trial. The jury was not instructed on conspiracy to murder Ibarra as factor (b) conduct, and no juror was asked to find beyond a reasonable doubt that appellant was part of a conspiracy to murder Ibarra. (*People v. Foster, supra*, 50 Cal.4th at p. 1364.)

Appellant argues that there was insufficient evidence to show that he shot Ibarra. (AOB 413-414.) This contention is also without merit.

The jurors were instructed that they could only consider the evidence of the uncharged murder of Ibarra as an aggravating factor if they were satisfied beyond a reasonable doubt that appellant had committed the act. (18 CT 5107.) The evidence established that Cipriano Ramirez and Mosqueda had a telephone conversation shortly before the murder, Cipriano was informed that Ibarra was present at Mosqueda's home, and Cipriano told Mosqueda that they were coming over to "take care of business." (57 RT 12781.) Appellant, Cipriano and Flores arrived at the apartment complex minutes later. (57 RT 12783-12784.) This evidence demonstrates that it is highly likely that appellant and Flores were with Cipriano Ramirez at the time of his conversation with Mosqueda. Once appellant, Cipriano and Flores arrived, they parked directly behind Ibarra's vehicle. (57 RT 12784.) All three men exited the vehicle and Cipriano told Mosqueda to go inside. (57 RT 12791.) Once Mosqueda walked out of sight, two of the men began fighting Ibarra while the third man, who was wearing a white hat, stood by. (60 RT 13190-13192.) The two men who were fighting Ibarra jumped back and the man with the white hat stepped forward and fired five to six shots at Ibarra. (60 RT 19192, 13194.) All three men immediately and simultaneously ran back to their car and fled the scene. (60 RT 13197.)

The evidence showed that the shooter had been wearing the white hat and the Pendleton. (60 RT 13191-13194.) Mosqueda gave conflicting statements regarding who was wearing the white hat on the night of the murder. Mosqueda testified that Flores had been wearing the white hat on the night Ibarra was murdered, however, she did not initially tell law enforcement that Flores was present at the time of the shooting. (57 RT 12807, 12832.) The day after Ibarra's murder, Mosqueda told Ibarra's brother, Jesse, that appellant was the one with the white hat and that appellant had shot Ibarra. (58 RT 12975-12978.) Mosqueda told Jesse Ibarra that she was fearful because she received telephone calls from Cipriano Ramirez saying they would take care of her. (*Ibid.*)

Moreover, separate from Mosqueda's statements, there was other evidence to support the inference that appellant was the shooter. A white baseball cap was seized from appellant when he was taken into custody. (58 RT 12940-12942.) Appellant's uncle, Gerardo Soto, saw appellant the night of the murder. He stated that appellant was wearing a dark Pendleton and a hat, but that the hat was not white. (58 RT 12940-12942.) The foregoing evidence was sufficient to allow the jury to reasonably have found that appellant shot Ibarra.

The weight to be given to Mosqueda's and Jesse Ibarra testimony and their credibility were matters exclusively within the province of the jurors. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The jurors each had the opportunity to determine the demeanor of the witnesses, to resolve the conflicting testimony, including the conflicting statements of Mosqueda.

Assuming arguendo that there was not substantial evidence from which any juror could find beyond a reasonable doubt that appellant shot Ibarra, appellant suffered no prejudice. As noted above, the jurors were instructed that they had to each find beyond a reasonable doubt that appellant had murdered Ibarra before they could consider that act as an

aggravating factor. In the absence of evidence to the contrary, this Court presumes that the jurors followed the trial court's instruction not to consider any other-violent-crimes evidence unless the jurors found beyond a reasonable doubt that appellant committed the offense. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1089.) Further, as discussed previously, the prosecutor's focus in the penalty argument was on the circumstances and brutality of the Yarbrough murder. The Ibarra murder was mentioned, along with numerous other crimes, including the brutal carjackings and kidnapping of Leonel Paredes and Juan Carlos Ramirez. (See Arg. XVI., ante.) Thus, it is not reasonably likely that appellant would have received a more favorable penalty verdict absent the evidence.

XVIII. THE TRIAL COURT PROPERLY ADMITTED CIPRIANO RAMIREZ'S STATEMENTS; ANY ERROR WAS HARMLESS

Appellant contends that the trial court violated his Sixth Amendment right to confrontation by permitting Deputy Contreras, Mosqueda and Jesse Ibarra to recount statements of Cipriano Ramirez during appellant's trial. (AOB 415-417.) Appellant's claim lacks merit.

A. Background

At trial, Alma Mosqueda testified regarding the Javier Ibarra murder.[35] She specifically testified regarding the conversation she had with Cipriano Ramirez shortly before the murder. During direct-examination she was asked:

> [Prosecutor]. And on that evening, did you recall whether or not any of those three persons phoned your apartment?

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[35] Cipriano Ramirez was called as witness, outside the presence of the jury, regarding the Ibarra murder. He declined to answer questions asserting his Fifth Amendment right against self-incrimination. (58 RT 12870-12873.)

[Mosqueda]. Yes, Cipriano phoned my apartment.

Q. And did you recognize his voice from having talked to him before?

A. Yes.

Q. And what, if anything, did he ask you?

MR. BRYAN: Objection, your Honor, hearsay.

MR. BARTON: Goes to intend (sic). Not offered for the truth, your Honor.

THE COURT: Overruled. Reserve.

MR. BRYAN: Ask it be stricken.

THE COURT: Denied. Your objection's preserved and need not be restated for this same line of questioning.

[Prosecutor]. But did you suspect that something bad was going to happen and you didn't [want] Javier in your apartment.

A. Yes.

(57 RT 12774-12775.) After a brief sidebar the following transpired:

[Prosecutor]. As you sit here today, after refreshing your recollection, do you have any independent memory of what, if anything, Cipriano said to you about coming over.

[Mosqueda]. Yes, I remember he said that -- after I talked to him, he said is it okay if we can come, if they could come over and take care of business. Boys, I don't know what it was.

THE COURT: Keep your voice up now, ma'am.

MR. BRYAN: Aranda-Bruton, and other objections, your Honor.

(57 RT 12781-12782.)

Javier Ibarra's brother, Jesse Ibarra, testified that the day after the murder he spoke to Alma Mosqueda. (58 RT 12975.) Alma Mosqueda

told Jesse Ibarra that she spoke to Cipriano Ramirez prior to the murder, that Cipriano asked if Javier Ibarra was present at her apartment, and that Cipriano stated, "we are coming over to take care of business." (58 RT 12976-12977.) Appellant's counsel objected to this line of questioning on the grounds that it called for hearsay and violated *Aranda-Bruton*.[36] The objections were overruled. (58 RT 12976-12977.)

Deputy Contreras testified that when he spoke to Cipriano Ramirez after the murder, Cipriano stated that his car had been stolen and that he was not present at the apartment complex on the night of the murder.[37] (57 RT 12838-12839.)

Appellant later moved to strike the witnesses' testimony regarding the statements of Cipriano Ramirez that had been allowed into evidence on the ground that the testimony was based on hearsay. (59 RT 13027.) Appellant also moved for a mistrial based on the admission of Cipriano's statements. (59 RT 13028.) The motion to strike and mistrial motion were denied. (59 RT 13027-13028.)

B. There Was No Violation of the Confrontation Clause

A defendant has a constitutional right to confront and cross-examine witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) In *Crawford v. Washington* (2004) 541 U.S. 36, 53-54, the Supreme Court announced that the Confrontation Clause bars the use of only "testimonial" hearsay statements. In *Davis v. Washington* (2006) 547 U.S. 813, 826-827, the United States Supreme Court explained that a statement is "testimonial"

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[36] *People v. Aranda* (1965) 63 Cal.2d 518, 530; *Bruton v. United States* (1968) 391 U.S. 123.)

[37] Appellant asserts that Cipriano's statement that he was coming over to take care of business was introduced through Deputy Contreras. Respondent has not found where this statement was admitted through Deputy Contreras. (AOB 415 citing 57 RT 12838-12839.)

if, viewed objectively, its "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution." (*Davis,* at pp. 829-830.) Significantly, nontestimonial statements are not subject to the Confrontation Clause, although they still remain subject to traditional hearsay rules of evidence. (*Id.* at p. 821.)

As this Court has recognized, prior case law under *Ohio v. Roberts* (1980) 448 U.S. 56, 66, had permitted the admission of hearsay testimony only if "the declarant was truly unavailable to testify" and "the statement bore adequate indicia of reliability." (*People v. Cage* (2007) 40 Cal.4th 965, 975, 981, fn. 10.) After *Crawford* and *Davis*,

> *Roberts*...and its progeny are overruled for all purposes, and retain no relevance to a determination whether a particular hearsay statement is admissible under the confrontation clause.

(*People v. Cage, supra,* 40 Cal.4th at p. 981, fn. 10.)

Thus, this Court found that a victim's statement to an emergency room physician was nontestimonial and did not implicate the Confrontation Clause. Therefore, it was properly admitted under traditional statutory hearsay exceptions as a spontaneous statement (Evid. Code, § 1240) and a report of physical injury (Evid. Code, § 1370), regardless of any indicia of reliability. (*People v. Cage,* at pp. 974, 987, 991.)

Under these principles, the Confrontation Clause does not preclude admission of Mosqueda's or Jesse Ibarra's testimony about Cipriano's out-of-court statement that they were coming to the apartment complex to "take care of business." As detailed above, Cipriano made this statement to Mosqueda while he was on the telephone with her, before the murder. Cipriano's statement that they intended to come take care of business caused Mosqueda to fear for Ibarra's safety. (57 RT 12782-12783.) No law enforcement officials were present. Viewed objectively, the primary purpose of Cipriano's statement was not "to establish or prove past events

potentially relevant to later criminal prosecution." (*Davis v. Washington*, *supra*, 547 U.S. at pp. 822, 826-827.) Consequently, Cipriano's statement to Mosqueda was nontestimonial. Therefore, the Confrontation Clause has no application.

The same is true of Mosqueda's statement to Jesse Ibarra. Mosqueda's statement to Jesse Ibarra was introduced to show Mosqueda's state of mind at the time she received the telephone call from Cipriano, and her subsequent act of removing Javier Ibarra from her apartment. (Evid. Code, § 1250.) This statement was not testimonial because it was not made to establish past events that were relevant to future criminal proceedings. Instead, they were introduced to establish her state of mind at the time she received the telephone call.[38]

C. Evidence Code Section 1230

The trial court below properly exercised its discretion in admitting Mosqueda's testimony concerning Cipriano's nontestimonial statements under the hearsay exception contained in Evidence Code section 1230.

According to this section,

> the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was against the declarant's penal interest.

(*People v. Geier* (2007) 41 Cal.4th 555, 584.) "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration." (*Id.* at p. 584.) When determining whether the statement

> is truly against interest ... and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the

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[3838] To the extent appellant is arguing that his Sixth Amendment confrontation rights are violated under *Aranda-Bruton.* (AOB 416), he is incorrect because the statements were nontestimonial and consequently, not subject to the Confrontation Clause.

possible motivation of the declarant, and the declarant's relationship to the defendant.

(*Ibid.*) The trial court's decision whether to admit or exclude the statement is reviewed for an abuse of discretion. (*Id.* at p. 585.)

This hearsay exception allows for the admission of one defendant's incriminating statement against himself and his codefendant under certain circumstances. (*People v. Maciel* (2013) 57 Cal.4th 482, 526; *People v. Valdez* (2012) 55 Cal.4th 82, 143-144.)

Here, Cipriano's incriminating statement to Mosqueda that they were coming over to take care of business was admissible against appellant as a declaration against Cipriano's own penal interest. As detailed above, Cipriano made these statements to Mosqueda prior to the time the murder occurred. The statements did not attempt to shift blame away from Cipriano. To the contrary, Cipriano's statement that they were coming over to "take care of business," implied that he, along with appellant and Flores, were coming to the apartment complex to murder Ibarra. The statement was made shortly before the murder occurred and there was no question that both appellant and Cipriano arrived at the apartment complex together in Cipriano's vehicle just minutes before the murder. Thus, the statement that they were coming over to take care of business was evidence of the conspiracy because Cipriano intended the statement to be a threat to Ibarra, and it was taken as such as evidenced by Mosqueda's subsequent actions.

Accordingly, the trial court properly allowed the statements into evidence at trial.

D. Evidence Code Section 1223

Cipriano's statement to Mosqueda that they were coming over to take care of business, was also admissible under Evidence Code section 1223. This section permits admission of an out-of-court statement if (1) the statement was made while the declarant was participating in a conspiracy to

commit a crime, (2) the statement was in furtherance of the objective of that conspiracy, and (3) the statement was made either during or before the defendant actively participated in that conspiracy. (Evid. Code, § 1223.) The statement need not be made to a fellow conspirator. (See *People v. Sully* (1991) 53 Cal.3d 1995, 1231 [statements reasonably viewed as "attempt to commit potential witness to silence," within coconspirator exception].)

At the time Cipriano made incriminating statements, he did so while a participant of the conspiracy and in furtherance of that conspiracy. All three men - appellant, Cipriano and Flores - were participating in a conspiracy to commit murder. In furtherance of that conspiracy, all three went to the apartment complex to confront, and murder Ibarra. Consequently, the admission of his statement against his coconspirators was proper under Evidence Code section 1223.

