SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ERIC ANDERSON, Defendant and Appellant.	**CAPITAL CASE** Case No. S138474

SUPREME COURT
FILED
MAR 25 2015
Frank A. McGuire Clerk
Deputy

San Diego County Superior Court Case
No. SCE230405
The Honorable Lantz Lewis, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
THEODORE M. CROPLEY
Deputy Attorney General
MICHAEL T. MURPHY
Deputy Attorney General
State Bar No. 178384
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3081
Fax: (619) 645-2271
Email: Mike.Murphy@doj.ca.gov
Attorneys for Plaintiff and Respondent

DEATH PENALTY

TABLE OF CONTENTS

Page

Introduction 1

Statement of the Case 1

Statement of Facts 5

I. Summary of Facts Relating to Guilt 5

A. Prosecution Case 5

1. Background information about Anderson and his codefendants 5

2. Anderson burglarizes home of Bell family on January 8, 2003 7

3. Anderson burglarizes home of Dolan family on April 9, 2003 8

4. Anderson conspires to commit burglary and robbery, and on April 14, 2003, murders Steven Brucker in the course of that conspiracy 10

5. Anderson admits involvement in the murder to a roommate 19

6. Anderson changes his appearance, flees to Oregon, gives a false name to police, and plots his escape from jail 20

7. While in jail awaiting trial, Anderson attacks a witness who testified against him at the preliminary examination 23

B. Defense case 23

II. Summary of Facts Relating to Penalty 25

A. Prosecution Case 25

1. Anderson shot at a motorist because she "aggravated" him with her driving 25

2. Anderson was convicted of possessing a stolen car and three separate residential burglaries 26

TABLE OF CONTENTS
(continued)

Page

B. Defense case 27

Argument 28

I. The trial court properly refused to sever the trial of Anderson and Lee because their defenses were not antagonistic and there was substantial independent evidence of Anderson's guilt 28

A. Trial court proceedings 28

B. Standard of review 31

C. Governing law 31

D. The trial court properly refused to order separate trials of Anderson and Lee 32

E. Even if the trial court abused its discretion under state law by denying the motion to sever, the error was harmless 35

F. The joint trial did not result in a grossly unfair trial that requires reversal under the due process clause of the federal constitution 39

II. The trial court properly refused to sever the burglary charges from the murder and conspiracy charges because joinder was authorized by section 954, there was cross-admissibility of evidence, and Anderson failed to make a clear showing that he would be prejudiced by a joint trial 41

A. Trial court proceedings 41

B. Standard of review 42

C. Governing law 43

D. The trial court properly refused to order a separate trial for the burglary charges 44

1. Joinder was authorized under Section 954 44

TABLE OF CONTENTS
(continued)

Page

2. The trial court properly concluded that joinder would not prejudice Anderson 45

E. Even if the trial court abused its discretion under state law by denying the motion to sever, the error was harmless 50

F. The joint trial did not result in a grossly unfair trial that requires reversal under the due process clause of the federal constitution 51

III. The trial court properly exercised its discretion to allow evidence of Anderson's flight from San Diego, and his plans to escape from jail, because it was relevant to show consciousness of guilt 52

A. Trial court proceedings 52

B. Standard of review 54

C. The trial court properly exercised its discretion by admitting evidence that was relevant to establish Anderson's consciousness of guilt 55

D. Any error in the admission of evidence was harmless during the guilt phase of the trial 59

E. By failing to object or to request a limiting instruction at trial, Anderson forfeited any claim that evidence of his flight from California and plans to escape from jail was erroneously admitted at the penalty phase; any error was harmless 61

IV. The trial court properly allowed Handshoe to testify because his plea agreement was not unduly coercive 63

A. Trial court proceedings 63

B. Standard of review 65

C. Governing law 65

TABLE OF CONTENTS
(continued)

Page

D. Handshoe's testimony was properly admitted because his plea agreement required only that he testify truthfully 67

E. Even if Handshoe's testimony was the result of a coercive plea agreement, no due process violation resulted from its admission because the prosecution's case did not depend substantially on that testimony 69

F. Any error was harmless 71

V. The trial court properly excluded the testimony of a defense witness because the proffered testimony was irrelevant 72

A. Trial court proceedings 73

B. Standard of review 74

C. Governing law 74

D. The trial court properly excluded irrelevant evidence 74

E. Any error was harmless 75

VI. The trial court properly refused to order that Peretti provide a urine sample for drug testing because there was no probable cause to believe she was under the influence of a drug while testifying 76

A. Trial court proceedings 77

B. Standard of review 77

C. Governing law 77

D. The trial court properly refused to order drug testing because there was no probable cause to believe Peretti was testifying while under the influence of a drug 79

E. Any error was harmless 79

TABLE OF CONTENTS
(continued)

Page

VII. The trial court properly allowed the jury to hear the sound of Anderson's Ford Bronco because the sound was relevant circumstantial evidence of Anderson's participation in the crimes 81

A. Trial court proceedings 81

B. Standard of review 83

C. The trial court properly exercised its discretion by allowing the jury to hear the sound of Anderson's Bronco because it was relevant to establishing the identity of the murderer 84

D. Any error was harmless 88

VIII. The trial court properly allowed the prosecution to impeach a defense witness with evidence of his prior felony convictions because they were relevant to his credibility 89

A. Trial court proceedings 89

B. Standard of review 90

C. The trial court properly allowed the prosecution to impeach Stevens with his prior felony convictions because they were relevant to his credibility and where unlikely to cause any undue prejudice to Anderson 91

D. Any error was harmless 95

IX. The trial court properly admitted evidence of a hearsay statement pursuant to the exception to the hearsay rule for prior inconsistent statements 96

A. Trial court proceedings 97

B. Anderson forfeited this claim by failing to raise it in the trial court 99

C. Standard of review 100

TABLE OF CONTENTS
(continued)

Page

D. The trial court properly allowed investigator baker to testify to Northcutt's statements regarding what Anderson had said to him because an exception to the hearsay rule applied to both levels of hearsay ... 101

E. Any error was harmless ... 106

X. The trial court properly allowed evidence, over Anderson's hearsay objection, that Anderson was identified by law enforcement as a suspect three days after the murder because the evidence did not amount to hearsay ... 108

A. Trial court proceedings ... 108

B. Standard of review ... 109

C. The trial court properly allowed Detective Goldberg to testify that Anderson was identified as a suspect on April 17, 2003, because that evidence was not offered to prove the truth of any out-of-court statement ... 110

D. Any error was harmless ... 111

XI. Cumulative effect of evidentiary errors ... 112

XII. The trial court properly refused to instruct the jury that Peretti and Paulson were accomplices as a matter of law because that determination depended on material facts that were in dispute ... 113

A. Trial court proceedings ... 113

B. Standard of review ... 114

C. Governing law ... 114

D. The trial court properly refused to instruct the jury that Peretti and Paulson were accomplice as a matter of law because the evidence permitted different conclusions on that issue ... 115

TABLE OF CONTENTS
(continued)

Page

E. Any error was harmless because the evidence sufficiently corroborated Peretti's and Paulson's testimony 118

XIII. The evidence sufficiently corroborated the testimony of Peretti and Paulson 119

XIV. The trial court properly instructed the jury on the law of accessory liability because it was relevant to issues raised by the evidence 120

A. Trial court proceedings 120

B. Standard of review 122

C. Governing law 122

D. The trial court properly instructed the jury on the law of accessory liability because it was relevant to establish that Peretti's grant of immunity did not necessarily mean that she was an accomplice to the crimes charged 123

E. Any error was harmless 124

XV. The trial court properly instructed the jury that it must decide the case based only on the evidence formally presented during the trial proceedings 125

A. Trial court proceedings 125

B. Standard of review 129

C. The trial court properly responded to Juror Number 12's question 129

D. Any error was harmless 131

XVI. The record does not support Anderson's claim that the prosecutor committed misconduct during the trial 133

A. Trial court proceedings 133

B. Standard of review 137

C. The prosecutor behaved appropriately in each of the instances cited by Anderson 137

TABLE OF CONTENTS
(continued)

Page

1. The prosecutor did not inappropriately vouch for his case 138

2. The prosecutor did not mischaracterize the evidence 140

3. The prosecutor did not ask argumentative questions 142

D. Any error was harmless 143

XVII. The trial court did not err by failing to conduct an inquiry into the impartiality of the members of Anderson's jury after there were published accounts of the verdict in Huhn's case 143

A. Trial court proceedings 144

B. Standard of review 147

C. The trial court exercised sound discretion in dealing with the verdict in the Huhn case and the publicity that followed 147

1. The trial court took appropriate steps to ensure the impartiality of the jury 148

2. The trial court did not abuse its discretion by not asking the jurors if they had been exposed to media accounts of the verdict 150

D. Any error was harmless 151

XVIII. The record does not support Anderson's claim of juror misconduct 152

A. Trial court proceedings 152

B. Standard of review 155

C. The inadvertent placement in the jury room of a document not admitted in evidence did not amount to juror misconduct 155

TABLE OF CONTENTS
(continued)

Page

D. The inadvertent placement in the jury room of a document not admitted in evidence did not result in a miscarriage of justice 158

E. Any presumption of prejudice was rebutted 159

XIX. Respondent does not object to Anderson's request for this court to review the sealed record relating to the denial of his motion for discovery of peace officer personnel records 159

XX. The validity of the penalty verdict is not undermined by Anderson's testimony in favor of the death penalty..... 160

XXI. The trial court properly refused to instruct the jury with a revised version of CALJIC No. 8.85 163

XXII. The trial court did not err in refusing to instruct the jury that there need not be any mitigating circumstances to justify a decision that the penalty be life without parole 165

XXIII. The trial court did not err in refusing to instruct on lingering doubt 166

XXIV. California's death penalty statute is consistent with constitutional principles 166

XXV. California's sentencing scheme does not violate equal protection principles 167

XXVI. California's death penalty law does not violate international norms of humanity and decency 168

XXVII. The one-year enhancement for the prison prior allegation should be stricken because it is based on the same prior offenses that serve as the bases for the serious felony prior allegations, for which five-year enhancements were imposed 168

XXVIII. The cumulative effect of the alleged guilt and penalty phase errors do not require reversal of the convictions or death judgment 168

Conclusion 169

TABLE OF AUTHORITIES

Page

CASES

Alcala v. Superior Court
(2008) 43 Cal.4th 1205 49

Arizona v. Fulminante
(1991) 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302................40, 71

Bruton v. United States
(1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476..........................28

Cahill v. San Diego Gas & Elec. Co.
(2011) 194 Cal.App.4th 939..54, 55

Chambers v. Mississippi
(1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297........................168

Chapman v. California
(1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 ....passim

Cooley v. Superior Court
(2002) 29 Cal.4th 228 77

Crane v. Kentucky
(1986) 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636........................75

Darden v. Wainwright
(1986) 477 U.S. 168, 91 L. Ed. 2d 144, 106 S. Ct. 2464 137

Davis v. Alaska
(1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347..........................77

Delaware v. Van Arsdall
(1986) 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674........................77

Donnelly v. DeChristoforo
(1974) 416 U.S. 637, 40 L.Ed.2d 431, 94 S.Ct. 1868........................137

Dyer v. MacDougall
(2nd Cir. 1952) 201 F.2d 265..131

Elkins v. Superior Court
(2007) 41 Cal.4th 1337 131

Estelle v. McGuire
(1991) 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 .... 60, 71, 88, 96

In re Cruz
(1966) 64 Cal.2d 178 4

Jammal v. Van de Kamp
(9th Cir. 1993) 926 F.2d 918 .... 60, 106, 111

Montana v. Egelhoff
(1996) 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 75

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court
(1999) 20 Cal.4th 1178 .... 149, 150