E. Statement to Deputy Cervantes

To the extent appellant is arguing that Cipriano's statement reporting his vehicle stolen to Deputy Cervantes was inadmissible hearsay, he is incorrect. (AOB at p. 415 citing 57 RT 12838-12839.) The statement Cipriano made to Deputy Cervantes was not offered for its truth, and thus, was not hearsay. (57 RT 12838.) The prosecutor's purpose in introducing this statement was not to argue that Cipriano's statement to Deputy Cervantes was true, but to demonstrate that Cipriano was being untruthful in an attempt to cover up the crime. (Cf. *People v. Gann* (2011) 193 Cal.App.4th 994, 1011, fn. 10 [false statements made by coconspirator "not offered for their truth," and not "testimonial."])

F. Harmless Error

Assuming arguendo that the court erred in allowing testimony concerning Cipriano's out of court statements, any error was harmless.

Even if Cipriano's statement that they were coming over to "take care of business" was admitted in error, Mosqueda identified appellant and Cipriano as the two people who arrived at her apartment complex and were present at the time Ibarra was shot. She explained that they came over and confronted Ibarra in the parking lot of the apartment complex. Moments later she heard shots and found Ibarra shot to death. Although her account of who had been wearing the white hat on the night of the murder varied, she always maintained that appellant and Cipriano were present at the time of the murder.

Nunez corroborated Mosqueda's testimony. Nunez witnessed three men, one of whom was wearing a white hat, in the parking lot of the apartment complex approach another man. Two of the three men began fighting the man who had been by himself Suddenly, the two men jumped back, and the man with the white hat shot the man the two had attacked. Nunez saw the three men get into their car and flee.

Thus, even if Cipriano's statements should have been excluded, in light of the other evidence presented regarding the Ibarra murder, the brutal circumstances of the Yarbrough murder, and appellant's prior violent crimes against Paredes and Juan Carlos Ramirez, there is no reasonable probability that the admission of Cipriano's statements were prejudicial. (*People v. Medina* (1995) 11 Cal.4th 694, 767.)

XIX. APPELLANT'S VIOLATION OF HEALTH AND SAFETY CODE SECTION 11370.1 CONSTITUTED PROPER FACTOR (B) EVIDENCE

Appellant contends that the trial court erroneously allowed evidence of appellant's prior unadjudicated possession of methamphetamine with a firearm, in violation of section 11370.1 of the Health and Safety Code, as an aggravator under section 190.3, factor (b). (AOB 418- 423.) The trial court properly allowed the prosecution to present evidence of appellant's

unadjudicated criminal conduct because his simultaneous possession of a loaded handgun and methamphetamine constituted an implied threat to use force or violence.

A. Background

On August 22, 1997, appellant was found in possession of methamphetamine while armed with a firearm, in violation of section 11370.1 of the Health and Safety Code.[39] The prosecutor sought to introduce this evidence as an aggravator under factor (b) of section 190.3. (See 15 CT 4307-4309, 4312-4315.) The court ruled the evidence was admissible because appellant's possession of the drugs and gun involved the express or implied threat to use force or violence. (54 RT 12025-12026.) The court specifically noted that the evidence demonstrated that appellant was in the immediate presence of both the drugs and the gun, and that the firearm was loaded and available for appellant to use. (54 RT 12025-12026.)

B. There Was Sufficient Evidence For The Jury To Consider The Weapons and Drug Evidence Because It Involved An Implied Threat Of Force Or Violence

Under section 190.3, factor (b), a prosecutor may introduce evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, subdivision (b).) A trial court's decision to admit factor (b) evidence is reviewed for abuse of discretion. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1127.)

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[39] This incident resulted in appellant being charged with violations of Health and Safety Code sections 11370.1, subdivision (a) and 11550, subdivision (e), in the two counts that were bifurcated and tried after this case. (5 CT 1491-1498; 18 CT 5224, 5229.)

In *People v. Garceau* (1993) 6 Cal.4th 140, overruled on other grounds in *People v. Yeoman, supra,* 31 Cal.4th at pages 117-118, a search of the defendant's residence revealed a silencer, a machine gun, and handguns, in violation of sections 12021, subdivision (a) (felon in possession of a firearm) and 12020, subdivision (a) (possession of a machine gun). This Court held that the admission in the penalty phase of that evidence was proper because the defendant's possession of the firearms "clearly involved 'the threat to use force or violence.'" (*Id.* at p. 203.) Similarly in *People v. Quartermain* (1997) 16 Cal.4th 600, this Court found that a defendant's possession of a sawed off firearm and silencer materials demonstrated an implied threat of violence, and was admissible factor (b) evidence. (*Id.* at p. 631.)

In this case, appellant's unlawful possession of methamphetamine while armed with a loaded pistol created an implied threat of violence. Health and Safety Code section 11370.1 was enacted,

> [N]ot [] to protect the user from the consequences of his or her own conduct, but to protect the public and law enforcement officer and "'stop the growing menace from a very deadly combination – illegal drugs and firearms.'" [Citation.] Proponents of the legislation creating section 11370.1 "noted that armed controlled substance abusers posed a threat to the public and peace officers." [Citation.]

(*In re Ogea* (2004) 121 Cal.App.4th 974, 984.)

The fact that gun itself was not illegal does not change the result. Appellant simultaneously possessed the methamphetamine with a loaded pistol in close enough proximity that it was available for use. In fact, the firearm was found with a round chambered, in a black purse where appellant had been kneeling when officers first observed him. (57 RT 127724, 12733.) As in *People v. Dykes*, the concealment of the loaded firearm with one round chambered "rendered it available for instant, surprise use . . ." (*People v. Dykes* (2009) 46 Cal.4th 731, 777.) Not only

did appellant possess a loaded firearm and methamphetamine, a urine sample also detected the presence of methamphetamine and THC, making him even more dangerous due to his ingestion of drugs. (57 RT 12725, 12728, 12733.)

Finally, appellant's other crimes demonstrated that he used firearms to commit violent offenses, including, the brutal murders of Yarbrough and Ibarra and the carjacking, kidnapping and assault on Leonel Paredes. (*Dykes, supra,* 46 Cal.4th at p. 777 [use of a similar firearm in the present offense supported an inference that prior possession of concealed firearm was an implied threat of violence].)

Thus, under these circumstances, the trial court did not error in admitting evidence of appellant's unlawful possession of a loaded handgun and methamphetamine under factor (b) of section 190.3 because that crime involved the implied threat of violence.

Assuming arguendo that the trial court erred in admitting the evidence, appellant cannot establish prejudice. The introduction of evidence concerning his possession of the weapon and drug testimony during the penalty phase was not unduly prejudicial. During the guilt phase of appellant's trial, the jury heard evidence that appellant possessed a firearm and used it to murder Yarbrough. The jury received evidence that appellant had traveled from Arizona to Kern County with a Tec-9, and that he regularly had it in his possession prior to the Yarbrough murder. (33 RT 7865-7870; 7850-7852; 47 RT 10382, 10408, 10458; 14 CT 4146.) Evidence was also introduced that appellant used drugs, and appellant himself testified that he was "high and drunk" at the time he killed Yarbrough. (47 RT 10411-10412.) Having heard this evidence during the guilt phase, it is unlikely that the testimony of Officer Coronado regarding appellant's possession of the loaded firearm and methamphetamine would

have influenced the jury's penalty phase verdict. (*People v. Garceau, supra*, 6 Cal.4th at p. 204.)

XX. APPELLANT FAILS TO ESTABLISH THAT PROSECUTORIAL MISCONDUCT OCCURRED; ANY ERROR IN ALLOWING THE PROSECUTOR TO IMPEACH APPELLANT WITH CONDUCT THAT INVOLVED MORAL TURPITUDE WAS HARMLESS

Appellant argues that the prosecutor committed misconduct, by impeaching appellant with conduct involving a vehicle theft that he entered a misdemeanor plea to in 1994. (AOB 424-432.) Appellant fails to establish that misconduct occurred, the trial court properly allowed appellant to be impeached by evidence of his prior misdemeanor conduct involving moral turpitude, and any error was harmless..

A. Background

The People moved to admit, and appellant sought to exclude, evidence of appellant's prior conduct involving a misdemeanor auto theft conviction in 1994 for impeachment, if appellant testified at trial.[40] (11 CT 3250, 3268.) Appellant argued that the evidence of the prior auto theft was similar to the charged carjacking counts and would amount to propensity evidence. Appellant further argued that he was not the person who initially stole the vehicle and thus, he did not commit a theft offense because he lacked the intent to steal. (9 RT 2372-2373.) The prosecutor argued that appellant's intent to steal could be inferred from the fact that appellant fled from the police while he was driving the stolen vehicle. (9 RT 2376.) The

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[40] Both defense counsel and appellant counsel characterize the 1994 auto theft conviction as a "joyriding" charge. (AOB 425, 47 RT 10370, 10379.) However, as the People noted, the misdemeanor conviction was for a violation of section 10851. (9 RT 2184; 2374; Probation Report at p. 4 ["VC 10851/PC 17 (def driver of stln veh w/5 passengers involved in a high speed chase")].)

trial court ruled that the prosecutor had not shown "beyond a reasonable doubt" that appellant's conduct involving the vehicle theft was a crime of moral turpitude, but allowed for the prosecutor to revisit the issue later. (9 RT 2376, 2382-2383.)

Subsequently, the prosecutor informed the court that he and defense counsel had a discrepancy concerning the motion in limine regarding the impeachment of appellant. (47 RT 10370.) Specifically the prosecutor stated:

> MR. BARTON: [] What about the issue of impeachment? Counsel and I discussed it, and there's a discrepancy on what the Court's ruling was on in limine, if you recall, for this witness.
>
> THE COURT: That's a cross-examination issue.
>
> MR. BARTON: Well, he may want to bring it out if the Court says it's coming in. As I recall, I get to impeach him with the fact that he had the misdemeanor conduct, not a conviction but misdemeanor conduct of auto theft and also –
>
> MR. GARDINA: Joyriding.
>
> MR. BARTON: Well, Counsel calls it joyriding.
>
> And also with the fact that he provided drugs to someone in the furnishing case or the case actually he was out on bail, which we have all heard about.
>
> Counsel's recollection and my notes indicate I can't mention the gun that was seized in that case, and I had withdrawn any efforts to get into the 1995 murder case.
>
> The only issue then that remained between Mr. Gardina and I that was unclear was the shank incident in the jail. And my recollection was the Court said I could go into that if I had a 402 hearing with that detentional (sic) officer first and satisfy the Court that there was a foundation for it.
>
> Defense has some arguments about that, because, in order to rebut it, they want to call back these in-custody people they have

put off until penalty phase. I suppose we could deal with that if it arises.

That was the only issue Mr. Gardina and I were not clear on, whether or not I get to ask him isn't it true you conspired with a group of other inmates to make shanks for assaults on the guards.

(47 RT 10370-10371.) The court and counsel discussed the shank incident that appeared to be the focus of the discrepancy. (47 RT 10371-10375.)

The parties then discussed whether the conduct involving the auto theft was admissible:

THE COURT: With regard to the other offers of proof of alleged moral turpitude conduct –

MR. BARTON: I think we have agreed on what the prior rulings were on those, Judge.

THE COURT: Well –

MR. BARTON: The only one we had was this incident about the shank. I'm not going to try to get into the other stuff the Court ruled on.

THE COURT: All right. Your recollection is that my tentative ruling, if it was a tentative, was to admit evidence of the auto –

MR. BARTON: Just the conduct.

THE COURT: The conduct.

MR. BARTON: It ended up being a misdemeanor conviction; so the conviction is irrelevant. And it was just the conduct. And the Court said that it was tentative, and my recollection is because there's a 352 issue. If we got the shank issue in, maybe we wouldn't get the auto issue in. If we got the auto incident in, maybe we wouldn't get the shank incident in. You couldn't really come down to 352, as far as ultimate incident to impeach, without having that 402.

Is that what you recall, Mr. Gardina?

MR. GARDINA: I'm sorry?

THE COURT: That's consistent with my notes, because I did have a concern under 352. The issue came up if we let in the auto theft is it going to be prejudicial in light of the charges in this case and what weight would that have. And, again, I did indicate it was a tentative, and I would wait and hear what other moral turpitude conduct there was.

With regard to the offer of proof on the shank incident, I can indicate a tentative, and Counsel can then argue it. But my tentative would be that if we admit evidence of the auto-related conduct, what we have described as auto theft or joyriding, admit that, admit evidence of the furnishing of drugs. You have got two separate incidents involving allegations of moral turpitude. And then, under 352, from a cumulative standpoint, we could exclude evidence of the shank.

MR. BARTON: But that wouldn't be prejudice to bring it up in the penalty phase for other purposes, like future danger is concerned; correct?

THE COURT: That's correct. This is only guilt phase.

MR. BARTON: I can live with that, your Honor.

THE COURT: That's my tentative.

MR. GARDINA: Thank you.

THE COURT: Submit it on that?

MR. BARTON: Yes.

MR. GARDINA: Yes.

THE COURT: That's my ruling, doing the 352 analysis.

(47 RT 10375-10377.)

On direct examination appellant admitted that he entered a misdemeanor no contest plea to joyriding. (47 RT 10379.) On cross-examination the prosecutor asked appellant if the "joyriding" incident involved him being in a stolen vehicle, fleeing from the police and ultimately crashing the vehicle with others inside the vehicle. (47 RT

10448.) Appellant counsel objected that it was improper impeachment and reserved a motion based on prosecutorial misconduct. (47 RT 10448-10449.) The trial court overruled the objection. (47 RT 10448-10449.)