People v. Adams
(1960) 182 Cal.App.2d 27 140

People v. Adams
(1993) 19 Cal.App.4th 412 131

People v. Alcala
(1992) 4 Cal.4th 742 85

People v. Alvarez
(1996) 14 Cal.4th 155 109

People v. Andrews
(1983) 149 Cal.App.3d 358 .... 156, 157

People v. Antick
(1975) 15 Cal.3d 79 92

People v. Aranda
(1965) 63 Cal.2d 518 28

People v. Arias
(1996) 13 Cal.4th 92 .... 42, 43

People v. Bacon
(2010) 50 Cal.4th 1082 .... 76, 77

People v. Barnett
(1998) 17 Cal.4th 1044 ....58, 62, 95

People v. Beagle
(1972) 6 Cal.3d 441 92

People v. Bean
(1998) 46 Cal.3d 919 52

People v. Beeman
(1984) 35 Cal.3d 547 115

People v. Bolden
(2002) 29 Cal.4th 515 113

People v. Boyd
(1990) 222 Cal.App.3d 541 ....85, 86, 87

People v. Boyer
(2006) 38 Cal.4th 412 ....66, 114

People v. Boyette
(2002) 29 Cal.4th 381 76

People v. Branch
(2001) 91 Cal.App.4th 274..57

People v. Breverman
(1998) 19 Cal.4th 142 122

People v. Brown
(1988) 46 Cal.3d 432 ....62, 63, 164

People v. Brown
(2004) 33 Cal.4th 382 162

People v. Burns
(1987) 189 Cal.App.3d 734...93

People v. Carasi
(2008) 44 Cal.4th 1263 ....31, 32

People v. Carrasco
(2014) 59 Cal.4th 924 ....167, 168

People v. Castro
(1985) 38 Cal.3d 301 ....91, 92, 94

People v. Cavazos
(1985) 172 Cal.App.3d 589..92

People v. Chavez
(2000) 84 Cal.App.4th 25..91

People v. Chessman
(1959) 52 Cal.2d 467 44

People v. Clair
(1992) 2 Cal.4th 629 ....90, 91, 92

People v. Coffman and Marlow
(2004) 34 Cal. 4th 1 ....passim

People v. Cole
(2004) 33 Cal.4th 1158..114, 122, 129

People v. Cooper
(1991) 53 Cal.3d 771 ....157, 158

People v. Cotton
(1959) 169 Cal.App.2d 1..140

People v. Cross
(2008) 45 Cal.4th 58 ....122, 125

People v. Cruz
(2008) 44 Cal.4th 636 164

People v. Cummings
(1993) 4 Cal.4th 1233 ....29, 151

People v. Cunningham
(2001) 25 Cal.4th 926 169

People v. Danielson
(1992) 3 Cal.4th 691 ....63, 161

People v. Davis
(2009) 46 Cal.4th 539 46

People v. Dement
(2011) 53 Cal.4th 1 106

People v. Dewey
(1996) 42 Cal.App.4th 216 91

People v. Doolin
(2009) 45 Cal.4th 390 49

People v. Duncan
(1991) 53 Cal.4th 955 165

People v. Dunkel
(1977) 71 Cal.App.3d 928 79

People v. Duty
(1969) 269 Cal.App.2d 97 124

People v. Dykes
(2013) 46 Cal.4th 731 137

People v. Earp
(1999) 20 Cal.4th 826 .... 78, 79, 142

People v. Ewoldt
(1994) 7 Cal.4th 380 .... 47, 48

People v. Falsetta
(1999) 21 Cal.4th 903 .... 60, 71, 106, 111

People v. Farnum
(2002) 28 Cal.4th 107 167

People v. Fields
(1998) 61 Cal.App.4th 1063 110

People v. Flood
(1998) 18 Cal.4th 470 124

People v. Fries
(1979) 24 Cal.3d 222 94

People v. Frye
(1998) 18 Cal.4th 894 .... 129, 138

People v. Gaines
(2009) 46 Cal.4th 172 160

People v. Gamache
(2010) 48 Cal.4th 347 31

People v. Garrison
(1989) 47 Cal.3d 746 ....66, 69

People v. Gray
(2005) 37 Cal.4th 168 166

People v. Green
(1951) 102 Cal.App.2d 831 68

People v. Green
(1980) 27 Cal.3d 1 ....100, 139

People v. Guiuan
(1998) 18 Cal.4th 558 129

People v. Gutierrez
(2009) 45 Cal.4th 789 74

People v. Guzman
(1988) 45 Cal.3d 915 ....160, 161

People v. Hamilton
(2009) 45 Cal.4th 863 ....passim

People v. Hardy
(1992) 2 Cal.4th 86 ....32, 33, 35

People v. Hartsch
(2010) 49 Cal.4th 472 118

People v. Hensley
(2014) 59 Cal.4th 788 147

People v. Hernandez
(1988) 47 Cal.3d 315 151

People v. Hill
(1998) 17 Cal.4th 800 ....112, 140, 169

People v. Hines
(1997) 15 Cal.4th 997 166

People v. Hinton
(2006) 37 Cal.4th 839 95

People v. Holloway
(1990) 50 Cal.3d 1098 131

People v. Homick
(2012) 55 Cal.4th 816 66

People v. Hoover
(1974) 12 Cal.3d 875 114

People v. Hovarter
(2008) 44 Cal.4th 983 .... 60, 106, 111

People v. Huggins
(2006) 38 Cal.4th 175 .... 138, 139

People v. Jackson
(1996) 13 Cal.4th 1164 40

People v. Jenkins
(2000) 22 Cal.4th 900 65

People v. Johnson
(1992) 3 Cal.4th 1183 .... 101, 102, 104, 162

People v. Johnson
(1993) 6 Cal.4th 1 165

People v. Johnson
(2003) 109 Cal.App.4th 1230 142

People v. Jones
(1993) 5 Cal.4th 1142 168

People v. Jones
(2012) 54 Cal.4th 1 166

People v. Kelly
(1992) 1 Cal.4th 495 129

People v. Kipp
(2001) 26 Cal.4th 1100 56

People v. Kitt
(1978) 83 Cal.App.3d 834 .... 156, 157, 158

People v. Lang
(1989) 49 Cal.3d 991 .... 91, 92

People v. Letner
(2010) 50 Cal.4th 99 32

People v. Lucero
(2000) 23 Cal.4th 692 164

People v. Lucky
(1988) 45 Cal.3d 259 .... 44, 45

People v. Mai
(2013) 57 Cal.4th 986 161

People v. Martinez
(2010) 47 Cal.4th 911 .... 150, 151, 152

People v. Matson
(1974) 13 Cal.3d 35 44

People v. Mayfield
(1997) 14 Cal.4th 668 142

People v. McKinnon
(2011) 52 Cal.4th 610 167

People v. McKinzie
(2012) 54 Cal.4th 1302 .... 164, 165

People v. Medina
(1974) 41 Cal.App.3d 438 .... passim

People v. Medina
(1995) 11 Cal.4th 694 138

People v. Melton
(1988) 44 Cal.3d 713 .... 78, 79

People v. Mendoza
(2000) 78 Cal.App.4th 918 93

People v. Merriman
(2014) 60 Cal.4th 1 74

People v. Montes
(2014) 58 Cal.4th 809 .... 31, 32

People v. Mooc
(2001) 26 Cal.4th 1216 160

People v. Morris
(1991) 53 Cal.3d 152 .... 55, 56

People v. Musselwhite
(1998) 17 Cal.4th 1218 165

People v. Nakahara
(2003) 30 Cal.4th 705 .... 160, 161

People v. Nesler
(1997) 16 Cal.4th 561 .... 155, 156, 159

People v. Nuckles
(2013) 56 Cal.4th 601 124

People v. Padilla
(1995) 11 Cal.4th 891 139

People v. Page
(2008) 44 Cal.4th 1 167

People v. Perry
(1972) 7 Cal.3d 756 .... 55, 56

People v. Perry
(2006) 38 Cal.4th 302 165

People v. Pitts
(1990) 223 Cal.App.3d 1547 93

People v. Plengsantip
(2007) 148 Cal.App.4th 825 124

People v. Price
(1991) 1 Cal.4th 324 ....85, 118, 169

People v. Quartermain
(1997)16 Cal.4th 600 62

People v. Ray
(1996) 13 Cal.4th 313 ....147, 165

People v. Remiro
(1979) 89 Cal.App.3d 809 ....56, 58

People v. Riggs
(2008) 44 Cal.4th 248 138

People v. Robbins
(1988) 45 Cal.3d 867 47

People v. Rodgers
(1987) 240 Cal.App.3d 258 92

People v. Rodriguez
(1986) 42 Cal.3d 730 114

People v. Sattiewhite
(2014) 59 Cal.4th 446 164

People v. Schmeck
(2005) 37 Cal.4th 240 166

People v. Scott
(1978) 21 Cal.3d 284 78

People v. Scott
(2011) 52 Cal.4th 452 ....passim

People v. Seaton
(2001) 26 Cal.4th 598 165

People v. Seijas
(2005) 36 Cal.4th 291 100

People v. Soper
(2009) 45 Cal.4th 759 ....42, 43, 44, 45

People v. Souza
(2012) 54 Cal.4th 90 31

People v. Stanley
(2006) 39 Cal.4th 913 43

People v. Staten
(2000) 24 Cal.4th 434 166

People v. Stewart
(1985) 171 Cal.App.3d 59 ....92, 94

People v. Sully
(1991) 53 Cal.3d 1195 ....114, 115

People v. Thomas
(2012) 53 Cal.4th 771 52

People v. Thornton
(1992) 3 Cal.App.4th 419 91

People v. Turner
(1984) 37 Cal.3d 302 ....31, 39, 164

People v. Uribe
(2011) 199 Cal.App.4th 836 137

People v. Vaiza
(1966) 244 Cal.App.2d 121 ....85, 86, 87

People v. Valencia
(2008) 43 Cal.4th 268 164

People v. Vines
(2011) 51 Cal.4th 830 ....43, 46

People v. Watson
(1956) 46 Cal.2d 818 ....passim

People v. Webb
(1993) 6 Cal.4th 494 ....160, 161

People v. Whalen
(2013) 56 Cal.4th 1 ....118, 119

People v. Wheeler
(1992) 4 Cal.4th 284 .... 90, 91

People v. Whitt
(1990) 51 Cal.3d 620 161

People v. Williams
(2008) 43 Cal.4th 584 .... 74, 100

People v. Woodard
(1979) 23 Cal.3d 329 .... 92, 93

People v. Yoeman
(2003) 31 Cal.4th 93 47

People v. Zambrano
(2007) 41 Cal.4th 1082 .... 49, 50

People v. Zapien
(1993) 4 Cal.4th 929 .... 57, 99, 114

Pitchess v. Superior Court
(1974) 11 Cal.3d 531 .... 159, 160

Press Enterprise Co. v. Superior Court of California
(1984) 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 149

Richmond Newspapers v. Virginia
(1980) 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 149

Rock v. Arkansas
(1987) 483 U.S. 44, 97 L.Ed.2d 37, 107 S.Ct. 2704 160

Shamblin v. Brattain
(1988) 44 Cal.3d 474 55

Smith v. Phillips
(1982) 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 131

Turner v. Louisiana
(1965) 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 131

United States v. Aragon
(5th Cir. 1992) 962 F.2d 439 151

United States v. Balter
(3rd Cir. 1996) 91 F.3d 427 40

United States v. Bermea
(5th Cir. 1994) 30 F.3d 1539 151

Yates v. Evatt
(1991) 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 .... passim

STATUTES

Evidence Code
§ 140 84
§ 210 .... 56, 84, 94
§ 350 .... 74, 84
§ 351 74
§ 352 .... passim
§ 353, subd. (b) 59, 106, 111
§ 354 .... 74, 75
§ 780, subd. (f) 143
§ 780, subd. (j) 143
§ 788 91
§ 1043 et seq. 159
§ 1101 .... 45, 46
§ 1101, subd. (a) 61
§ 1101, subd. (b) 46
§ 1200 101
§ 1201 100
§ 1220 101
§ 1235 .... 96, 101, 102

Penal Code
§ 31 115
§ 32 .... 115, 124
§ 182, subd. (a) 2
§ 187, subd. (a) 1
§ 192, subd. (a) 3

§ 190.2, subd. (a)(17) 1
§ 190.3, subds. (b) & (c) 61
§ 190.3, subds. (a) through (k) 163
§ 211 3
§ 212.5 3
§ 213 3
§ 460 2
§ 487, subd. (d) 2
§ 654 .... 4, 5
§ 664 3
§ 667.5, subd. (b) 168
§ 832.7 159
§ 954 .... passim
§ 995 2
§ 1089 150
§ 1098 31
§ 1111 114
§ 1118.1 3
§ 1138 .... 129, 130
§ 1147 145
§ 1163 144
§ 1170.12 2
§ 1239, subd. (b) 5, 11
§ 1324 68
§ 12022, subd. (a)(1) 2
§ 12022.5, subd. (a)(1)) 2
§ 12022.53, subd. (b) 3
§ 12022.53, subd. (d) 2
§ 29800, subd. (a)(1) 2

CONSTITUTIONAL PROVISIONS

California Constitution
art. I, § 15 77
art. I, § 28, subd. (f)(4) 91
art. VI, § 13 .... passim

United States Constitution
Fifth Amendment 97, 104
Sixth Amendment 77

OTHER AUTHORITIES

1A Wigmore, Evidence (Tillers rev. ed. 1983) § 102 47

2 Wigmore, Evidence (Chadbourne rev. ed. 1979) § 302 47

2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 304 ....47, 48

Cal. Law Revision Com.com, Deering's Ann. Code Evid. (2004 ed.)
foll. § 140 84

CALJIC
No. 1.00 128
No. 3.00 121
No. 3.10 113
No. 3.19 113
No. 6.40 121
No. 8.85 ....163, 164, 165
No. 8.88 165
No. 17.31 125

INTRODUCTION

Appellant Eric Anderson and two accomplices drove to the home of Steven Brucker to steal money from a safe inside Brucker's house. Anderson parked his car in the driveway and, along with one of his accomplices, approached the front door of the residence on foot. Brucker opened the door and told Anderson to "get the fuck off my property." Anderson responded by saying, "fuck you," and shooting Brucker in the chest with a .45 caliber handgun. The bullet perforated Brucker's heart, and caused his death a short time later. After shooting Brucker, Anderson and his accomplices fled the scene.

A jury convicted Anderson of capital murder and conspiracy to commit burglary and robbery. It also convicted him of two counts of residential burglary based on other incidents. At a bench trial, the court found Anderson guilty of being a felon in possession of a firearm. The jury returned a verdict of death, and the trial court sentenced Anderson accordingly.

In this appeal, Anderson challenges various rulings made and instructions given by the trial court, accuses the prosecutor of having committed misconduct, and contends that his death sentence is unconstitutional for several reasons. As discussed in detail below, none of Anderson's claims entitle him to relief, and the judgment should be affirmed.

STATEMENT OF THE CASE

The San Diego County District Attorney charged Anderson and three codefendants (Brandon Handshoe, Apollo Huhn, and Randy Lee) with the murder of Steven Brucker on April 14, 2003, and alleged as special circumstances that the murder was committed in the course of an attempted residential burglary and an attempted residential robbery (Pen. Code, § 187,

subd. (a), 190.2, subd. (a)(17)).[1] All four defendants were also charged with conspiracy to commit residential burglary and residential robbery (§ 182, subd. (a)). The district attorney further alleged that Anderson personally fired a handgun in the commission of the murder resulting in great bodily injury and death (§ 12022.53, subd. (d)), that he personally used a handgun in the commission of the conspiracy (§ 12022.5, subd. (a)(1)), and that his codefendants were vicariously armed with a handgun in the commission of both offenses (§ 12022, subd. (a)(1)). Anderson was charged with four additional crimes: two residential burglaries based on facts unrelated to the murder and conspiracy charges (§§ 459, 460), being a felon in possession of a firearm (former § 12021(a)(1) (now § 29800, subd. (a)(1))), and grand theft of a firearm (§ 487, subd. (d)). Finally, the district attorney alleged that Anderson had previously suffered one prison prior (§ 667.5, subd. (b)), two serious felony priors (§ 667, subd. (a)), and three strike priors (§§ 667, subds. (b)-(i), 1170.12). (1 CT 106-114.)

Anderson pleaded not guilty and denied the allegations. (9 CT 1774.) During pre-trial proceedings, the trial court granted Anderson's unopposed motion pursuant to section 995 to dismiss the grand theft charge on the basis that he had been ordered to answer that charge without reasonable or probable cause. (3 CT 592-599; 9 CT 1810; 4 RT 669). The court denied Anderson's request to be tried separately from his codefendants, and further denied his request to sever the burglary charges; however, the court ordered that a separate jury hear the case against Huhn. (1 CT 155-156, 162-196; 5 CT 1075-1080; 9 CT 1810; 3 RT 600-4 thru 600-9, 600-30 thru 600-31; 4 RT 669-689, 689-691, 712-713; 6 RT 1110-1112 .) Anderson waived his right to a jury trial on the charge of being a felon in possession of a firearm,

---

[1] All further references are to the Penal Code unless otherwise indicated.

and that charge was tried to the court; the remaining charges were tried to a jury. (9 CT 1842.)

During the jury selection process, Handshoe negotiated a plea bargain with the district attorney. Consistent with the terms of that bargain, he pleaded guilty to voluntary manslaughter (§ 192, subd. (a)) as a lesser included offense of the murder charge. He also pleaded guilty to an added charge of attempted residential robbery (§§ 664, 211, 212.5, & 213), and admitted an allegation that he personally used a firearm in the commission of the attempted robbery (§ 12022.53, subd. (b)). (9 CT 1829-1830.)