Afterward, appellant filed a mistrial motion based, in part, on the prosecutor's cross-examination of appellant. (15 CT 4255-4257.) Appellant argued that the prosecutor had mischaracterized the "misdemeanor conviction as a form of auto theft" and that the trial court erred in admitting that evidence because the auto theft crime was similar in nature to the charged carjacking counts. (15 CT 4256.) The prosecutor responded that the underlying conduct in the auto theft case provided him with a good faith basis to believe that appellant knew the vehicle was stolen, and that he was entitled to ask about the underlying conduct because it involved a crime of moral turpitude. (47 RT 10541-10542.) The court denied the mistrial motion stating, "I'm not going to find that the People have inappropriately asked questions related to those subjects." (47 RT 10552.)

The jury was instructed that evidence of the auto theft was introduced for the limited purpose of showing that appellant engaged in past criminal conduct involving moral turpitude and could be considered only for assessing his believability. Specifically, the court instructed:

> This evidence may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may take into consideration in weighing the testimony of that witness.

(16 CT 4552; CALJIC No. 2.23.1.)

B. Appellant Fails to Establish That The Prosecutor Committed Misconduct By Cross-Examining Appellant Concerning His Prior Misdemeanor Acts Involving Moral Turpitude

Appellant contends that the prosecutor committed prejudicial misconduct by impeaching appellant with his prior conduct involving the vehicle theft and evading. (AOB 432.) Appellant fails to establish that prejudicial misconduct occurred.

> A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." [Citations.] [Citations.]

(*People v. Clark, supra*, 52 Cal. 4th at pp. 960-961.) Eliciting inadmissible testimony is prosecutorial misconduct. (*People v. Bonin* (1988) 46 Cal.3d 659, 689-690, overruled in part in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Ochoa , supra*, 19 Cal.4th at pp. 427-432.)

Here, there is no evidence that the prosecutor intentionally misled the court regarding the court's pre-trial ruling at the motion in limine. In fact, from the record it appears that everyone, including the prosecutor, defense counsel and the court, was under the misapprehension that the court had earlier stated it would allow evidence of the vehicle theft.

The prosecutor's cross-examination of appellant concerning his misdemeanor conduct was proper because the conduct evincing moral turpitude was admissible, not the conviction. As discussed below, both driving or receiving a stolen vehicle and evading are crimes of moral

turpitude. The prosecutor's question during cross-examination simply expounded upon the conduct appellant had already introduced by demonstrating that appellant's actions were not simple joyriding, but instead involved driving a stolen vehicle and evading law enforcement. Defense counsel's attempt to minimize the conduct by categorizing it as misdemeanor joyriding did not preclude the prosecutor from introducing evidence of the underlying conduct. Thus, appellant was properly impeached with the very limited inquiry on cross-examination of the conduct underlying his misdemeanor conviction.

Assuming arguendo that the prosecutor's cross-examination of appellant was improper, it did not result in prejudice to appellant. Any misconduct in this case was clearly not so egregious as to render the entire trial fundamentally unfair. (See *People v. Bonin, supra*, 46 Cal.3d at p. 690.) The jury was instructed that evidence of appellant's prior misdemeanor conduct involving moral turpitude could only be used to evaluate his credibility. The evidence was not so inflammatory that it would sway the jury to convict appellant, particularly in light of the heinous facts underlying the Yarbrough murder and the carjacking and kidnappings of Leonel Paredes and Juan Carlos Ramirez. The prosecutor's reference to that misdemeanor conduct was brief, consisting of one question. Other instances of appellant's untruthfulness had already been introduced at trial. (See Arg. XX, C, post.) Thus, appellant cannot establish that any alleged misconduct based on the prosecutor's impeachment with appellant's prior misdemeanor conduct rendered his trial fundamentally unfair. (See *People v. Lang* (1989) 49 Cal.3d 991, 1012-1013.)

C. The Trial Court Properly Allowed Appellant To Be Impeached With His Prior Misdemeanor Conduct Involving Moral Turpitude

With the passage of Proposition 8,

> The voters have expressly removed most statutory restrictions on the admission of relevant credibility evidence in criminal cases .... Hence, they have decreed at the least that in proper cases, nonfelony conduct involving moral turpitude should be admissible to impeach a criminal witness.

(*People v. Wheeler* (1992) 4 Cal.4th 284, 295 (*Wheeler*).) This rule of admissibility applies to both misdemeanors and "other conduct" involving moral turpitude. (*Id.* at pp. 296-297, and fn. 7.)

While "a misdemeanor–or any other conduct not amounting to a felony–is a less forceful indicator of immoral character or dishonesty than is a felony," any misconduct involving moral turpitude may suggest a willingness to lie. (*Wheeler, supra,* 4 Cal.4th at pp. 295-296.) The trial court's ruling regarding impeachment evidence is reviewed for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Davis* (1995) 10 Cal.4th 463, 530.)

Appellant argues that in this case the trial court initially ruled that the 1994 conviction did not demonstrate an intent to steal and thus, ruled that evidence of the automobile theft would be inadmissible. (AOB 431.) While the trial court did initially rule during motions in limine that evidence of the vehicle theft appeared to be inadmissible for impeachment, the court left open the option of renewing the request to admit that impeachment evidence if new facts came to light. When the issue resurfaced, everyone, including appellant's trial counsel, appeared to agree that the conduct of the vehicle theft would be admitted for impeachment.

Appellant contends that there was no evidence that his misdemeanor automobile theft was conduct involving moral turpitude. (AOB 430-431.) "[M]oral turpitude means a 'readiness to do evil' or a 'moral depravity of any kind.'" (*People v. Lang, supra,* 49 Cal.3d at p. 1009, citing *People v. Castro* (1985) 38 Cal.3d 301, 314-315.) Vehicle theft and evading are proper areas for impeachment because they both involve moral turpitude.

(See *People v. Lang, supra*, 49 Cal.3d at p. 1011 [Vehicle Code section 10851 involved crime of moral turpitude].) Even if, as appellant argues, he was not the person who stole the car, his conduct of possessing and operating the stolen car, and fleeing from the police involved moral turpitude. (AOB 432; see *People v. Lang*, at p. 1011.) Thus, the underlying conduct of driving a stolen vehicle and evading law enforcement involved moral turpitude, and the court acted within its discretion by allowing the prosecutor to impeach appellant with his prior conduct.

In any event, any error was harmless. The erroneous admission of impeachment evidence is properly reviewed under the *Watson*[41] standard. (*People v. Castro, supra,* 38 Cal.3d at p. 319.) As noted above, the jury was instructed as to the limited nature of the impeachment evidence. (16 CT 4552; CALJIC No. 2.23.1; *People v. Boyde* (1988) 46 Cal.3d 212, 255.) Furthermore, the impeachment evidence pertaining to the automobile theft consumed little time. (47 RT 10379 [direct examination]; 47 RT 10448 [cross-examination].)

Moreover, appellant's untruthfulness with the police regarding the charged offenses provided the jury with ample reason to distrust his testimony, even without consideration of his prior criminal conduct. The jury heard evidence that appellant initially had lied to the police on July 19, 1998, when he denied any involvement in the Yarbrough murder, and denied using elicit drugs during that time period. (41 RT 9267-9268.) Appellant later admitted his involvement in the murder but claimed that he did not intentionally shoot Yarbrough. (14 CT 4135-4155 [appellant's confession July 24, 1998]; 47 RT 10406-10424 [appellant's trial testimony].) Thus, the only real question of credibility was whether

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[41] *People v. Watson, supra*, 46 Cal.2d at p. 836.

appellant was being truthful when he claimed he did not intend to shoot Yarbrough.

The jury had ample reason to distrust his self-serving testimony on this point in light of his initial denial to law enforcement and the circumstances of the crime. There was no dispute that appellant and Garza kidnapped and carjacked Yarbrough at gunpoint. Appellant admitted to slapping Yarbrough and driving him to a remote orchard, where the risk of being observed or interrupted was almost nonexistent. Appellant claimed that Garza tied Yarbrough's hands, taped his eyes with duct tape and placed Yarbrough on the ground in the orchard. (14 CT 4154-4155; 47 RT 10420, 10433.) Appellant had his Tec-9 in his hand and claimed that he only wanted to scare Yarbrough. However, the evidence refuted this defense. Appellant intentionally inserted the clip into the gun and pulled the trigger. (14 CT 4143; 47 RT 10420-10424.) Yarbrough was shot three times in the head, leading to the undeniable conclusion that appellant did not accidently fire the gun. (39 RT 9032, 9037.) Appellant did not attempt to render aid to Yarbrough. Instead, he fled the scene in Yarbrough's truck, disposed of the truck and the gun, and then fled to Mexico.

Even if the prosecutor should not have been allowed to impeach appellant with evidence of his prior vehicle theft offense, there is no reasonable probability that appellant would otherwise have received a more favorable result.

XXI. THE TRIAL COURT PROPERLY RULED THAT THE PROSECUTOR COULD REBUT APPELLANT'S MITIGATION EVIDENCE REGARDING HIS PRIOR INCARCERATION; APPELLANT FAILS TO SHOW PREJUDICE SINCE THE CHALLENGED EVIDENCE WAS NOT PRESENTED TO THE JURY

Appellant argues that the prosecutor's proffered rebuttal evidence was too speculative and ambiguous to be admissible, and that the trial court's

decision to allow it precluded him from offering in mitigation evidence of his prior incarceration. (AOB 433-441.) The trial court's ruling that the prosecutor's rebuttal evidence could become relevant depending on appellant's mitigating evidence was proper. In any event, the prosecutor never actually offered the challenged evidence, thus, appellant cannot establish prejudice.

A. Background

1. Lerdo Jail Incident

Initially, the prosecutor sought to admit evidence under section 190.3, factor (b), regarding an incident involving appellant and other inmates at the Lerdo jail. At a hearing under Evidence Code section 402, Officer Toody Clites testified that she worked as a detention officer in the Lerdo jail where appellant was housed during trial. (54 RT 12038.) Officer Clites was assigned to the C-pod of the jail, which was an administrative segregation housing unit for high risk inmates. (54 RT 12038-12039.) Officer Clites was able to hear inmates conversations through the intercom in the control room. (54 RT 12039.) Officer Clites testified that she heard inmates Stearns, Ruiz and Castro, discussing how guards had found contraband in the vent of a cell and that a shank had been seized from one of the inmates. (54 RT 12057.) Stearns was heard saying, "I'm going down, man, for a long fucking time. So I ain't hesitating on getting the fuck out of here or taking officers out." (54 RT 12059.)

Appellant, who was in his cell at that time, then asked Officer Clites if he could be let out of the cell. She released appellant from his cell and observed him walk upstairs to speak with Stearns. (54 RT 12059-12060.) She heard Stearns inform appellant of what had happened with him, Ruiz and Castro. Stearns and appellant discussed rats, shanks and officers, and Officer Clites heard appellant and Stearns discussing how they would make

additional shanks. (54 RT 12065.) Officer Clites heard Stearns tell appellant that the next time they were harassed or searched, "it was going to be on," to which appellant responded, "count me in." (54 RT 12060-12061.)

After appellant spoke to Stearns, he went to speak to Ruiz. Ruiz also told appellant about the shanks that were taken and how "they were sick and tired of this." (54 RT 12062.) Officer Clites then heard Ruiz tell appellant "it's fucking on Loco," and appellant again answered, "count me in." (54 RT 12062-12063.)

After hearing the conversations, Officer Clites notified her sergeant and the classification officers. (54 RT 12068.)

On March 7, 2001, the trial court ruled that the evidence was inadmissible under section 190.3, factor (b), but stated that it may be admissible for other reasons depending on appellant's mitigating evidence. (54 RT 12142.) The prosecutor argued that it could be admissible as rebuttal evidence, but that he would bring a separate motion on that issues. (54 RT 12142.)

On March 8, 2001, appellant stated that he may introduce evidence of appellant's good behavior while he was incarcerated at Camp Owens as a juvenile as evidence in mitigation. (55 RT 12350.) In response to the proffered Camp Owens evidence, the parties again discussed the possibility of the Lerdo jail incident coming in at trial as rebuttal evidence. The court tentatively ruled:

> My tentative would be that if the defense present evidence as to the defendant's conduct while housed at Camp Owens, if it is offered as a predictor of his future behavior, then the People would be entitled to admit evidence of the Lerdo shank incident, I'll describe it, as rebuttal to that.
>
> With regard to specific character traits, if you brought in someone from Camp Owen, for example, who would just testify that I had contact with the defendant, and he expressed no

> animosity toward people of other races or ethnic backgrounds, then it -- as long as it's very specific as to a specific character trait, that has nothing to do with the Lerdo shank incidents, then that's not going to open up the door.
>
> Again, I can't make an overly detailed ruling without having specifics, and I know, Mr. Bryan, you've offered some examples, of the type of evidence you might want to present.
>
> . . .
>
> If somebody says yes, he was well behaved, and complied with all the rules, then that probably does open the door, in terms of his -- because that gets into the issue of whether he's likely to be well behaved and comply with all the rules, if he receives a life without parole sentence.
>
> . . .
>
> [C]ertainly what I'll indicate is, it's probably appropriate to have a hearing outside the presence of the jury if the People seek to admit evidence involving the Lerdo shank incident, and at that point, we would address it outside the presence of the jury.

(55 RT 12366-12367.)

During trial, appellant did not offer evidence of his behavior at Camp Owens, and the People did not introduce evidence of the Lerdo jail incident.

2. Evidence That Appellant Had Been Shot and Jumped

On March 21, 2001, appellant sought to introduce evidence, through appellant's relatives, that appellant had been shot at, and on a separate occasion, "jumped" at the fair. Appellant explained that no one would testify as to who shot or attacked appellant because no one "knows for sure." (61 RT 13482.) The prosecutor stated that his proffered rebuttal would be to ask those witnesses whether they were aware of appellant's attacks on rival gang members. Specifically, the prosecutor stated that he had a report that appellant had been stopped in a vehicle after a drive-by

shooting in rival gang territory, and the vehicle contained the weapon that had been used in the shooting. (61 RT 13483-13485.) The prosecutor stated that the report pertaining to this incident had been provided to appellant that morning but that appellant had prior notice of the incident because it was listed in probation records that were in the defense attorney's possession. The prosecutor explained that the report had not been turned over earlier "because there had been nothing so far to use it for." (61 RT 13486.)

The court ruled:

> My ruling is based upon the offers of proof that the evidence that would be proposed by the defense would be designed to show the defendant was the victim of violent activity.
>
> It's relevant to rebut that by showing that the defendant may engage in violent activity, himself, which would invite retaliation. That's certainly a relevant issue for the jury to consider, and that the People would be entitled to rebut with the evidence proposed.

(61 RT 13487-13488.)

Appellant did not present evidence that he had been the victim of violent attacks, and the People presented no witnesses regarding appellant's attacks on rival gang members or his presence in a car shortly after a drive-by shooting.

B. The Prosecution's Proffered Rebuttal Evidence Was Proper to Balance Appellant's Evidence of His Good Character

Appellant contends that the trial court erred in tentatively ruling that if appellant presented evidence that he was well-behaved and complied with the rules at Camp Owens that the prosecutor could offer evidence regarding the incident at the Lerdo jail. (AOB 438-441.) Not so.

"[A] defendant who introduces good character evidence widens the scope of the bad character evidence that may be introduced in rebuttal." (*People v. Fierro* (1991) 1 Cal.4th 173, 237.)

> The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it *undermines* defendant's claim that his *good* character weighs in favor of mercy. Accordingly, the prosecutor, when making such a rebuttal effort, is not bound by the listed aggravating factors or by his statutory pretrial notice of aggravating evidence. (190.3.)

(*People v. Rodriguez* (1986) 42 Cal.3d 730, 791; see *People v. Daniels* (1991) 52 Cal.3d 815, 882-883.)

> The scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf. But once a defendant has placed his general character in issue, the prosecutor is entitled to rebut with evidence or argument suggesting a more balanced picture of his personality.

(*People v. Carpenter* (1997) 15 Cal.4th 312, 408-409 [internal quotation marks, citations, and brackets omitted].)

Here, appellant contemplated introducing evidence that he was "a peacemaker, he got along with all races, and ethnic groups, and he could be used to settle disputes by the staff" and that he was avoiding gang activity while at Camp Owens. (55 RT 12350.) The prosecutor's rebuttal evidence was directly related to that character evidence that appellant wanted to put before the jury as evidence in mitigation. Had appellant actually presented mitigating evidence of his good character, that he was a "peacemaker," appellant would have opened the door for the People to rebut that specific asserted aspect of appellant's personality. (See *People v. Raley* (1992) 2 Cal.4th 870, 912.) Had appellant introduced evidence in mitigation that he was a "peacemaker," a person used by correctional staff to settle disputes, evidence that appellant had spoken with other inmates regarding making shanks and taking officers out would have been specific and related directly

to that character trait. (*Ibid.*; see 54 RT 12062-12063.) Had appellant opened the door, the prosecution's proffered evidence could have been relevant to show a more complete picture of appellant's behavior while he was in custody.

Moreover, the court stated several times that the final decision whether to admit the prosecution's evidence concerning Lerdo jail would depend upon what the counselors at Camp Owens actually testified to at trial. The court explained that if they merely wanted to say that he got along with other races, that would not open the door to the Lerdo jail incident. However, if they testified that he was well-behaved and complied with the rules while at Camp Owens, the Lerdo jail incident would then become relevant. (55 RT 12366-12367.) The court's ruling did not foreclose appellant from introducing mitigating evidence pertaining to Camp Owens. Instead, the court properly ruled that depending on the specific evidence that appellant ultimately introduced, he could open the door to rebuttal evidence regarding the Lerdo jail incident.

Likewise, appellant's proffered evidence that he was attacked at the fair and shot at on a different occasion, would have opened the door to the prosecution's evidence concerning the drive-by shooting. The evidence of the drive-by shooting gave a more balanced picture of appellant. It would have rebutted the image that his family would offer of appellant as a non-violent, innocent victim. The drive-by shooting occurred in rival gang territory, and appellant was found by law enforcement within that vehicle shortly afterward with the weapon that was used in the shooting. Thus, there was direct evidence linking him to the drive-by shooting.

To the extent appellant argues that the People did not provide discovery concerning the drive-by shooting, he is incorrect. (AOB 438-439.) Unlike *People v. Gonzalez* (2006) 38 Cal.4th 932, cited by appellant, the People did provide appellant with the police reports pertaining to the

evidence it sought to introduce in rebuttal. (AOB 439.) In *Gonzalez*, the defendant was never given notice or discovery of the People's potential rebuttal evidence, and defense counsel was forced to make a choice whether to present mitigating evidence without knowing what the People would present in rebuttal. (*Id.* at p. 960.)

Here, once the prosecutor learned that appellant proposed to introduce evidence that he had been the victim of violent attacks, the prosecutor obtained the police reports and provided them to appellant. Moreover, appellant had notice of this incident from the probation packet well before the day the police reports were handed over. (61 RT 13486.) Finally, the defendant has the burden to demonstrate that the failure to timely disclose discovery was prejudicial and "that a continuance would not have cured the harm." (*People v. Pinholster* (1992) 1 Cal.4th 865, 941 citing *People v. Reyes* (1974) 12 Cal.3d 486, 502.) In this case, appellant did not request a continuance, and the evidence was never actually admitted.

Appellant was able to make an informed decision whether to present the mitigation evidence. Thus, there was no due process violation because there was no suppression of material evidence that was favorable to appellant and any late disclose "did not undermine the reliability of the proceedings." (*People v. Pinholster*, *supra*, at p. 942 citing *People v. Pesinger* (1991) 52 Cal.3d 1210, 1273-1274.)

C. Assuming the Trial Court Erred in its Tentative Ruling, Any Error Was Harmless in Light of the Evidence Presented at the Penalty Phase

Assuming arguendo that the trial court erred in ruling the prosecution's rebuttal evidence could be admissible depending upon the mitigation evidence appellant presented, appellant cannot establish prejudice.

The standard for assessing state law error at the penalty phase of a capital trial is whether there is a "reasonable possibility" the error affected the verdict. (*People v. Ochoa, supra*, 19 Cal.4th at p. 479.) To the extent appellant argues that the error implicated his federal constitutional rights, the test is whether the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 36.) The two tests have been deemed the "same in substance of effect." (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

As noted previously, the crimes appellant was convicted of were egregious. The prosecutor's focus at the penalty phase was on the brutality of the Yarbrough murder and appellant's brutal kidnappings of Paredes and Juan Carlos Ramirez. (See Arg. XVI, E, ante.)

Appellant presented extensive evidence in mitigation through his family regarding the violence appellant was exposed to growing up, including, the problems his family had in Bakersfield. Esperanza Villa explained that when appellant was young Esperanza's son was shot and killed at their house. (60 RT 13209.) Appellant's mother testified that their house had been shot at twice and that a person from Arvin had thrown a bottle through the window of their house. (60 RT 13238-13289.) Appellant's aunt, Olivio Soto, testified that there were difficulties for people who lived in Lamont and attended high school in Arvin. (60 RT 13299.) Appellant himself testified that while he attended Arvin High School he was jumped and had problems with "Arvinas." (47 RT 10389.) Thus, evidence concerning attacks, by unknown parties, against appellant, would have added little to the mitigating evidence in light of the fact that the jury was well-aware of the on-going problems appellant and his family faced while they lived in the Bakersfield area.

Appellant's proffered Camp Owens evidence also would not have affected the verdict in this case. Appellant's offer of proof was that he had

acted as a peacemaker who resolved disputes, got along well with other races, and distanced himself from gangs while he was at Camp Owens. However, appellant was only 15 years old at the time he was in Camp Owens and there was an abundant amount of evidence presented at trial to contradict this character evidence. Appellant was clearly involved in gangs after he was at Camp Owens. He had numerous gang tattoos, and his cohorts were fellow gang members. Instead of working out disputes, he escalated situations with the use of weapons and violence. As to Yarbrough's murder, the evidence established that the murder weapon was appellant's, and that he had purchased it in Arizona and brought it to California. Appellant showed his friends the weapon prior to the murder, and allowed others to handle and fire the gun. By appellant's own admissions, he was not a peacemaker. Appellant testified that he brutally attacked Juan Carlos Ramirez because Juan Carlos had allegedly beat-up his friend's sister. (47 RT 10401, 10403.) Appellant admitted that when he saw Yarbrough drive by on the night of the murder, he and Garza approached Yarbrough with the Tec-9. (47 RT 10410.) Appellant admitted that while Yarbrough was tied-up with tape over his eyes, appellant obtained his Tec-9, put the clip in the gun, and fired the gun. (47 RT 10420, 10433, 10420-10424.) This evidence would have directly contradicted any evidence presented in mitigation regarding appellant's ability to be a peacemaker.

Evidence regarding appellant's current involvement in gangs had been admitted. Although there was a stipulation that, since appellant's incarceration for Yarbrough's murder, he had not been involved in gangs (62 RT 13679-13680), the jury heard evidence during the guilt phase regarding appellant's association with criminal gangs, and appellant himself admitted his prior involvement. In any event, the court had determined that if appellant wanted to introduce evidence that he got along

with other races at Camp Owens, he could do so without opening the door to the Lerdo jail evidence.

Appellant was not prevented from presenting his mitigation evidence. The trial court's ruling allowing for the possibility that the prosecutor could present rebuttal evidence if appellant opened the door did not prejudice appellant because that rebuttal evidence was never actually admitted. There is no reasonable possibility the verdict would have been different had appellant presented his proffered mitigation evidence in light of the evidence actually presented at the penalty phase of the trial.

XXII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY EXCLUDING MITIGATING EVIDENCE OF SPECIFIC EVENTS THAT OCCURRED PRIOR TO APPELLANT'S BIRTH

Appellant contends that the trial court erred by excluding mitigating evidence pertaining to his father's relationship with his mother and the effect it had on his brother, prior to the time he was born. (AOB 442-452.) Respondent submits that the evidence was irrelevant to appellant's background or character.

A. Background

Esperanza Villa[42], appellant's maternal grandmother, testified at the penalty phase of the trial. (60 RT 13204.) She testified that appellant was born in a small home in Mexico. The family was poor and everything, including food, was scarce. (60 RT 13206.) Esperanza knew appellant's father and explained that he "drank a lot." Appellant's mother, Angelita Villa Ramirez, left appellant's father in Mexico and came to the United States when appellant was a one-year old. (60 RT 13208.) When appellant arrived in the United States, he was sick. (60 RT 13208.)

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[42] Esparanza Villa and Angelita Villa Ramirez will be referenced by their first name to avoid confusion.

Defense counsel asked Esperanza if she saw how appellant's father had treated his mother. The prosecutor objected that it was irrelevant. The court sustained the objection "with regard to the period prior to the birth of the defendant." (60 RT 13211.) Esperanza was then asked if she saw how appellant's father had treated his mother in front of Lorenzo, appellant's older brother. (*Ibid.*) The prosecutor objected that the question was irrelevant and the court sustained the objection. (*Ibid.*) A brief side-bar then took place:

> MR. BRYAN: Your Honor, Lorenzo was the older brother. He was present during the abusive treatment of the mother. And, as is not uncommon, he became the abuser when the family moved to Lamont. And -- well, anyway, that's it. He became the man of the house and was very abusive toward the younger boys, particularly the Defendant Ramirez, Juan.
>
> THE COURT: That's what is relevant, not going back generations.
>
> MR. BRYAN: I'm not going back generations. I'm trying to show Lorenzo -- why he was the way he was.
>
> THE COURT: The question is why is Juan the way he is. And if Lorenzo was abusive, then you can put in evidence of Lorenzo's abuse.

(60 RT 13211-13212.)

Esperanza testified that by the time appellant was born, she had already moved to the United States. (60 RT 13212.) She received letters from Angelita while Angelita was still in Mexico in which Angelita stated that she was treated very badly by appellant's father. Esperanza also testified that appellant's father died of alcoholism in Mexico. (60 RT 13214.)

Angelita, appellant's mother, testified at the penalty phase. (60 RT 13222.) Angelita testified that appellant's father was an alcoholic and that he was very violent when he drank. A large portion of their money went

towards his drinking, and there were times when they had to ask neighbors for food so they could eat. There were other times when the family would have to go without food. (60 RT 13225.) The following questions were asked by appellant's counsel:

Q.: Was Juan's father violent with you when he was drinking?

MR. BARTON: Objection, your Honor, as to prior to Juan's birth.

THE COURT: Sustained. Let's lay a foundation as to the period after Juan's birth.