The case proceeded to trial with two juries: one jury heard the case against Anderson and Lee; the other jury heard the case against Huhn.

At the conclusion of the prosecution's case-in-chief, the court granted Lee's motion for judgment of acquittal with respect to the conspiracy charge due to insufficient evidence of an agreement involving Lee. (see § 1118.1). (9 CT 1884, 1886, 1889, 1890, 1892; 26 RT 4596-4598.)

On June 27, 2005, the jury found Anderson guilty as charged, and found the special allegations to be true. (9 CT 1926, 1928-1934, 1936; 33 RT 5427-5430.) The court found Anderson guilty of the possession charge. (9 CT 1926, 1936; 33 RT 5443-5444.) Anderson waived his right to a jury trial on the prior conviction allegations, and, following a bench trial, the court found those allegations to be true. (9 CT 1926, 1938; 33 RT 5435-5436; 34 RT 5461-5465.)

Lee was found not guilty of the murder charge and discharged from the case. (9 CT 1926, 1935; 33 RT 5430, 5434.) The jury that heard the case against Huhn found him guilty of murder and conspiracy, and found the special allegations to be true. (9 CT 1916-1917, 1919-1923.)[2]

[2] The judgment in Huhn's case was reversed on appeal for juror misconduct. (*People v. Huhn* (April 3, 2007, D047328) [nonpub. opn.].)

On July 8, 2005, Anderson's jury returned a verdict of death. (9 CT 1950-1952; 37 RT 5723.) The court denied Anderson's motion for a new trial and to modify the sentence from death to life without the possibility of parole. (8 CT 1663-1681, 1701-1707, 9 CT 1953-1954; 36 RT 5731-5745.)

The trial court imposed judgment on October 28, 2005. Anderson was sentenced to death for the murder conviction. (9 CT 1954, 1956; 38 RT 5754.) As enhancements to that sentence, the court imposed an indeterminate term of 25 years to life for the use of a firearm, plus two consecutive terms of 5 years for each of Anderson's prior serious felony convictions, for a total indeterminate term of 35 years to life. (9 CT 1954; 38 RT 5755.)

For the conspiracy conviction, the court sentenced Anderson to an indeterminate term of 25 years to life in accordance with the three strikes law, plus a consecutive term of 4 years for the use of a firearm, and two consecutive terms of 5 years for the prior serious felony convictions, for a total indeterminate term of 39 years to life. Execution of this sentence was stayed pursuant to the rule in section 654 prohibiting multiple punishments for the same act. (9 CT 1955; 38 RT 5755; see *In re Cruz* (1966) 64 Cal.2d 178, 180-181 [holding section 654 bars punishing a defendant "for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes."].)

For each of the burglary convictions, the court sentenced Anderson to an indeterminate term of 25 years to life in accordance with the three strikes law, plus two consecutive determinate terms of 5 years for the prior serious felony convictions, for a total indeterminate term of 35 years to life. The terms were ordered to be served consecutively to the prison term imposed for the murder conviction. (9 CT 1955; 38 RT 5755-5756.)

For the conviction of being a felon in possession of a firearm, the court sentenced Anderson to an indeterminate term of 25 years to life in

accordance with the three strikes law. Execution of that sentence was ordered stayed pursuant to section 654. (9 CT 1955; 38 RT 5756.)

Lastly, the court imposed a term of 1 year for the true finding on the prison prior allegation, to be served consecutively to the other prison terms imposed. (9 CT 1955; 38 RT 5756.)

Execution of all the prison terms imposed above was ordered stayed pending execution of the death judgment. (9 CT 1955; 38 RT 5756.)

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

STATEMENT OF FACTS

I. SUMMARY OF FACTS RELATING TO GUILT

A. Prosecution Case

1. Background information about Anderson and his codefendants

Anderson was on parole, living in a condominium in the City of Poway with James Stevens (a former prison cellmate) and Travis Northcutt. (20 RT 3505-3506; 21 RT 3584, 3617-3621, 3630-3631, 3635.) Handshoe, Huhn, and Lee lived in mobile home parks in the Rios Canyon area of El Cajon. (16 RT 2499, 2560, 2561, 2568, 2655-2657; 18 RT 3069-3070; 19 RT 3267; 20 RT 2442-2443, 2448, 3479-3480, 3490; 22 RT 3690, 3691, 3701, 3705-3706, 3825.) Among other vehicles, Anderson drove a 1989, two-tone brown Ford Bronco. (15 RT 2441-2442; 16 RT 2520-2521, 2641-2642, 2697; 18 RT 3072-3074; 19 RT 3196-3202, 3230, 3255; 20 RT 3470, 3484; 21 RT 3572-3573, 3584, 3618, 3637; 22 RT 3666-3667; 24 RT 4170; see 30 RT 5206.)

Handshoe, Huhn, their friend Zachary Paulson, and Huhn's girlfriend, Valerie Peretti, frequently spent their time at Handshoe's mobile home. (16 RT 2498, 2560-2562; 17 RT 2911-2912.) Handshoe's mobile home was the "hangout place" for many in the area because Handshoe's parents were

rarely there and people could freely use drugs. (16 RT 2563, 2566; 17 RT 2885, 2925; 18 RT 3119, 3124-3126.) Handshoe, Huhn, Paulson, and Peretti ingested methamphetamine and/or marijuana on a daily basis, with the exception that Peretti stopped using methamphetamine in January 2003 after discovering she was pregnant with Huhn's child. (16 RT 2559-2560, 2564, 2570-2571, 2659-2660; 17 RT 2889, 2916-2917, 2924-2927; 18 RT 3125; 22 RT 3810-3812, 3879-3882, 3886.) None of them had jobs, so they sometimes stole items from cars to trade for drugs. (16 RT 2563; 17 RT 2890, 2927-2928; 22 RT 3814-3816.)

Paulson testified he was "pretty messed up" during the months preceding April 2003 due to drug use, and that Huhn and Handshoe were too. (17 RT 2926.) Sometimes they went on binges, meaning they continuously ingested methamphetamine for several days without sleeping. (17 RT 2925-2926, 2948; 22 RT 3813-3814.) Peretti told police in May 2003 that Huhn's "life is dope," and that he did not care about anything else. (16 RT 2565.)

Lee was a mutual friend or acquaintance of the above group of people; however, he generally did not visit Handshoe's mobile home or ingest methamphetamine. (16 RT 2496, 2695; 17 RT 2862, 2865-2866, 2871-2872; 18 RT 3115-3120; 22 RT 3797, 3930-3931; 23 RT 3953.)

John Michels had gone to school with Handshoe, Huhn, and Lee, and he lived next door to Lee. (20 RT 3479-3480.) Between November 2002 and April 2003, Anderson visited Michels's mobile home about ten times to do tattoo work for Michels. (20 RT 3468, 3472, 3475, 3479-3481.) Michels introduced Anderson to Huhn. (20 RT 3490-3491.) Beginning in January 2003, Anderson was seen "quite frequently" at Handshoe's trailer by Karen Barnes, one of Handshoe's neighbors. (19 RT 3267-3269, 3278-3279.) Robert Forchette, an acquaintance of Handshoe and Huhn, testified that about February 7, 2003, he was in Handshoe's mobile for a couple of hours

talking and watching television with Handshoe, Huhn, and Anderson. (22 RT 3727-3279, 3742.)

Phone records showed that between April 8 and April 17, 2003, there were 31 calls made between Anderson's cell phone number and the number of the phone in Handshoe's mobile home, including seven on April 14—two before 10:45 a.m., and five after 4:50 p.m. (16 RT 2499, 2500; 20 RT 3304-3308, 3316-3321, 3327-3332.)

On April 14, 2003, Peretti was 15 years of age, Handshoe was 18, Huhn and Lee were 22, and Anderson was 29. (1 CT 106; 16 RT 2555, 2654.)

2. Anderson burglarizes home of Bell family on January 8, 2003

Arlene Bell lived on Lupin Way in an unincorporated area of La Mesa. (19 RT 3169, 3180.) On January 8, 2003, Bell was gone from her home between about 12:00 p.m. and 1:30 p.m. When she returned home, she found a glove in the driveway that did not belong to her. (19 RT 3169, 3174.) She also discovered that someone had entered her house through a bathroom window and "tore up" everything inside. In particular, the drawers of a tool chest in the garage were all open, all the drawers in her bedroom were pulled out, and her mattress was flipped over. (19 RT 3169-3170.) Things were missing from an entertainment center and a book case. (19 RT 3170.) In addition, everything that was on top of her dresser had been taken, including two or three jewelry boxes. (19 RT 3171.) One of the boxes had a label on the bottom indicating it was made in Poland. (19 RT 3173.) A couple of silver coins were among the items taken. (19 RT 3172.) It total, about 33 items had been stolen from the residence. (19 RT 3176.) Most of the items taken were smaller things—like the coins and jewelry boxes—that could be easily "fenced," or sold for cash. (19 RT 3175.)

A short time later, while talking to a community service officer from the sheriff's department who had gone to her residence to take a report, Bell heard the ringing of a cell phone that did not belong to her or the officer. After a brief search, Bell found a cell phone inside her home that apparently had fallen underneath a load of firewood. She gave the phone to the officer, who in turn provided it to Suzanne Fiske, a deputy with the sheriff's department. (19 RT 3173, 3181-3183.) About a month later, Deputy Fiske determined that the telephone number assigned to the cell phone belonged to Anderson. (19 RT 3220-3222.)

On April 24, 2003, Deputy Fiske searched Anderson's residence in Poway, where she found the jewelry box made in Poland and the silver coins taken from Bell's residence on January 8. (19 RT 3223.) The box was recovered from Stevens's bedroom, to which Anderson had regular access. (19 RT 3234, 3239.) Inside the jewelry box were credit cards and an identification card in Anderson's name. (19 RT 3226.)

3. Anderson burglarizes home of Dolan family on April 9, 2003

Mr. and Mrs. Dolan lived on Japatul Valley Road in Alpine, a "country road" about half a mile south of Interstate 8. Michael Hansen, an officer with the San Diego Police Department, lived across the street from the Dolan's house. (19 RT 3162, 3193.) In the afternoon on April 9, 2003, while tending his garden, Hansen heard Mr. Dolan's truck, which had a distinctive sound, drive away from the Dolan residence. (19 RT 3193-3194.) Mrs. Dolan had left the house in the morning. (19 RT 3164.) About half an hour after Mr. Dolan left, Hansen heard a different vehicle, that was "kind of loud sounding," drive into the Dolan's driveway, but did not pay much attention to it. (19 RT 3194.) The driveway of the Dolan's residence goes down at a steep angle, and Hansen could not see cars parked in the driveway. (19 RT 3195, 3203.) Later, Hansen heard the vehicle leaving the

Dolan residence. This time, Hansen focused on the Dolan's driveway when he heard the vehicle, recalling that the Dolan's had been burglarized a couple of years before. (19 RT 3195.) Hansen saw a brown and tan, full-size, older model Ford Bronco crest the driveway of the Dolan's residence and quickly drive away. (19 RT 3196-3197.)

Mrs. Dolan returned home later that afternoon to discover that the house had been burglarized. (19 RT 3164.) A thin white rubber glove, like the ones typically seen in a doctor's office, was found in the driveway. (19 RT 3159-3160, 3217.) A window of a back door had been broken. (19 RT 3158, 3162, 3165; 21 RT 3216.) Inside the house, "there was glass all over," and "dresser drawers and things were pulled out and . . . clothes were thrown all over." (19 RT 3165; see also 21 RT 3216 [sheriff's deputy describing the majority of the house as having been "ransacked"].) Missing from inside the house was money, jewelry, a .22 caliber handgun, and a gun holster. (19 RT 3158-3160.) Among the items of jewelry taken were a locket and a ring with the inscription "Jenny" inside it. (19 RT 3165-3167.) As with the Bell burglary, all of the items taken were relatively small in size and easily disposable. (19 RT 3168.) A sheriff's deputy attempted to find fingerprints at several locations throughout the house but was unsuccessful. (21 RT 3216-3217.)

The following day, Hansen left his home and drove West on Interstate 8 towards El Cajon. He saw merging onto the freeway a Bronco that looked like the one he had seen leaving the Dolan residence the day before. (19 RT 3198, 3205.) He followed the Bronco for about 10 to 15 minutes. (19 RT 3205-3206.) During that time, Hansen had two good opportunities to look at the driver, whom he identified in court as Anderson. (19 RT 3198-3201, 3206.) Hansen wrote down the license plate number of the Bronco, and provided that information to the sheriff's department. He also ran the

license plate number himself, and learned that the Bronco was registered to Anderson. (19 RT 3199-3201, 3207.)

Several days later, Anderson gave the "Jenny ring" taken from the Dolan residence to the mother of a woman he had been dating. (21 RT 3606-3610.) And on May 16, 2003, when Anderson was arrested in Oregon, he was in possession of the .22 caliber handgun stolen from the Dolan residence. (23 RT 4066.)

4. Anderson conspires to commit burglary and robbery, and on April 14, 2003, murders Steven Brucker in the course of that conspiracy

Peretti testified under a grant of immunity. (16 RT 2653.) She testified that in the summer of 2002, Lee told her and Huhn there was a family living in El Cajon that had a safe containing $2 million. Lee urged Huhn to steal the money, and said he wanted 15 percent of it; Lee said he would not steal the money himself because he knew the family. (16 RT 2523-2530.) Peretti did not take Lee's statements about the safe seriously, and dismissed it as "crazy talk," and just a comment about a "pipe dream." (16 RT 2964-2965.)

Handshoe testified for the prosecution in accordance with a plea agreement. Pursuant to the agreement, in exchange for Handshoe's truthful testimony, the prosecution agreed to let Handshoe plead guilty to a lesser charge of manslaughter for his role in the murder, and further agreed that Handshoe would be sentenced to a total prison term of 17 years. (22 RT 3805-3810, 3875-3879.) Handshoe testified that on four or five occasions between the summer of 2002 and April 2003, Lee raised the topic of committing a robbery, and specified that he knew a house that contained a safe with about $1 million in it. (22 RT 3763-3770.)

Paulson testified that Lee made similar statements in his presence. According to Paulson, Lee raised the idea in January or February 2003 of

taking money from a safe. (17 RT 2865-2869.) Paulson explained that Lee raised the issue while Handshoe, Lee, and Paulson were discussing how to obtain money to fund their drug habit. (17 RT 2865, 2902, 2961-2962.) Lee offered that he knew the owner of the El Cajon Speedway, and that this person had a lot of money, "like a million dollars," inside a safe. (17 RT 2866-2868.) Lee suggested that Paulson and Handshoe could "just go in there and rob him," and that he was "an older man" they could hold hostage. (17 RT 2869-2870.) Lee stated he could show them where the house was, and that he wanted 15 percent of the money taken from the safe. (17 RT 2871, 2882, 2959-2960.) Paulson testified he didn't think the suggested robbery would actually take place, but that Lee was just talking gibberish. (17 RT 2896-2897.)

Paulson testified that Lee raised the issue again about a month later, probably in March 2003, when Lee, Paulson, Handshoe, and Huhn were sitting in Lee's car. (17 RT 2871-2872.) Lee said he knew the nephew of the owner of the El Cajon Speedway, and that the owner had a lot of money in a safe. (17 RT 2872.) Lee said that Paulson, Handshoe, and Huhn should rob the owner. (*Ibid.*) Lee would not participate in the robbery, but would show them where the owner of the speedway lived in exchange for 15 percent of the money. (17 RT 2872-2873, 2959-2960.)

Paulson considered Lee's idea, as did Handshoe and Huhn. (17 RT 2873, 2941.) Handshoe and Huhn talked about hiding out for awhile afterward if they committed the robbery, and Handshoe further said he would leave the state. (17 RT 2874-2875.) Handshoe expressed to Paulson that he wanted to do it because he wanted the money. (17 RT 2873, 2959.) Paulson decided he would not participate in the proposed robbery. (*Ibid.*)

Paulson was present on a third occasion when the prospect of robbing the owner of the El Cajon Speedway was discussed. This conversation occurred during the first week of April 2003 at Handshoe's mobile home.

(17 RT 2876.) Present were Paulson, Lee, Handshoe, Huhn, someone named Jake, and Anderson. (17 RT 2876-2878.) Huhn said he could get into the safe; Anderson said he could hold the owner hostage and "pistol whip" him if necessary; Handshoe said he could act as a lookout. (17 RT 2879.) Handshoe again expressed that he would leave town after the robbery. (17 RT 2940.) Both Handshoe and Huhn said they would share some of the money with Paulson and Jake. (17 RT 2940.)

Steven Brucker owned the El Cajon Speedway. (See 15 RT 2394-2395.) He lived on Medill Avenue in an unincorporated area of El Cajon. (15 RT 2382, 2401; 17 RT 2821.) The Brucker residence contained a safe, which was located in a back bedroom. (15 RT 2385, 2392-2393, 2402.) The safe was approximately 4 feet wide by 8 feet tall, and employed a combination lock. (15 RT 2398.) The Bruckers kept guns and jewelry in the safe, and at most up to $2,000 in cash. (15 RT 2387, 2393, 2398-2399, 2402.) Brucker had two cars that he generally drove: a red truck and a white jeep. (15 RT 2404-2405.)

Lee had been friends with one of Brucker's sons, Eric, for a period of time in the late 1990's when they were in high school together. (15 RT 2382-2385, 2388, 2402.) Lee had worked at the El Cajon Speedway for a period of time selling parking tickets. (15 RT 2389.) Lee also visited Eric at the Brucker residence 10 to 20 times. (15 RT 2384-2385.) Eric testified he was confident that Lee knew of the presence and location of the safe based on his time spent inside the house during those visits. (15 RT 2386.)

On April 13, 2003, Anderson called Peretti's house looking for Huhn. Later that day, Peretti saw Anderson at Handshoe's mobile home; that was the first time she had met him. (16 RT 2601-2602.) She didn't think anything of his presence, however, because she knew that Anderson owed Huhn some tattoo work, and that Huhn had been trying to get Anderson to do tattoo work for Handshoe. (16 RT 2603-2607.)

On April 14, 2003, about 12:30 in the afternoon, Peretti went to Handshoe's mobile home. (16 RT 2500.) She was planning to meet Huhn there, and to go out with him to get something to eat and to see a movie. (16 RT 2501, 2667.) Peretti knocked on the door, and was let in by Handshoe, who appeared to be under the influence of drugs. (16 RT 2501-2502, 2617-2620.) Huhn and Anderson were also inside. (16 RT 2502.)

When she first walked in, Peretti sat down and asked, "where's Apollo at?" (16 RT 2503.) Peretti sensed there was reluctance to her being there, and she recalled Handshoe saying to Anderson that it was okay because she was Huhn's girlfriend. (16 RT 2503-2504.) Handshoe explained to Peretti they were planning to rob someone. (16 RT 2535-2536, 2699.) Huhn expressed to Peretti he wanted her to leave. (16 RT 2536-2537.) Nonetheless, Peretti remained in the mobile home for about 45 minutes until the three men left. (16 RT 2504.)

Peretti testified that during her time in the mobile home, the three men were doing different things at different times. (16 RT 2510.) Peretti saw Anderson "messing" with several handguns that were in a duffle bag. (16 RT 2504, 2507-2508.) Anderson also had another bag that contained what Peretti described as disguises. (16 RT 2508.) Specifically, the bag appeared to contain extra articles of clothing, including shirts, gloves, ski-masks, and beanies. (16 RT 2508-2509, 2634.) Anderson was wearing a hair-piece or wig that went down over his ears. (16 RT 2509, 2621.) Peretti described the color of the hair-piece as "dirty" or "salt and pepper." (16 RT 2509-2510, 2621.) Anderson was also wearing thick reading glasses, a "trucker hat" (meaning a baseball cap made with mesh or screen material on the top part of it), and gloves. (16 RT 2519, 2624-2625.) Handshoe and Huhn tried on gloves from the bag. (16 RT 2519-2520.)