BY MR. BRYAN:

Q. After Juan was born, when he was drinking, would he be violent with you?

A. He was always violent when he drank.

Q. And would that be with you and the boys?

A. Yes, with the children also.

Q. Did you try to -- for instance, did you raise chickens, try to do that?

A. Yes, I did. I had pigs, chickens.

Q. Would your husband let you eat those?

A. No.

Q. When he would return from one of his trips when he was drinking, would he count the animals when he returned?

A. He would always count them.

Q. If there was one missing, he would be upset; is that correct?

MR. BARTON: Objection. Leading.

THE COURT: I'll overrule it, but don't lead, please.

You may answer.

MR. BRYAN: Thank you.

THE WITNESS: Yes, he would get very upset, very angry, if we would kill one of his animals.

(60 RT 13225-13226.)

Later, Angelita testified that appellant's older brother, Lorenzo, was often left in charge while she worked, and Lorenzo would beat the other children, including appellant. (60 RT 13230, 13239.) However, she later testified that the older siblings would hit appellant to "correct him" or "straighten him out," and that she did not think it was abusive if they tried to "correct him." She testified that appellant's older siblings loved him and that she never saw injuries to appellant when she would come home. (60 RT 13241-13242.)

Appellant's aunt, Maria Villa, testified that she knew appellant's mother and father. (60 RT 13263-13264.) The following exchange then occurred:

BY MR. BRYAN [Defense counsel]:

Q. Do you remember anything about her husband?

MR. BARTON [Prosecutor]: Objection, relevance.

THE COURT: During the relevant period of time, after the birth of the defendant.

Rephrase.

MR. BRYAN: Yes.

BY MR. BRYAN:

Q.: After the defendant's birth.

A.: After Juan was born, we heard about him, we heard people talk about him.

Q.: Alcoholic?

A.: Yes.

Q.: Was he violent?

MR. BARTON: Objection, calls for hearsay.

THE COURT: Lay a foundation as to the source of knowledge.

BY MR. BRYAN:

Q : Was this common knowledge in the family?

MR. BARTON: Same objection.

A.: Yes.

THE COURT: Overruled.

BY MR. BARTON:

Q.: That he was alcoholic and violent toward [Angelita]and the children?

MR. BARTON: I object, vague, compound, lacks foundation and irrelevant unless this defendant is included.

THE COURT: It's compound with regard to all the potential violence.

Rephrase.

BY MR. BRYAN:

Q.: After Juan's birth, was it common knowledge in the family that his father was alcoholic?

A. Yes. And that's the reason we brought [Angelita] back over here with the children.

Q.: Was it also common knowledge in the family that he was violent towards Angelita and the children?

A.: Yes.

Q.: So the family decided to try to bring her here?

A.: Yes.

(60 RT 13264-13265.)

B. The Trial Court Properly Exercised Its Discretion In Ruling That Evidence of Abuse Prior to Appellant's Birth Was Irrelevant

A defendant has the right to present any relevant mitigation evidence, including aspects of his character or record that may provide a basis for a sentence less than death. (*People v. Harris* (2005) 37 Cal.4th 310, 352.)

> The "background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself." [Citation.] The "background of the defendant's family is on no consequence in an of itself."

(*People v. McDowell* (2012) 54 Cal.4th 395, 434; *In re Crew* (2011) 52 Cal.4th 126, 152.) However, a defendant's right to present mitigating evidence in the penalty phase does not trump or override ordinary rules of evidence. (*People v. Thorton* (2007) 41 Cal.4th 391, 454.) The court retains the discretion to exclude "irrelevant evidence that does not bear on the defendant's character, record or the circumstances of the offense." (*People v. Souza* (2012) 54 Cal.4th 90, 137; see *Lockett v. Ohio* (1978) 438 U.S. 586, 604, fn. 12.)

Here, the trial court properly exercised its discretion to sustain the prosecutor's relevancy objections, and to limit the evidence in mitigation to the time period after appellant's birth. Appellant's theory of relevance was that appellant's older brother, Lorenzo, had witnessed their father's abuse between their mother and father and, as a result, Lorenzo abused appellant once the family moved from Mexico to Lamont. (60 RT 13211-13212.) The court noted that the fact that appellant was abused by Lorenzo was relevant and could be admitted, but why Lorenzo was abusive was irrelevant and speculative. (60 RT 13211-13212.)

The trial court's subsequent ruling sustaining the prosecutor's objection was proper because evidence of appellant's father's violence had

to be limited to the time after appellant was born. Whether appellant's father had been abusive prior to the time of appellant's birth had no relevance on appellant's character. (*People v. McDowell, supra*, 54 Cal.4th at p. 434.) Appellant would not have been adversely affected by violence he was never exposed to.

Appellant cites to *Hernandez v. Martel* (C.D. Cal. 2011) 824 F. Supp.2d 1025, 1050 and *In re Gay* (1998) 19 Cal.4th 771, 805, for the proposition that proper mitigation investigation involves "'going back generations.'" However, each of these cases dealt with the genetic component of psychological disorders, such as drug and alcohol abuse or schizophrenia. (*In re Gay,* at pp. 804-805; *Hernandez v. Martel*, at p. 1050.)

In this case, appellant wanted to introduce evidence that appellant's father beat his mother prior to his birth to demonstrate that appellant's older brother witnessed the violence and then beat appellant. Any effect that violence had on Lorenzo was irrelevant at appellant's trial because Lorenzo's motive for beating appellant was not the mitigating evidence. The mitigating evidence was the fact that Lorenzo mistreated appellant as a child. It may have demonstrated Lorenzo's character, but Lorenzo was not on trial. Appellant's, not Lorenzo's, character was at issue. Moreover, any inference that Lorenzo was abusive because he witnessed his father's abuse was speculative, particularly in light of the fact that Lorenzo did not testify. To the extent appellant contends that his father's abuse of his mother prior to appellant's birth may have affected his mother's health during the pregnancy, or that any such abuse had an effect on appellant's health and development in utero, appellant presented no such evidence at trial to support this theory. Appellant cannot raise new theories for admissibility on appeal. (Evid. Code, § 354, see *People v. Fauber* (1992) 2 Cal.4th 792, 830-831.)

Appellant fails to show that the trial court's evidentiary rulings were erroneous.

C. Assuming Arguendo the Trial Court Erred, There Was No Prejudice In Light of the Mitigating Evidence Presented

Assuming the trial court erred in sustaining the prosecutor's objections regarding evidence of violence by appellant's father prior to appellant's birth, there was no prejudicial error. Appellant presented evidence in mitigation that his father was an alcoholic who beat his mother and the children regularly. (60 RT 13208, 13225, 13264.) Appellant's mother testified that appellant's father was always violent when he drank, and that, due to the father's alcoholism and violence, she left with the children to come to the United States when appellant was a one-year old. (60 RT 13225-13226.) Maria Villa and Esperanza both testified that it was common knowledge that appellant's father was an alcoholic who was violent towards his wife and children. (60 RT 13208, 13264-13265.) The jury heard that appellant's father later died of alcoholism. (60 RT 13214.) The jury also heard evidence that appellant was beaten regularly by his older brother, Lorenzo. (60 RT 13229-13230, 13239-13240, 13267.)

The evidence appellant presented at trial exposed the violence that took place in the home while appellant and his family lived in Mexico. "Accordingly, '[t]he jury was allowed to hear and consider the essence of the mitigating evidence,' and any error was harmless." (*People v. Souza*, *supra*, 54 Cal.4th at p. 138, citing *People v. Hughes* (2002) 27 Cal.4th 287, 397.)

XXIII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE EVIDENCE OF THE EFFECT APPELLANT'S EXECUTION WOULD HAVE ON HIS FAMILY

Appellant contends that the trial court erred and violated his constitutional rights by excluding evidence regarding the impact appellant's execution would have on his family, and that this error violated his Eighth and Fourteenth Amendment rights under the United States Constitution. (AOB 453-465.) Such evidence is not mitigating and the court properly excluded it.

A. Background

The prosecutor argued that evidence of the impact appellant's execution would have on his family should be excluded. (54 RT 12223-12226.) The prosecutor noted that evidence illuminating positive characteristics of a defendant are admissible but evidence regarding the impact of the execution on the defendant's family were not admissible. (54 RT 12223-12224.) The prosecutor requested that a jury instruction be fashioned advising the jury of how they could consider the testimony of the defendant's family. (54 RT 12224.) Defense counsel did not give any specific examples of evidence he wished to introduce in mitigation but instead stated that

> I believe that sympathy is a general concept[] and can be applied to the whole situation. I don't think one can separate the various sympathies. . . . . if a mother has sympathy for her son, how do we separate that from her son's qualities.

(54 RT 12226-12227.)

The trial court agreed with the prosecutor and ruled:

> I'll grant the motion to the extent that it's asking the Court to instruct the jury that the sympathy of the defendant's family is not a factor in mitigation or a circumstance in mitigation, and

again, we can fashion an appropriate instruction that's consistent with the law we've cited.

(54 RT 12228.)

The jury was instructed in relevant part:

> Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.

(62 RT 13726.)

B. The Trial Court Correctly Ruled That The Jury Could Not Consider The Effect Appellant's Execution Would Have On His Family

Appellant's argument is based on the faulty premise that a defendant is entitled to admit execution-impact evidence. This Court has consistently held that the impact an execution has on a defendant's family members is not admissible. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1291; *People v. Bennett* (2009) 45 Cal.4th 577, 601-602; *People v. Vieira* (2005) 35 Cal.4th 264, 295; *People v. Smith* (2005) 35 Cal.4th 334, 366-367; *People v. Smithey* (1999) 20 Cal.4th 936, 1000; *People v. Ochoa, supra*, 19 Cal.4th at pp. 455-456.) A defendant's background and character are relevant and admissible, but not the distress of his or her family. (*People v. Ochoa,* at p. 456.) Thus, a defendant may offer evidence that he or she is loved by family members, and that family members want him or her to live because it is indirect evidence of character. (*Ibid.*) However, the impact of a death sentence on the defendant's family and friends has no similar bearing on the individualized nature of the penalty decision. (*People v. Bemore* (2000) 22 Cal.4th 809, 856.)

> The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed.

(*People v. Ochoa,* at p. 456.)

Appellant argues that the impact of his execution on his family would have shown his unique character as a human being. (AOB 458, 460-462.) However, appellant does not explain how his family's testimony would have shown evidence of appellant's character.

Appellant further argues, relying on *Payne v. Tennessee* (1991) 501 U.S. 808, that execution-impact evidence is admissible . (AOB 457-458.) Specifically, he argues that *Payne's* rationale was that there should be parity between the type of evidence available to the state and the defendant, and thus, a defendant's family should be allowed to testify regarding the impact the execution would have on them since victim-impact evidence is admissible. (AOB 458.) *Payne,* however, does not support this position.

In *Payne,* the United States Supreme Court overruled *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805, to hold that the prosecutor could introduce victim impact evidence to balance the scales in a capital trial. (*Payne v. Tennessee, supra,* 501 U.S. at pp. 811, 822, 829.) The high court did not implicitly hold that the defendant was entitled to offer a wider range of evidence than previously required. Rather, the high court noted that there were no limits on the relevant mitigating evidence a capital defendant may introduce concerning "*his own circumstances*." (*Id.* at p. 822, emphasis added.)

Appellant equates victim impact evidence to execution impact evidence and argues the state was provided a non-reciprocal benefit. (AOB 458.) He argues that because evidence was presented that Yarbrough's family members suffered from his murder of Yarbrough, equal protection and fundamental fairness are violated unless he is able to present evidence his family will suffer if he is executed for his crime. (AOB 457-459.) The evidence, however, is not the same. Victim impact evidence is relevant to show the harm done by the defendant in committing his crime, that is, a

circumstance or effect of his conduct. (See *Payne v. Tennessee, supra,* 501 U.S. at p. 827.) The State has a legitimate interest in showing the jury that the victim was a unique individual. (*Id.* at p. 825.) Execution-impact evidence, on the other hand, is not relevant because it does not address the defendant's character, record, or individual personality. (See *People v. Smithey, supra*, 20 Cal.4th at p. 1000.) As a result, there was no violation of equal protection and the trial was not fundamentally unfair because the trial court excluded execution-impact evidence.

Even if there had been error in limiting how the jury could consider evidence of the impact of a death verdict on appellant's family, reversal is not required where "the state proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Smith, supra*, 35 Cal.4th at p. 368, quoting *Chapman v. California, supra*, 386 U.S. at p. 24.) Here, the trial court did not limit the evidence that appellant could offer in mitigation concerning his character, background, or even his family's opinions regarding whether he deserved to live, the court merely limited how the jury could consider the evidence. (54 RT 12228; 62 RT 13726; see *People v. Ochoa, supra*, 19 Cal.4th at p. 456; *People v. Williams* (2008) 43 Cal.4th 584, 644.) Appellant was able to present testimony showing his relationship with his family, including his two young daughters. Maria Villa testified that appellant loved his children. (60 RT 13268.) Olivia Soto testified that she regularly took appellant's daughters to visit him in custody. (60 RT 13306-13307.) Angelita testified that the mother of appellant's children was ill with a heart problem, and that during the time appellant lived in Arizona he had supported his children. (60 RT 13252-13253, 13255.) Angelita testified that appellant was "very endearing with" her and always remembered her birthday and holidays. (60 RT 13236.)

Although the jury could not consider the effect his execution would have on his family as a factor in mitigation, they were able to consider evidence of his family's love for him as mitigation. The jury heard additional mitigation evidence, specifically, appellant's poor living conditions, his alcoholic father's abuse, his brother's abuse, his health problems, his drug addiction, and the violence he endured throughout his childhood.