At one point, Huhn was sitting next to Peretti while Anderson and Handshoe talked nearby about how they were going to commit the robbery.

(16 RT 2510.) Huhn was not directly involved in the conversation with Anderson and Handshoe at that time because "he was too busy listening to [Peretti] yelling at him." (16 RT 2512.) Peretti was angry at Huhn because she believed he was high on methamphetamine, and she could not get high with him due to being pregnant. (16 RT 2666-2667, 2698.)

Anderson asked for some paper, then drew a map or diagram of a house and described how they were going to commit the planned robbery. (16 RT 2512-2515, 2640.) Anderson described how a certain doorway at the house was situated, and declared that he would stand over the victim while Handshoe went inside the house to the safe. (16 RT 2514-2515.) Anderson said there should be two vehicles at the residence where the robbery was to take place: a red one and a white one. (16 RT 2514.) At the time of the murder, Brucker's red truck and white Jeep were both parked in the driveway of his residence. (15 RT 2404-2405.)

Anderson asked Huhn whether he was going to go with them, at which point Huhn joined the conversation with Anderson and Handshoe. (16 RT 2514-2515.) Huhn said he would go because Peretti was a bitch and he did not want to sit there and listen to her yell at him. (16 RT 2550.) Peretti told Huhn she did not want him to go, but he chose to go anyway. (16 RT 2698-2699.)

They discussed what they would do with the money they expected to get from the robbery; they all agreed they would go shopping. (16 RT 2516-2518, 2704.)

Anderson pulled a large semiautomatic handgun from his waistband, pulled the slide back, and said, "Let's do this fast." (16 RT 2533-2534, 2538.) Peretti testified this resulted in a tense, scary moment. (16 RT 2673.) Shortly before the men left the mobile home, Handshoe said, "Let's go do this before it gets too late." (16 RT 2537.) Handshoe was armed with a small gun. (16 RT 2537-2538.)

When asked about the mood in the mobile home, Peretti testified it seemed as if Anderson had done this before. (16 RT 2516.) She further testified that Handshoe and Huhn were nervous and could not keep in one spot, and that she thought they were scared. (16 RT 2516-2517, 2673.) She admitted, however, that she had previously said in an interview that "they were almost excited because they were going to come into a lot of money." (16 RT 2518.)

Handshoe's testimony largely corroborated Peretti's. Handshoe testified to the following: he was inside his mobile home with Huhn, Peretti, and Anderson prior to the murder (22 RT 3792); Anderson was "jacking rounds," i.e., ejecting rounds, from a handgun and said something to the effect of, "We're going to do this right" (22 RT 3792-3793, 3892-3894, 3913); he gave Anderson a pen and paper and Anderson drew something on it (22 RT 3835); Anderson had disguises in a duffle bag and wore a hair-piece and a hat (22 RT 3857-3860, 3911); there was discussion about burglarizing a house (22 RT 3912); he understood from the discussion that he was to be the lookout (22 RT 3889; 23 RT 3955-3956); before leaving the mobile home, he armed himself with a .25 caliber semi-automatic handgun, "just to have it" (22 RT 3794).

Handshoe further testified that Anderson was like "a maniac with a gun," and that he was afraid of Anderson. (22 RT 3894-3895.) Handshoe told the jury he went with Anderson to the Brucker residence that day because he was afraid of Anderson and he wanted to help Huhn, who told him he needed money because he had a child on the way. (22 RT 3791-3792, 3841, 3895.) Handshoe claimed to have thought they were only going to commit a burglary, and that he did not expect anyone to be at the residence. (22 RT 3896; 23 RT 4000.)

Handshoe, Huhn, and Anderson left the mobile home, and drove away in Anderson's Ford Bronco. (16 RT 2520-2521.) Peretti stood at the door to

the mobile home, and, as the Bronco drove away, she "flipped off" Huhn because she was still angry at him. (16 RT 2522-2523; 24 RT 4221.)

Anderson drove to the Brucker residence. (16 RT 2520-2522; 22 RT 3751-3752.) The Brucker house sits below the elevation of the roadway, at the end of a long driveway. (15 RT 2428-2429, 2433-2436.) According to Handshoe, Anderson parked the Bronco in the Brucker's driveway, near the street. (22 RT 3753-3754, 3865, 3867.) Anderson and Huhn got out of the Bronco and walked down the driveway toward the front door of the house. (22 RT 3755.) Anderson was wearing a disguise, consisting of a "silverfish brown-gray" wig and a baseball cap. (22 RT 3761-3762, 3861.) He was also carrying a .45 caliber handgun tucked under his arm. (22 RT 3756.) Handshoe remained in the Bronco as a lookout; he was supposed to alert his confederates if anyone came toward the house by using a walkie-talkie Anderson had given him. (22 RT 3754-3755.) From his vantage point in the Bronco, Handshoe could not see the front of the house where Anderson and Huhn walked to. (22 RT 3755.)

Within two minutes, Handshoe heard a gunshot and then heard Brucker scream. (22 RT 3757.) Anderson and Huhn ran back to the Bronco and got inside. Anderson drove the Bronco away from the area. (22 RT 3757-3761.)

As he drove away, Anderson said things had gone wrong, and that he "shot the guy." (22 RT 3759.) After a short while, Handshoe asked to be let out of the Bronco near his friend Rory Fay's house, which was about two or three miles from Handshoe's mobile home. (22 RT 3761-3762, 3870.) Before Anderson let Handshoe out, he told Handshoe and Huhn that if they said anything, they "would be next." (22 RT 3761.)

Four witnesses testified they saw a Bronco driving near Brucker's residence the day of the murder. Kenneth Leonard testified he was "cut-off" by a "dark-colored vehicle, which [he] assumed was a Bronco at the time,"

as it came out of the Brucker's driveway. (18 RT 2980-2981, 2984-2986, 2991.)[3] Leonard was shown Exhibit 20, which contained four photographs of Anderson's Bronco. (15 RT 2441-2442; 18 RT 2982; 22 RT 3666-3667.) Leonard testified that Anderson's Bronco was the same model as the one that cut him off, but that, due to how quickly the incident happened, he could not say if it was exactly the same one. (18 RT 2982, 2986.) He had previously told Investigator Baker that the Bronco he saw was darker, and had told police that it was black. (18 RT 2987-2989.) Leonard remembers seeing two figures in the Bronco, and thinks he told police that the driver might have been wearing a ball cap. (18 RT 2980, 2982.)

Penelope Hartnett testified that she lived just down the street from the Bruckers. (18 RT 2999-3000.) On the day of the murder, she "heard a loud rumble of a car zooming by really fast, so it made me pop my head up to look up, and I saw a brown Bronco with a beige bottom zooming by my house. . . ." (18 RT 3000.) Hartnett testified that the photographs of Anderson's Bronco in Exhibit 20 looked "very similar" to the one she saw. (*Ibid.*)

Megan Guisti, who was 13 years of age at the time of trial, testified that while riding her bicycle on Brucker's street, she saw a tan Bronco being driven by a man with sunglasses and a mustache. She said the Bronco depicted in Exhibit 20 looked darker than the one she had seen. (19 RT 3258-3264.) Guisti had previously told Investigator Baker that the driver also wore a hat. (24 RT 4170-4171, 4200-4201.)

---

[3] During his trial testimony, Leonard marked on Exhibit 13 the driveway from which the Bronco emerged. (18 RT 2980-2981.) That exhibit had been previously identified as an aerial photograph showing Brucker's house and the surrounding residences. (15 RT 2435-2436.) During closing argument, Anderson's attorney stated that Leonard indicated the Bronco emerged from the Brucker's driveway. (30 RT 5207.)

Dustin Vangorkum lived near the Bruckers, and was working in front of his house the day of the murder. (18 RT 3083-3084.) He noticed a certain car drive by at a speed that was a lot faster than most cars. (18 RT 3084, 3086, 3090.) When asked if the Bronco depicted in Exhibit 20 looked like the car that he saw speeding, Vangorkum answered, "That is the vehicle." (18 RT 3085.) He explained that the two-tone paint job on the car was "pretty outstanding, and it's a vehicle that we hadn't seen in our neighborhood before." (*Ibid.*) Vangorkum (a car enthusiast) (18 RT 3091) further described the features of the Bronco that caught his attention: "The wheels and tires were distinctive. They had a little oversized tire on it. I'm not – I wasn't sure at the time if that was distinctive to Broncos of that year, but most distinctively what caught my eye and attention was the exhaust. It didn't really sound like a factory exhaust; it was a little deeper in tone, not more of a quiet exhaust or what anybody would typically put on a car." (18 RT 3086.) Vangorkum stated the exhaust sounded "loud." (*Ibid.*) On cross-examination, Vangorkum testified that he told police he believed the distinctive sound of the Bronco came from a modified exhaust system, as opposed to a defective exhaust system, i.e., one without leaks in it. (18 RT 3093-3094.) However, he qualified that statement during his testimony by pointing out that he could not say definitively that it was modified without actually inspecting the car. (18 RT 3093.)

After being shot, Brucker called 911. A recording of that call was admitted in evidence and played for the jury. (15 RT 2323; 24 RT 4240-4241; 8 CT 1635; 9 CT 1886.) According to a transcript of that recording, Brucker told the dispatcher that two white males knocked on his door, and that one of the men shot him one time in the heart. (7 CT 1421-1424.)