The prosecutor argued various factors in aggravation, including the circumstances of the Yarbrough murder. Specifically, that appellant and Garza kidnapped and carjacked Yarbrough at gunpoint, stripped him of his clothes, tied his hands behind his back, and taped his eyes, prior to shooting him in the head multiple times. (62 RT 13743-13744.) The prosecutor presented evidence and argued that Yarbrough's death had a significant impact on his family. (59 RT 13037-13040.) The prosecutor also focused on appellant's prior convictions for the crimes against Paredes and Ramirez. (62 RT 13747-13748.)

Even if the jurors had been instructed that they could consider the effect appellant's execution would have on his family, there is no reasonable probability that the penalty would have been different in light of the entire penalty phase evidence presented.

XXIV. APPELLANT'S DUE PROCESS RIGHT TO AN IMPARTIAL TRIAL JUDGE WAS NOT VIOLATED BY THE TRIAL COURT'S CONDUCT

Appellant contends that the trial court's conduct throughout appellant's trial demonstrated actual bias and requires reversal of the guilt and penalty phase verdicts. (AOB 466-481.) Appellant's claim is without merit. The trial court's rulings, remarks, and complaints pertaining to defense counsel did not demonstrate bias or prejudice towards appellant.

Due process requires a fair trial before a judge with no actual bias against the defendant or interest in the outcome. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904; *In re Murchison* (1955) 349 U.S. 133, 136; see *People v. Brown* (1993) 6 Cal.4th 322, 333 [due process right to an impartial judge].) Claims of judicial partiality or actual bias can be based solely on the manner in which the trial court conducted itself at the trial or hearing. (*People v. Brown,* at pp. 332-340.) However,

> [T]he due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.] Less extreme cases – including those that involve the mere appearance, but not the probability, of bias – should be resolved under more expansive disqualification statutes and codes of judicial conduct.

(*People v. Freeman* (2010) 47 Cal.4th 993, 1005 citing *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868.)

There is a presumption of honesty and integrity in the people serving as adjudicators. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47.) "Expression of opinion uttered by a judge, in what he concedes to be a discharge of his official duties, are not evidence of bias or prejudice." (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 310-311; see § 1044 [trial court has the duty to control the trial proceedings].)

If an attorney engages in improper behavior the trial court has the discretion to reprimand the attorney. (*People v. Guerra, supra*, 37 Cal.4th at p. 1111.)

> [A] trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.

(*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) However, judicial rulings never establish a charge of judicial bias, especially where those

rulings are subject to appellate review. (*Liteky v. United States* (1994) 510 U.S. 540, 546-547, 555; *People v. Guerra, supra,* 37 Cal.4th at p. 1112; *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 795–796.)

On appeal, this Court assesses "whether any judicial misconduct or bias was so prejudicial that it deprived defendant of a 'fair, as opposed to a perfect trial.'" (*People v. Snow* (2003) 30 Cal.4th 43, quoting *United States v. Pisani* (2nd Cir. 1985) 773 F.2d 397, 402.)

A. The Trial Court Was Not Biased During Voir Dire

Appellant claims that the trial judge's bias against him and his defense counsel was so profound that the judge's perception was distorted. (AOB 468-471.) Appellant cites to the court's voir dire of two prospective jurors, Mr. Burton and Mr. Kellerhals, to support his contention. As discussed previously in Arguments II and IV, the court's discussions with defense counsel, outside the presence of the jury, were not improper and do not demonstrate a bias on the part of the judge.

During Mr. Burton's voir dire, the court asked, "If the evidence and law required it, could you return a verdict for the death penalty," and, "If the evidence and law require it, could you return a verdict for life without parole?" (17 RT 4312-4313.) Defense counsel objected to the questions, stating that the "the law never requires death." (17 RT 4313.) Outside the presence of the jury, the court and counsel discussed the court's questions. Defense counsel again repeated that the court's question was improper because the law never requires death. (17 RT 4318-4319.) The court cautioned defense counsel to be accurate in his statement because the court had stated "if the evidence and law require it." The court explained that the question was whether, after the court had instructed the jury on the law, the jury could return a verdict of death or LWOP based on the evidence and the law. (17 RT 4318-4319, 4321.)

During voir dire, defense counsel objected to the judge's questioning of Mr. Kellerhals. Outside the presence of the jury, defense counsel stated that the judge repeatedly questioned Mr. Kellerhals about whether he could keep an open mind regarding the credibility of witnesses despite their occupation. Defense counsel stated that he felt the judge had intimidated Mr. Kellerhals into giving an answer the judge wanted. (20 RT 4860-4861.) The court admonished defense counsel to be careful in what he said because the court did not take the allegation lightly, and did not feel that he had intimidated the juror. The court cautioned defense counsel,

> be very careful when you give your response, because if you're making an allegation without some good faith basis, I may have to pursue that.

(20 RT 4861.) Defense counsel responded that the judge "probably will pursue that" and that he regarded the judge's statement as "intimidation of counsel." (20 RT 4861.)

The court clarified and stated when he told defense counsel to be careful, he was concerned that defense counsel's statement implied that the judge was intimidating witnesses or engaging in improper behavior. (20 RT 4864.) The prosecutor stated that he did not believe the judge's tone or manner with Juror Kellerhals was harsh or improper. (20 RT 4865.)

These two examples of the trial court's alleged "distorted perceptions" during voir dire do not establish judicial bias. As stated previously, the trial court has broad discretion in conducting voir dire, (*People v. Whalen, supra,* 56 Cal.4th at pp. 29-30), and defense counsel's objections in both instances reflect his disagreement with the trial court's voir dire. Neither example demonstrates that the judge misunderstood or misperceived defense counsel's objections or statements to the court. The judge, instead, disagreed with defense counsel's objections regarding the manner in which the judge was conducting voir dire.

For example, Mr. Burton's voir dire does not reflect that the judge was incorrect when it told defense counsel that he had misquoted the court. In fact, defense counsel had misquoted the court. Moreover, there is no indication that the prosecutor "endorsed defense counsel's position as being legally correct," and that the judge then accepted defense counsel's position. (AOB 469.) What the prosecutor indicated was that he thought the disagreement between defense counsel and the court was one of semantics, which it appeared to be. (17 RT 4321.)

The same is true of Juror Kellerhals. The court was not biased against defense counsel, nor were the court's perceptions "distorted." (AOB 470-471.) Instead, the court appeared to react to defense counsel's serious accusations that the court was intimidating a juror into giving a desired answer, an accusation that any judge would take seriously. The court responded to that accusation by stating he did not believe he had intimidated the juror, an observation echoed by the prosecutor. The judge then considered appellant's challenge for cause and denied it based on the juror's responses and demeanor. (20 RT 4867-4868.)

Nothing in the record indicates that the judge misperceived defense counsel's comments or objection. Instead, the record reflects that the judge responded to defense counsel's accusation of judicial misconduct and ruled on defense counsel's objections. Appellant fails to establish that judicial bias affected the court's voir dire.

B. The Trial Court Did Not Harass Defense Counsel By Threatening to Pursue Formal Sanctions From the State Bar

Appellant's argues that the judge harassed defense counsel through threats, and a pursuit of sanctions through the California State Bar. (AOB 471-472.) The record discloses that the judge's admonition to counsel did not demonstrate bias, harassment, or threats to defense counsel.

After the court denied appellant's mistrial motion based on the court's alleged improper voir dire of two jurors, the court stated:

> I appreciate counsel are going to be aggresive (sic) advocates for your sides.
>
> But once again, I caution counsel that to the extent that you make representations about what the record is, if you feel that this Court is engaging in some activity which is to be construed as unfair, then I ask you to please be careful and have a good faith basis for making those types of challenges. Because, again, they can be certainly proper, if you think there's a good faith basis for it. But if you don't have a good faith basis for it, there can be subsequent proceedings, including State Bar proceedings, if counsel are engaging in tactics that are not good faith.
>
> I'm not suggesting that's happened.
>
> It's just that we don't lightly accuse either counsel or courts of being biased or unfair without good faith.
>
> If there is lack of good faith, there can be implications.
>
> I'm not saying that as a threat. I'm asking counsel to have a basis for making those kinds of accusations.

(23 RT 5486-5487.)

The court stated on two occasions that he was not suggesting that anyone had brought motions in bad faith and that his statement was not meant as a threat. (23 RT 5487-5488.) The court directed those comments to both defense counsel and the prosecutor, without singling out either person. (23 RT 5486-5488.)

Even if the court's comments had been directed solely at defense counsel, it is within a judge's discretion to admonish or even rebuke an attorney when the attorney asks inappropriate questions or otherwise engages in improper conduct. (*People v. Snow, supra*, 30 Cal.4th at p. 78.) The trial court's comments were made outside the presence of the jury and were followed by an explanation that the court did not intend the comment

to be taken as a threat. Although, at times, there was some friction between defense counsel and the court, "such manifestations of friction between court and counsel, while not desirable, are virtually inevitable in a long trial." (*People v. Snow*, at p. 78.) The trial court comments did not deprive appellant of a fair trial or a reliable verdict.

C. The Trial Court Did Not Demonstrate Favoritism Toward the Prosecution

Appellant contends that the trial court showed favoritism to the prosecution by constantly rushing appellant's counsel during voir dire. (AOB 472-473.) This claim has previously been raised and discussed in Arguments II and IV, ante.

As noted previously, the trial court did not adhere to the three-minute time limit for voir dire that was initially placed on both the People and appellant's counsel. The trial court noted early on in voir dire that the time limit was "out the window." (25 RT 5903.) Appellant's counsel was afforded ample opportunity to questions jurors during voir dire, and often questioned them at length. The trial court's occasional request that counsel keep questioning brief was an appropriate exercise of the trial court's power. (See Arguments II and IV, ante; *People v. Carpenter, supra*, 15 Cal.4th at p. 353.)

Appellant has cited nothing in the record that demonstrates there was favoritism towards the prosecution during voir dire or that the trial court engaged in bias against defense counsel such as to call into question the reliability of the judgment. (*People v. Snow, supra,* 30 Cal.4th at p. 82.)

D. Judge Quashnick's Ruling

Appellant criticizes Judge Quashnick's denial of appellant's Code of Civil Procedure section 170.1 motion that was brought against Judge Twissleman during trial. (AOB 473-475.) He complains that Judge

Quashnick's decision omits certain facts and should be afforded no deference.

Appellant's challenge to Judge Quashnick's denial of the disqualification is not cognizable. A writ of mandate is the exclusive mechanism for challenging the denial of a motion to disqualify a judicial officer under section 170.1 of the Code of Civil Procedure. (Code Civ. Proc. § 170.3, subd. (d); *People v. Panah* (2005) 35 Cal.4th 395, 444; *People v. Brown* (1993) 6 Cal.4th 332, 335-336.)

E. The Trial Court Did Not Commit Misconduct By Allowing the Prosecutor To Argue That Appellant Was the Shooter in the Ibarra Murder

Appellant claims that the trial court was deceptive and committed misconduct by allowing the prosecutor to argue during the penalty phase that appellant was the person who shot Ibarra. (AOB 476-478.)

Specifically, he argues the trial court was deceptive by changing its ruling after it had initially precluded the prosecutor from arguing that appellant was the shooter. This claim was previously addressed in Argument XVI, and to the extent the trial court's ruling may have been incorrect, it does not demonstrate judicial misconduct.

This argument has been forfeited. Appellant's motion pursuant to Code of Civil Procedure section 170.1 was raised prior to the trial court's penalty phase rulings, and appellant failed to request that Judge Twissleman recuse himself as a result of this ruling. (13 CT 3719 [Appellant's motion to recuse Judge Twissleman].) As such, the claim is forfeited. (*People v. Seaton* (2001) 26 Cal.4th 598, 698.)

Even if the claim is not forfeited, it lacks merit. Adverse or incorrect legal rulings do not establish judicial bias or misconduct where those rulings are subject to review. (*Liteky v. United States* (1994) 510 U.S. 540, 546-547, 555; *People v. Guerra, supra*, 37 Cal.4th at p. 1112.) Moreover, a

trial court is not bound by its in limine rulings if the evidence is later proffered at trial. (*People v. Williams, supra*, 16 Cal.4th at p. 196.) Appellant cannot demonstrate that the court's ruling demonstrated judicial bias or prevented appellant from receiving a fair trial.

F. The Trial Court Properly Implemented Procedural Rules Regarding Motions Based on Prosecutorial Misconduct

Appellant contends that the trial court's ruling directing motions based on prosecutorial misconduct be asked at sidebar demonstrate the trial court's bias because the court appeared to prejudge the objections and motions based on prosecutorial misconduct. (AOB 478.) Not so.

Appellant has forfeited this argument because he failed to request that Judge Twissleman recuse himself as a result of this ruling. (*People v. Seaton, supra*, 26 Cal.4th at p. 698.)

Assuming it is not forfeited, it lacks merit. As previously discussed, the trial court properly implemented procedural rules requiring motions based on prosecutorial misconduct be made outside the presence of the jury. (See Arg. VII, ante.) The trial court properly exercised its discretion to control the proceedings. Appellant fails to establish that the ruling deprived him of a fair trial or a reliable verdict.

G. Appellant's Claim That the Court Reported Attorney John Anthony Bryan to the State Bar is a Matter That is Outside the Appellate Record and Should Not be Considered on Direct Appeal

Appellant claims that Judge Twisselman's bias is demonstrated by his mid-trial reporting of John Anthony Bryan to the California State Bar. (AOB 479-481.) Appellant attaches two letters that are not part of the appellate record to support this claim. (AOB 480 citing to Appendix A.).

"'Appellate jurisdiction is limited to the four corner of the record on appeal . . . .'" (*People v. Waidla, supra*, 22 Cal.4th at pp. 743-744 citing *In*

re Carpenter, supra, 9 Cal.4th at p. 646.) Since the letters from the California State Bar are not part of the record, they can not be considered on appeal, and this claim should be raised, if it all, in a petition for habeas corpus. (*Id.* at p. 744.)

Even if this Court were to consider the merits of the claim, appellant has failed to demonstrate he was deprived of a fair trial because of any complaint made by Judge Twissleman to the California State Bar regarding appellant's attorney, Mr. Bryan. Appellant's counsel was unaware that a complaint had been made at the time of trial (65 RT 14374), and the court did not display overt bias against appellant counsel so as to render appellant's trial fundamentally unfair. (*People v. Snow, supra*, 30 Cal.4th at p. 79.) Nor, as argued above, does the record demonstrate that the trial court lost its impartiality. Thus, appellant was not deprived of a fair trial. (*Id.* at p. 82)

XXV. APPELLANT'S CONVICTION AND DEATH SENTENCE DO NOT VIOLATE INTERNATIONAL LAW

Appellant contends his trial and sentence of death are in violation of the provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCP), American Declaration of the Rights and Duties of Man, and International Convention Against All Forms of Racial Discrimination. (AOB 482-505.)

This Court has previously rejected these contentions and concluded that California's death-penalty scheme does not violate international law or norms of humanity and decency. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1143 [imposition of death penalty in accordance with applicable law does not violate the ICCPR]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1029 [Article 6 of the Covenant on Civil and Political rights and laws of Western Europe]; *People v. Lewis* (2008) 43 Cal.4th 415, 539; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Blair* (2005) 36 Cal.4th 686,

754; *People v. Brown* (2004) 33 Cal.4th 382, 403-404; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Schmeck* (2005) 37 Cal.4th 240, 304; *People v. Myles* (2012) 53 Cal.4th 1181, 1225.)

International law does not compel the elimination of capital punishment in California. (*People v. Lewis, supra,* 43 Cal.4th at p. 539, citing *People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Snow, supra,* 30 Cal.4th at p. 127; *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.)

Moreover, appellant's citation to statistical studies showing that race correlates to the imposition of the death penalty does not demonstrate that California's death-penalty scheme violates international law.

> The Constitution does not require that a state eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate as a criminal justice system that includes capital punishment.

(*McCleskey v. Kemp* (1987) 481 U.S. 279, 319.) A defendant does not have to look to international law for protection against racial discrimination because both under the state and federal Constitutions, racial discrimination by the state is prohibited. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511.)

There is no reason for this Court to revisit its rejection of these same contentions regarding the death penalty violating international law.

XXVI. THERE IS A SUFFICIENT RECORD ON APPEAL FOR THIS COURT TO ADDRESS AND REJECT APPELLANT'S VIENNA CONVENTION CLAIM

Appellant contends that this Court should defer any findings regarding violations of appellant's rights under Article 36 of the Vienna Convention on Consular Relations until habeas counsel has an opportunity to investigate and present the claim in a habeas corpus petition. (AOB 506-

515.) Appellant brought two motions in the trial court based on alleged violations of his rights under Article 36 of the Vienna Convention. Those motions were briefed, argued and denied by the trial court. There is a sufficient record to address the claims on direct appeal.

A. Background

1. December 2000 Suppression Motion

Appellant filed a pre-trial motion to suppress his statements to law enforcement on the ground that the statements were obtained in violation of his rights under the Vienna Convention and International Law. (12 CT 3324-3334.) Specifically, he argued that had he known of his consular rights under the Vienna Convention on Consular Relations, the police interrogation would not have occurred. (12 CT 3330, 3363-3368.)

At a hearing on the suppression motion, the parties stipulated to the following: (1) appellant was born in Mexico and remained a Mexican citizen; (2) the Mexican consulates in Fresno and El Paso were willing and able to assist any Mexican national, including appellant, if their assistance was requested; (3) from the time of appellant's arrest and incarceration in El Paso through the time he made his second statement at the sheriff's substation in Bakersfield, no law enforcement personnel advised him of his consular rights; and, (4) appellant did not request contact with the Mexican Consul prior to his attorney, Mr. Bryan, becoming involved in the case, and appellant has never requested and been denied the right to consular advice. (18 RT 4323-4330.)

The trial court denied the suppression motion, noting that the Ninth Circuit had held in *United States v. Lombera-Camorlinga* that suppression of a statement is not a remedy for violations of the Article 36 of the Vienna Convention. (18 RT 4354-4355; see *U.S. v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882.)

2. July 2001 - New Trial Motion/Motion to Reduce Penalty

Appellant filed a motion for new trial and motion to reduce the penalty to life in prison without the possibility of parole. (19 CT 5465.) Appellant argued that he was entitled to a new trial or the modification of his death sentence to life in prison because his confession was in violation of his Article 36 rights under the Vienna Convention. (19 CT 5466-5467.) Appellant submitted a letter from the Consulate of Mexico that explained that the Consulate of Mexico supported appellant's new trial motion and motion to reduce the penalty because appellant had not been advised of his consular rights prior to his confession, the trial was highly publicized making it fundamentally unfair, and for humanitarian reasons because of appellant's poor health. (19 CT 5442-5453.) The trial court denied the motion for new trial and motion to reduce the penalty. (65 RT 14394.)

B. There Is A Sufficient Record For This Court to Deny Appellant's Claim

The trial court properly denied appellant's claim that he was prejudiced by law enforcement's failure to comply with Article 36 of the Vienna Convention.

1. The Vienna Convention on Consular Relations and *Avena*

a. The Vienna Convention: Its purpose and preamble

Since 1969, the United States has been a party to the multi-lateral, 79-article Vienna Convention, which focuses chiefly upon consular relations, functions, and privileges. The preamble emphasized that the purpose of the Vienna Convention was to ensure consular functioning, "[N]ot to benefit individuals." (Vienna Convention, pmbl.) Only articles 5 and 36 refer to individuals.

b. Article 36

Article 36, which instructs local authorities to inform arrested foreign nationals of their rights of consular notification, does not provide for a particular judicial remedy. Instead, it states that the rights of consular notification "shall be exercised in conformity with the laws and regulations of the receiving state," subject to a proviso that such laws must give "full effect" to the purposes of Article 36.

Article 36 provides in pertinent part:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.
>
> . . .
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

(Vienna Convention, Art. 36.)

c. The International Court of Justice Decision In Avena

In *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* 2004 I.C.J. L2 (Judgment Mar. 31) (*Avena*), the International Court of Justice (ICJ), resolved a proceeding brought in 2003 by Mexico against the United States, alleging that the United States had breached its Article 36 obligations to 51 Mexican citizens, including appellant.[43] Those citizens had been convicted of capital crimes in ten state courts, and each had been sentenced to death. The ICJ concluded that the United States had breached its obligations under Article 36, paragraph 1(b) of the Convention. (*Id.* at pp. 53-54, ¶ 106.) However, the ICJ emphasized that the correctness of any conviction or sentence was not before it and that any consideration of "the prejudice and its causes," was for United States courts to decide. (*Id.* at p. 60, ¶ 122.) The ICJ directed the United States to "review and reconsider" the convictions and sentences of the affected Mexican citizens without regard to procedural default rules. (*Id.* at pp. 56-57, 65, ¶ 138).

d. United States Supreme Court Precedent following *Avena*

In *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, Moises Sanchez-Llamas, a Mexican national who was not associated with the *Avena* case , challenged his conviction for attempted murder on the ground he was not advised of his right to consular assistance under Article 36 of the Vienna Convention. (*Id.* at pp. 339-340.) Sanchez-Llamas had raised the issue at trial and on appeal. The Oregon Supreme Court affirmed his conviction, finding that Article 36 did not create personally enforceable rights. (*Id.* at p. 340.) The United States Supreme Court granted certiorari and

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[4343] Appellant appears to be one of the 51 named Mexican citizens. His name appears as: "Juan De Dios Ramirez Villa."

consolidated the case with that of a Honduran national, Mario Bustillo, who also had an Article 36 claim. (*Ibid.*) Bustillo had been convicted of murder in Virginia and asserted his Article 36 claim for the first time in a post-conviction state habeas petition. The Virginia court had dismissed Bustillo's claim as procedurally barred because he had not raised the issue at trial or on appeal. (*Id.* at p. 342.) The United States Supreme Court ultimately held that (1) the suppression of evidence was not a proper remedy for a violation of Article 36 (*id.* at p. 350), and (2) notwithstanding *Avena*, state rules of procedural default may be applied to Article 36 claims of the Vienna Convention. (*Id.* at p. 360.)

In *Medellin v. Texas* (2008) 552 U.S. 491, Jose Ernesto Medellin, one of the Mexican nationals named in the *Avena* decision, filed a second state habeas petition challenging his Texas murder conviction and death sentence on the ground he had not been informed of his Vienna Convention rights. (*Id.* at p. 503.) Medellin relied on the *Avena* decision and President George W. Bush's February 28, 2005, Memorandum, stating that the United States would discharge its international obligations under *Avena* by having state courts give effect to the decision. (*Ibid.*) The Texas Court of Criminal Appeals dismissed Medellin's application for writ of habeas corpus as an abuse of the writ, concluding that neither *Avena* nor the President's Memorandum was binding federal law that could displace Texas' limitations on filing successive habeas applications. (*Id.* at p. 504.) The United States Supreme Court affirmed the judgment of the Texas court, holding that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law . . . ." (*Id.* at pp. 498-499.)

In *Garcia v. Texas* (2011) __U.S.__ [131 S.Ct. 2866], Humberto Leal Garcia, a Mexican national, sought a stay of execution on the ground that his conviction was in violation of the Vienna Convention on Consular Relations because the United States had failed to advise him of his right to

consular services and assistance. (*Id.* at p. 2867.) Garcia argued that due process prohibited his execution while Congress was considering whether to "enact legislation implementing the *Avena* decision." (*Ibid.)* In rejecting his stay of execution, the United States Supreme Court stated "Our task is to rule on what the law is, not what it might eventually be." (*Ibid.*) It further noted,

> It has now been seven years since the ICJ ruling and three years since our decision in *Medellin I*, making a stay based on the bare introduction of a bill in a single house of Congress even less justified. If a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.

(*Id.* at p. 2868.)

2. The Trial Court Properly Denied Appellant's **Motion to Suppress and Motion for New Trial**

Appellant fails to show that he has an individually enforceable right under the Vienna Convention. Even assuming he does have such a right, the trial court properly denied appellant's motion to suppress and new trial motion.

Although the ICJ in *Avena* found that the Vienna Convention guaranteed individually enforceable rights, the ICJ's interpretation of the Convention is not binding on United States courts and is only entitled to "respectful consideration." (See *Sanchez-Llamas, supra*, 548 U.S. at pp. 355-356.) The Vienna Convention itself counsels against finding that individual rights are created by the treaty.

The first sentence of Article 36 states that its provisions are adopted "with a view to facilitating the exercise of consular functions." (See Vienna Convention, Art. 36(1).) Notably absent is any declaration of individual rights. Moreover, as appellant correctly notes, he cannot compel

this Court to enforce the *Avena* judgment. (AOB 511; see *Medellin v. Texas, supra*, 552 U.S. at p. 491.)

Appellant's argument that future legislation may be implemented giving effect to *Avena* is speculative. (AOB 513-515.) As the United States Supreme Court noted in *Garcia v. Texas*, if the enactment of a statute implementing *Avena* was a priority it would have been done by now. (*Garcia v. Texas, supra,* 131 S.Ct. at p. 2868.) Appellant's request that this Court "review and reconsider" the claim based on the possibility of future legislation should be rejected. (*Id.* at p. 2867.)

Even if appellant could establish an individually enforceable right under the Convention, his claim still fails because he cannot demonstrate that the denial of his consular rights caused him prejudice.

It was stipulated that appellant was a Mexican national and that he was not advised of his consular rights until his attorney Mr. Bryan, became involved in his case, well after he made his statements to law enforcement. However, appellant cannot demonstrate that law enforcement's failure to advise him of his consular right caused him prejudice. (*People v. Maciel* (2013) 57 Cal.4th 482, 505 citing *Breard v. Greene* (1998) 523 U.S. 371, 377.) Appellant failed to show that there was a causal relationship between any violation of his rights under the Vienna Convention and his confession. As the trial court noted, suppression of appellant's statements to law enforcement was not a remedy for violations of Article 36 of the Vienna Convention. (18 RT 4354-4355; see *U.S. v. Lombera-Camorlings, supra,* 206 F.3d at p. 882; cf. *People v. Maciel, supra*, 57 Cal.4th at p. 505; *People v. Enraca* (2012) 53 Cal. 4th 735, 757.) Moreover, it was undisputed that appellant moved to the United States when he was a small child, and that he spoke English fluently. (18 RT 4350.) Appellant was advised of his *Miranda* rights by law enforcement on two separate occasions, waived his rights, and spoke to law enforcement, thus, making it highly unlikely that

appellant – who had knowingly and voluntarily declined the services of an attorney on two occasions – would have chosen to speak to a consular representative.[44] No law holds that suppression is constitutionally required for a violation of the Vienna Convention, thus, appellant's statement would not have been suppressed.