Deputy Sheriff Karl Miller responded to the residence. He found Brucker sitting on a stool inside the house, holding his left hand on his

chest. There was blood on his white shirt. (17 RT 2821-2822.) Brucker told Deputy Miller that two white males came to his door, and that he opened his door and told them to "get the fuck off my property." The males said something back to Brucker, who told them again to "get the fuck off my property." (17 RT 2823.) Brucker reported that one of the men responded by saying, "fuck you," and shooting him in the chest with an automatic weapon. (17 RT 2823-2824, 2838-2839, 2841.)

Brucker told Miller that his assailants were white males. He further described the shooter as being in his late 30's, with hair and a full beard that were "salt-and-pepper" colored, and wearing a baseball cap and dark clothing; all he offered about the other assailant was to say he looked to be about in his late 20's. (17 RT 2825, 2832-2836.) Police found a .45 caliber shell casing outside the front door of Brucker's house. (17 RT 2824, 2826-2827; 18 RT 3009-3010.) They attempted to lift fingerprints from the shell casing, but could not obtain any with sufficient detail for comparison purposes. (18 RT 3008-3009, 3013-3014.)

Brucker lost consciousness while riding in an ambulance, and was pronounced dead at a hospital. (17 RT 2827.) An autopsy confirmed that Brucker suffered a single gunshot wound to the chest, and showed that the projectile perforated the right side of his heart. (18 RT 3056-3059.)

5. Anderson admits involvement in the murder to a roommate

Travis Northcutt, one of Anderson's roommates, spoke to district attorney investigator Steven Baker in September 2004. (20 RT 3505-3506; 24 RT 4167-4168.) Northcutt was initially reluctant to talk, but eventually relented. (24 RT 4168.) He told Investigator Baker that he did not care for Anderson, and that Anderson was an asshole. (24 RT 4182-4183.) Northcutt stated that sometime between December 2002 and April 2003, Anderson said to him that "he was coming along and that something big

was going to happen, a big hit that involved a safe," and that Anderson asked him "if he wanted to be part of it." (24 RT 4169, 4183.) Northcutt also stated that, while watching television with Anderson and Stevens, a newscast aired regarding the murder of the owner of the El Cajon Speedway. Anderson told Northcutt he was only the third person to know that Anderson was involved, and to "keep his fucking mouth shut" or else Northcutt "would be next." (24 RT 4169-4170.) Finally, Northcutt told Investigator Baker he had seen Anderson wearing a goofy hairpiece, and that Anderson drove a Ford Bronco most of the time. (24 RT 4170.)

6. Anderson changes his appearance, flees to Oregon, gives a false name to police, and plots his escape from jail

On April 24, 2003, Anderson visited his former girlfriend, Charlene Hause, and her mother to say goodbye. (21 RT 3573, 3582, 3609.) He told them he was leaving the area. (21 RT 3575, 3609.) He explained to Hause that he was leaving town because of a parole violation, and that he was driving the white truck because "they" knew his Bronco. (21 RT 3574, 3582, 3583-3584.) Hause testified that Anderson had shaved the mustache he had worn since at least January. (21 RT 3575.) Earlier that day, law enforcement agents had conducted a parole search of the Poway condominium where Anderson lived. (21 RT 3621-3622, 3631.) Anderson was not present during the search. (21 RT 3633-3634.) His Bronco, however, was parked in the carport. (19 RT 3233; 21 RT 3618-3619, 3622, 3634.) Stevens was taken into custody and returned to prison for a parole violation based on the presence of stolen property inside the condominium. (21 RT 3622, 3631-3632.)

On April 30, 2003, Anderson left a voice message for Stevens's parole agent. (21 RT 3629, 3632-3633.) Anderson was angry that Stevens had been returned to prison based on the presence of the stolen property

inside the condominium, telling the agent, "It's all fucking mine. Come and get me." (21 RT 3629-3630.)

On May 16, 2003, Anderson was stopped for speeding while driving Stevens' white truck on Highway 20 in Harney County, Oregon. (23 RT 4061-4062, 4069.) He failed to provide an identification card or driver's license to the Oregon State Trooper who stopped him, and verbally identified himself as James Stevens, with a date of birth of November 16, 1973. (23 RT 4062-4063.) The trooper determined there was no DMV record of such a person. (23 RT 4063-4064.) He also learned that the truck Anderson was driving "had a California felony status on it." (23 RT 4064.) The trooper wasn't sure what that meant, but it made him suspicious and he searched the truck. (23 RT 4064-4065.) He found a handcuff key, syringes, marijuana seeds, materials for making false identification cards, and two firearms: a .22 caliber handgun underneath the driver's seat, and a shotgun in a toolbox in the bed of the truck. (23 RT 4066.) Based on the above circumstances, the trooper was concerned about public safety. (*Ibid.*) To enable him to gather more information, he arrested Anderson under Oregon law for failing to present a driver's license, and transported Anderson to jail. (23 RT 4067.) Oregon law enforcement officials learned Anderson's true identity the next day. (23 RT 4082.)

Oregon officials obtained a warrant and searched the truck Anderson had been driving. (23 RT 4082.) Items found inside the truck included the following: a laminated "U.B.C. scaffolding qualification" card in the name of James Stevens, but with Anderson's picture on it (23 RT 4084-4085); four sheets of paper with several different signatures on it (23 RT 4086); four types of "whiteout," a glue stick, a magnifying glass, several paintbrushes or "pen-type" items, blank self-laminating cards, self-adhesive labels, notary seals, a passport photo of Anderson, and rubber stamps indicating "Original" and "Acknowledgment. Please sign and return

immediately" (23 RT 4088-4089); a book entitled "Counterfeit I.D. Made Easy" (*ibid.*); a certificate of completion in Anderson's name for instruction in welding (23 RT 4089); a certificate of participation in Anderson's name for an adult school, dated October 6, 1997 (23 RT 4090); a certificate in Anderson's name for vocational education in auto body and fender repair, dated September 15, 1997 (*ibid.*); an unsigned certificate of baptism with the handwritten names of James Steven Hall, Steven Lee Hall, and Ruth Ann Powell on it (*ibid.*); a certificate of baptism with no names on it other than the sponsoring names and a pastor's signature (*ibid.*); a photocopy of a birth certificate for Raoul Guivera indicating a birthdate of March 9, 1970 (*ibid.*); six pages of blank certificates (23 RT 4091); five pages of blank baptism certificates (*ibid.*); a page showing different seals including various state seals (*ibid.*); a date stamp and embossing tool (23 RT 4093); and a Polaroid I-Zone digital camera (*ibid.*).

While awaiting extradition to California, Anderson told a cellmate that he had "warrants from California and wanted to get out of jail" (23 RT 4025), and talked about escaping (23 RT 4008-4010, 4014-4016, 4033-4043). The Harney County jail, where Anderson was housed, was located in the small town of Burns, Oregon, which was "basically in the middle of nowhere." (23 RT 4019.) The jail was staffed with no more than two guards at any given time. (23 RT 4101.) Anderson was in possession of a handcuff key; he told a cellmate he brought the key into the jail in his mouth. (23 RT 4013, 4035, 4042.)

Anderson plotted with one of his cellmates to overpower the guards. (23 RT 4010, 4014-4016, 4033-4034, 4043.) They would strip the guards of "money, radios, cell phones, if they had anything on them, and gag them and tie them and lock them in the cell and take everything away." (23 RT 4034.) After locking the guards in the cell, they would take the guards' keys and get the guns that were locked up in the jail, and steal a police car.

(23 RT 4036-4037.) Anderson said they would "shoot it out with the cops if it came down to that." (23 RT 4036.) At Anderson's request, another cellmate provided him with a hand-drawn map of the town of Burns, depicting the location of the jail in relation to the rest of the town. (23 RT 4011-4012.)

Oregon officials searched Anderson's cell on July 3, 2003. (23 RT 4094.) Items found that were of interest to law enforcement included the hand-drawn map described above, a piece of plastic that was "bent and is in a point formation," three razor blades from disposable razors (found interspersed inside a deck of cards), two handcuff keys, a paper clip that had one of its ends sharpened to a point, and two staples. (23 RT 4095-4099.)

7. While in jail awaiting trial, Anderson attacks a witness who testified against him at the preliminary examination

In February 2005, while awaiting trial, Anderson was placed in the same area of a jail facility as Paulson. Paulson had testified against Anderson in December 2003 at a preliminary examination. Anderson and four others dragged Paulson into a cell and beat him. (17 RT 2863-2864; 20 RT 3452-3456, 3464.) After the beating, Paulson was taken on a stretcher to a nurse at the jail. (20 RT 3423-3424.) She examined him, and then asked that he be taken to a hospital. (20 RT 3425.) Paulson was transported to a hospital where he received staple sutures to close a one-inch cut to his scalp. (20 RT 3425-3428.)

B. Defense Case

Anderson did not testify, but called various witnesses in an effort to impugn the prosecution's case in different ways.

James Stevens testified he met Anderson in 1996 when they became cellmates in prison. (27 RT 4747.) After Stevens was paroled in the early

part of 2000, he lived in a condominium in Poway owned by his parents. (27 RT 4747-4748.) Anderson began living there too after he was paroled in the early part of 2001. (27 RT 4748-4749.) Between then and April 2003, Anderson and Stevens often worked construction jobs together. (27 RT 4749-4751.) It was not unusual for Anderson to drive Stevens's white Ford F-150, or for Stevens to drive Anderson's Ford Bronco. (27 RT 4763-4765, 4767.)

According to Stevens, Anderson was driving the white Ford F-150 on the day of the murder; the Bronco was in the condominium carport. (27 RT 4769, 4792-4793.) Anderson returned to the condominium that evening. (27 RT 4772-4773, 4806.) Stevens did not recall anything unusual about Anderson when he returned, and they both went to work at the same construction job the following day. (27 RT 4773.) The contractor testified Anderson appeared calm at the job site that day, and he did not notice anything unusual about him. (27 RT 4730.) Stevens denied seeing news coverage of the Brucker murder in the presence of Anderson and/or Northcutt, and denied ever hearing Anderson tell someone to "shut the fuck up" while watching such a newscast. (27 RT 4763.)