Moreover, the evidence against appellant at trial was strong even without his confession or trial testimony. Shortly before the murder, witnesses saw appellant and Garza carjack and kidnap Yarbrough at gunpoint. Yarbrough's lifeless body was found several hours later. Yarbrough's hands were bound behind his back, his eyes were taped shut, and he had been shot multiple times. Appellant was seen driving Yarbrough's truck after the murder and fled the country immediately after the murder. When asked by his aunt if he committed the murder, he hung-up the telephone without answering.

The trial court properly denied appellant's suppression motion and motion for new trial because suppression is not an appropriate remedy for any alleged violation and appellant cannot demonstrate prejudice.

XXVII. CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL

Appellant repeats challenges to California's death penalty scheme that this Court has rejected in the past, and provides no compelling reason for this Court to reconsider any of its previous holdings. (AOB 516-532.).

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[44] The record is not clear as to the exact date appellant was advised of his consular rights, but it appears from the record that he was aware of these rights prior to the December 2000 suppression hearing.

A. California's Death Penalty Scheme is Not Impermissibly Broad

Appellant contends that his death sentence is invalid because California's current statutory scheme (§ 190.2) fails to narrow the class of offenders eligible for the death penalty in violation of his rights under the Eighth Amendments to the United States Constitution. (AOB 519-526.)

This Court has "considered and consistently rejected" this claim. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837, and cases cited therein.)

> The special circumstances set forth at section 190.2 are not impermissibly broad and adequately narrow the class of murders for which the death penalty may be imposed. [Citations.]

(*People v. Elliot* (2005) 37 Cal.4th 453, 487.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

B. Burden of Proof for Aggravating Factors

Appellant contends that California's death penalty scheme and accompanying penalty phase instructions fail to set forth the appropriate burden of proof or persuasion in violation of his rights under the Fifth, Sixth, Eight, and Fourteenth Amendment. (AOB 526-527.)

This Court has found that

> [t]he death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.]

(*People v. Thornton* (2007) 41 Cal.4th 391, 469; *People v. Gonzales, supra,* 54 Cal.4th at p. 1298; *People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Lomax* (2010) 49 Cal.4th 530, 594-595.) The death penalty law and instructions are also not

defective "for failing to inform the jury that there was no burden of proof." (*People v. Gonzales, supra,* at p. 1298; *People v. Lomax, supra,* at p. 595.)

C. Section 190.3, Factor (a)

Appellant contends that section 190.3, factor (a) is vague and applied in an arbitrary manner in violation of his Fifth, Sixth, Eight, and Fourteenth Amendment rights to due process and equal protection. (AOB 527-528.)

As appellant acknowledges, this Court has

> reject[ed] the assertion that factor (a) is so vague and arbitrary that it leads to the wanton or freakish application of the death penalty in violation of the Eighth Amendment to the United States Constitution [*People v. Hovarter* (2008) 44 Cal.4th 983, 1029].

(*People v. Mills* (2010) 48 Cal.4th 158, 213.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

D. Section 190.3, factor (b)

Appellant contends that the absence of a requirement of jury unanimity as to aggravating factors under section 190.3, factor (b), violated his rights under the Sixth and Eight Amendment to the United States Constitution. (AOB 528-529.)

This Court has found that section 190.3 is not unconstitutional "for failing to require unanimity as to the applicable aggravating factors. [Citation.]" (*People v. Elliot, supra,* 37 Cal.4th at pp. 487-488.) This Court has further held that

> "[n]othing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466[]) compels a different answer to th[is] question[ ]." [Citation.]

(*People v. Thomas, supra,* 51 Cal.4th at p. 506; *People v. Lee, supra,* 51 Cal.4th at pp. 651-652.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

E. The Jury Was Not Required to Make Written Findings

Appellant contends the failure to require the jury to make written findings deprived him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 529-530.)

This Court has found that "[t]he death penalty law is not unconstitutional for failing to require that the jury base any death sentence on written findings. [Citation.]" (*People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Thomas, supra,* 51 Cal.4th at p. 506.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

F. The United States Constitution Does Not Require Inter-case Proportionality Review of Death Sentences

Appellant contends that California' death penalty scheme violates the United States Constitution because it does not require inter-case proportionality review of death sentences. (AOB 530.)

This Court has repeatedly rejected the claim that the United States Constitution requires inter-case proportionality review of death sentences. (*People v. Valdez, supra,* 55 Cal.4th at p. 180; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

G. Disparate Sentence Review

Appellant contends that California's death penalty scheme violates the United States Constitution because it "fails to afford capital defendants with the same kind of disparate sentence review as if afforded felons under the determinate sentence law . . ." (AOB 530-531.)

As appellant acknowledges, this Court has rejected the claim that a defendant's constitutional rights are violated because disparate sentence review has been afforded to noncapital defendants. (*People v. Souza* (2012) 54 Cal.4th 90, 142.)

> Because capital and noncapital defendants are not similarly situated in the pertinent respects, equal protection principles do not mandate that capital sentencing and sentence-review procedures parallel those used in noncapital sentencing.

(*Id.*, citing *People v. Brasure* (2008) 42 Cal.4th 1037, 1069; *People v. Morgan* (2007) 42 Cal.4th 593, 627; *People v. Thomas, supra,* 51 Cal.4th at p. 507.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

H. Cruel and Unusual Punishment

Appellant contends that California's death penalty scheme violates the Eight Amendment to the United States Constitution because it constitutes cruel and unusual punishment. (AOB 531.)

As appellant acknowledges, this Court has rejected the claim that California's death penalty statute constitutes cruel or unusual punishment under the Eight Amendment. (*People v. McWhorter* (2009) 47 Cal.4th 318, 379, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1164; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

XXVIII. APPELLANT'S CONVICTIONS ON COUNTS 10 AND 11 SHOULD BE AFFIRMED

Appellant contends, without citing to any authority, that counts 10 and 11 should be reversed because the prosecutor unjustly proceeded to trial on these counts after appellant had been convicted of first degree murder and the jury had returned a verdict of death. (AOB 533-535.) Appellant is incorrect.

Appellant was charged with a violation of Health and Safety Code sections 11370.1 (count 10) and 11550 (count 11). Appellant moved to bifurcate counts 10 and 11 prior to the commencement of trial. (8 CT 2374-2378.) The People stipulated to the severance of counts 10 and 11 on the condition that appellant waive his statutory and constitutional right to a speedy trial. (10 CT 2846-2847.) The Court granted the motion to sever the counts and appellant waived time for trial so that counts 10 and 11 could proceed to trial after the trial on counts 1 through 9. (10 CT 2939; RT 1760-1764.)

After appellant was found guilty of counts 1 though 4 and 6 through 9 and the jury had returned a verdict of death, appellant moved to dismiss counts 10 and 11 in the interest of justice. (18 CT 5157-5161; 64 RT 13880.) The People opposed the motion arguing that the trial would be brief and that the People had an interest in prosecuting these counts in the event the penalty phase of appellant's trial was overturned on appeal. (18 CT 5163-5166; 64 RT 13881-13882.) The trial court denied the motion to dismiss. (64 RT 13900.)

Appellant has cited no authority for the proposition that it is improper for a prosecutor to proceed to trial on severed counts after a verdict of death has been rendered. (See *People v. Stanley, supra*, 10 Cal.4th at p. 793 [court may treat failure to cite authorities for legal argument as waiver].) Instead, appellant has cited to a United States Supreme Court case that has

no bearing on the issue presented in this claim. (AOB 535, citing *Berger v. United States* (1935) 295 U.S. 78, 88 [prosecutor has duty to refrain from making improper arguments to jury].) Here, the prosecutor did not make an improper argument, but opposed appellant's motion to dismiss pending charges.

Moreover, appellant requested that counts 10 and 11 be severed from the remaining counts prior to trial. Appellant should be estopped from asserting that this was unjust when he requested this procedure. (See *People v. Duncan* (1991) 53 Cal.3d 955, 969 [doctrine of invited error precludes defendant from reversal when error in trial was at his request].)

The trial on counts 10 and 11 was deferred at appellant's request. He cannot obtain the benefit of delay in the trial on those counts and then complain from prejudice due to that benefit. The trial court properly denied appellant's motion to dismiss the severed counts.

XXIX. THE TRIAL COURT WAS NOT REQUIRED TO GIVE AN INSTRUCTION ON LINGERING DOUBT

Appellant contends that the trial court violated his Sixth and Fourteenth Amendment rights by failing to instruct on lingering doubt. (AOB 536-540.)

The trial court was not required to give an instruction on lingering doubt. Although it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.) There is neither a state nor a federal constitutional requirement that the jury be specifically instructed that it may consider lingering doubt. (*People v. Harris* (2005) 37 Cal.4th 310, 359, citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173–174, and *People v. Lawley* (2002) 27 Cal.4th 102, 166.) The concept of lingering doubt is sufficiently encompassed within other instructions,

including CALJIC No. 8.85, which are ordinarily given in capital cases. (*Harris*, at p. 359; *People v. Rogers* (2009) 46 Cal.4th 1136, 1176.)

In this case, the trial court ruled that lingering doubt could be argued by appellant. (61 RT 13368.) However, the trial court properly refused appellant's request to instruct the jury on lingering doubt since the subject of lingering doubt was adequately covered by the court's instruction pursuant to CALJIC No. 8.85. (63 RT 13368-13369; 18 CT 5105-5106; *People v. Rogers, supra*, 46 Cal.4th at p. 1176.)

Appellant's challenge should be denied.

XXX. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO PRECLUDE THE PEOPLE FROM SEEKING THE DEATH PENALTY

Appellant complains that the trial court erred in denying him relief on the basis of intra-case proportionality because his codefendant, Efrain Garza, received a life sentence. (AOB 541-543.) The trial court properly denied appellant's motion to preclude the People from seeking the death penalty.

It is not disproportionate punishment when some codefendants are charged with capital offenses, and others are not, or that some receive other dispositions through plea bargaining. (*People v. Ledesma, supra*, 39 Cal.4th at p. 744; *People v. Box* (2000) 23 Cal.4th 1153, 1219; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Williams* (1997) 16 Cal.4th 153, 279-280.)

> Unless the state's capital punishment system is shown by the defendant to operate in an arbitrary and capricious manner, the fact that such defendant has been sentenced to death and others who may be similarly situated have not, does not establish disproportionality violative of constitutional principles. [Citation.]

(*People v. Visciotti* (1992) 2 Cal.4th 1, 77, quoting *People v. McLain* (1998) 46 Cal.3d 97, 121.) Moreover, the sentence received by a

codefendant is not a factor to be considered in proportionality review because it does not assist in determining the defendant's "personal responsibility and moral guilt." (*People v. Marshall* (1990) 50 Cal.3d 907, 938; *People v. Tafoya* (2007) 42 Cal.4th 147, 198-199.)

Here, the evidence showed appellant kidnapped and carjacked Yarbrough because of an issue Yarbrough had at appellant's aunt's house over a month before the murder. Appellant, not Garza, had the motive to commit the crime. As appellant admitted, he wanted to scare Yarbrough and wanted him to understand that it was not a joke to be friends with "gangbangers." Appellant, not Garza, obtained the Tec-9 and fired three fatal shots at Yarbrough after Yarbrough's eyes were taped shut and his hands were tied behind his back.

Appellant's death sentence is not disproportionate to his culpability of the crime for which he was convicted. (*People v. Bennett* (2009) 45 Cal.4th 577, 629.)

XXXI. APPELLANT WAS NOT PREJUDICED BY THE CUMULATIVE EFFECT OF ANY ALLEGED ERRORS DURING THE GUILT PHASE

Appellant contends that he was prejudiced by the cumulative effect of each alleged error in the guilt phase and that reversal of his convictions are warranted. (AOB 544-545.) There were no errors to accumulate. Even if there were errors, as discussed above, any claims of error are forfeited, meritless, or harmless. (See Arguments I-XXX, ante.) As a result, his claim fails. (*People v. Williams* (2013) 58 Cal.4th 197, 291.)

XXXII. APPELLANT WAS NOT PREJUDICED BY THE CUMULATIVE IMPACT OF ANY ALLEGED ERRORS DURING THIS CASE

Appellant argues that he was prejudiced by the cumulative impact of the alleged errors set forth in the preceding arguments and was deprived of his due process right to a fair trial. He seeks reversal of the judgment of

death. (AOB 546-552.) As discussed in the preceding arguments, appellant's claims of error are forfeited, meritless, and/or harmless. (See Arguments I – XXX, ante.)

Appellant has failed to show error or that he suffered prejudice as a result of any particular error or combined errors in either the guilt or penalty phase. As a result, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Panah* (2005) 35 Cal.4th 395, 479-480, 501.) Appellant was "entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

CONCLUSION

For the reasons set forth above, respondent respectfully submits that the judgment should be affirmed.

Dated: March 26, 2014

Respectfully submitted,

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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 94,493 words.

Dated: March 26, 2014

KAMALA D. HARRIS
Attorney General of California

Leanne Le Mon

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ramirez**
No.: **S099844**

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 March 26, 2014, 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 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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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 March 26, 2014, at Fresno, California.

Lynda Gonzales
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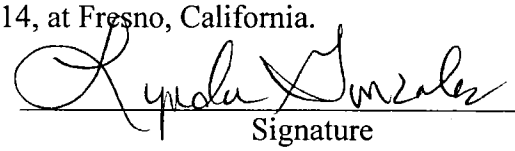
Signature