Department of Motor Vehicles records showed that in April 2003, there were 1,501 Ford Broncos, model years 1985 through 1995, registered to people residing in the eastern San Diego County communities of Alpine, El Cajon, Lakeside, and Santee. (27 RT 4851.) There were 559 such Broncos registered to people in the communities of Lemon Grove, La Mesa, and Poway. (27 RT 4852.)

Other evidence presented by Anderson related to the credibility of the prosecution's witnesses, in particular Peretti, Handshoe, and Paulson. (See, e.g., 24 RT 4300-4305 [when stopped by police while riding in a stolen car with Huhn on May 1, 2003, Peretti made no mention of the Brucker murder]; 26 RT 4481 [Paulson was arrested May 9, 2003, for driving a

stolen car, possession of stolen property, and resisting arrest]; 26 RT 4490-4499 [evidence contradicting Handshoe's claim during a "free talk" in April 2005 that he and Anderson set off an alarm at a home near the Brucker residence when they attempted to break into the home the day before Brucker's murder]; 26 RT 4556-4557 [Peretti's long-time friend testified that Peretti is a liar]; 27 RT 4667 [on May 15, 2003, Peretti denied to detectives that Huhn had been involved in the murder in any way].)

II. SUMMARY OF FACTS RELATING TO PENALTY

A. Prosecution Case

The prosecutor presented evidence that Anderson committed crimes on five occasions prior to the Brucker murder: one involved Anderson shooting at a motorist; one involved the possession of stolen property; the other three involved residential burglaries.

1. Anderson shot at a motorist because she "aggravated" him with her driving

On July 2, 1995, Dean Wall was a passenger in a truck being driven by Anderson in the area of Alpine, California. (35 RT 5574, 5577.) Anderson was driving slowly, maybe 10 miles an hour under the speed limit. A car that was behind them passed in front of them. When the car merged back in front of the truck, the driver used the blinker and "gave [them] plenty of room." (35 RT 5575.) Nonetheless, Anderson said to Wall something like, "That fucking bitch, who does she think she is?" (35 RT 5576.) After a short distance, the car made a right turn at an intersection; Anderson rolled into the intersection and made a left turn. (35 RT 5574-5575, 5576, 5581-5582.) Anderson then reached his arm through a sliding window in the back of the truck and fired 12 rounds at the car from a .22 caliber pistol. (35 RT 5528-5529, 5574-5575.) Wall then fired one round

from a .357 Magnum at the car's tires in an attempt to disable it and prevent the driver from getting to a phone. (35 RT 5575.)

A jogger flagged down a sheriff's deputy, reported the incident, and provided a description of the truck. (35 RT 5559-5560.) About two minutes later, the deputy saw the truck parked at a "map stop" off of Interstate 8. (35 RT 5561, 5571.) He positioned his patrol unit behind the truck, and approached the truck on foot. Anderson was seated in the driver's seat. (35 RT 5562.) The deputy saw the butt of a handgun sticking out from underneath the driver's seat. The gun was a .22 caliber pistol. (35 RT 5563.) The pistol was unloaded, but there was a magazine containing eight rounds of .22 ammunition within inches of it. (35 RT 5569-5570.) There were 32 rounds of .22 ammunition on the front seat of the truck, and a full box of .22 ammunition in a briefcase. (35 RT 5570.) Wall had a loaded .357 Smith and Wesson revolver tucked in his waistband. (35 RT 5564-5565, 5569.) Two expended shell casings from a .22 caliber bullet were found in the bed of the truck, and one such casing was found inside the cab of the truck. (35 RT 5556.)

While in jail in Oregon, Anderson told a cellmate about the above incident. Anderson explained that he and someone else had been on their way to a golf course to rob someone who had a Porsche. Another driver aggravated him and he "unloaded a clip at the car." (35 RT 5545.)

2. Anderson was convicted of possessing a stolen car and three separate residential burglaries

In April 1995, Anderson was convicted of one count of residential burglary and one count of possession of a stolen vehicle. In July 1995, in a separate case, Anderson was convicted of two counts of residential burglary. (35 RT 5557.)

B. Defense Case

The defense called Michael Mason as a witness. Mason testified that he shared a jail cell with Huhn for three or four weeks in 2003. During that time, Huhn said to Mason that he personally shot Brucker, and that only he and Handshoe approached the door of the residence. (35 RT 5614-5617.) Anderson refused to allow his attorneys to present any further mitigating evidence. (35 RT 5507.) However, over the objection of his attorneys (35 RT 5505-5507; 9 CT 1943-1944), Anderson made the following statement to the jury:

> I've given a lot of thought to what I want to say to you guys, but, you know, start off [*sic*] is nine pages. I'm down to one page, because, basically, I think anything I say to you would be a wasted breath. In one ear, out the other.
>
> But I feel compelled to tell you two things: one is that I don't give a shit. Give me the death penalty. If you believe I'm guilty, kill me.
>
> The second is: I'm innocent. Your verdict was wrong, and I hope you all can't sleep with yourselves.
>
> I don't know what you expected from my attorneys. This ain't Perry Mason or Matlock. No one is going to run into a courtroom saying, "I did it." What the hell did you expect? Did you not listen to the witnesses? Not a single piece of evidence.
>
> The Court: Mr. Anderson, I've indicated to you you can make a statement in the form of testimony. This is your chance to make a statement that addresses mitigating factors.
>
> If you want to talk about the penalty that you feel is appropriate, I encourage you not to do that, but if you feel compelled to do that – but this is not a chance for you [to] admonish the trial jurors.
>
> Please proceed if you have something relevant to testify about.

The Defendant: I really despise all of you and your decision. I don't think you were reasonable or fair. Thanks for nothing.

(35 RT 5622-5623.)

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO SEVER THE TRIAL OF ANDERSON AND LEE BECAUSE THEIR DEFENSES WERE NOT ANTAGONISTIC AND THERE WAS SUBSTANTIAL INDEPENDENT EVIDENCE OF ANDERSON'S GUILT

Anderson contends the trial court's refusal to sever his case from Lee's constituted an abuse of discretion, and resulted in an unfair trial that violated his federal and state constitutional rights to due process of law, because Lee's defense was antagonistic to his own defense. (AOB 37-44.) Respondent disagrees. Lee's defense was not antagonistic to Anderson's case. Even if it were, there was sufficient independent evidence proving that Anderson murdered Brucker such that severance was not required, and the joint trial comported with principles of due process.

A. Trial Court Proceedings

Before trial, Anderson filed a severance motion asking to be tried separately from his codefendants. (1 CT 155-156, 162-196.) Anderson argued that severance was required because he anticipated the prosecution would introduce extrajudicial statements of his codefendants at a joint trial, and that the admission of such statements would violate the *Aranda-Bruton* rule. (1 CT 181-191; see *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] [holding that a nontestifying codefendant's extrajudicial statement that incriminates the other defendant is inadmissible as a violation of the latter's rights to confrontation and cross-examination].) He also claimed that severance was required because he expected his codefendants to assert antagonistic defenses. (1 CT 192-195.)

The trial court denied the motion, but ordered that a separate jury hear the case against Huhn after the prosecutor stated his intention to offer in evidence extrajudicial statements made by Huhn. (3 RT 600-4 thru 600-10, 600-30 thru 600-31; 9 CT 1788; see *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 ["The use of dual juries is a permissible means to avoid the necessity for complete severance"].) The court's decision that antagonistic defenses did not require severance was informed by its review of the preliminary hearing testimony and the statement of facts contained in the severance motions, and was based on its conclusion that "this does not appear to be a case in which a successful defense by one defendant will preclude the acquittal of another, or the conviction of one will necessarily trigger the acquittal of another." (3 RT 600-8.) The court explained:

> [T]he district attorney is perfecting the case on a felony murder theory and seeking to find each defendant guilty of first-degree murder, based upon each defendant's alleged role in the attempted or alleged attempted residential burglary and robbery. [¶] This does not appear to be a case in which the district attorney will toss the facts into a jury's lap and ask the jury to sort out who is guilty of murder and who is not. The district attorney is contending all four are equally guilty of first-degree murder.

(3 RT 600-8.)

In a later pretrial motion, Anderson joined a request by Lee to sever the cases. (5 CT 1075-1080.) Anderson argued he should be tried separately from Lee for the same reasons he offered in his previous motion; namely, to avoid *Aranda-Bruton* issues and because he expected Lee's defense to be antagonistic to his own. (5 CT 1075-1080; 4 RT 673-679.)

At the hearing on the motion, Lee's counsel said he would not contest the allegation that Anderson, Huhn, and Handshoe committed the murder. (4 RT 671) Instead, counsel explained, Lee's defense would focus on the motivation for the murder, in an effort to show that Lee was not a party to

the alleged conspiracy that resulted in the killing of Brucker. To illustrate, counsel asked rhetorically, "[W]as it in response to, you know, Professor Moriarty over here, the grand schemer here, or was it for far different motivations? Either for Mr. Anderson's personal motivations or because we have basically a junkie gang that decided to go for the bigger pot of gold rather than breaking into cars to support their meth habit." (4 RT 671.)[4]

Anderson's counsel claimed that Lee's proposed defense required severance of the cases because it was exclusive of Anderson's defense, stating that "our defense is Mr. Anderson did not participate in the attempted robbery, burglary. He was not there at the time of the homicide. Mr. Roake [Lee's counsel] is saying that Mr. Anderson did this out of his own motivations and on his own." (4 RT 679.)

The court again denied the severance motion. (4 RT 689-691; 9 CT 1810.) The court explained:

> I think it is fairly clear from the factual statements that have been provided in all these motions and previous motions that the district attorney agrees in term of, I'll call it transactional appearance and transactional quality, that Mr. Lee is not in the same category as the other defendants. However, it's the argument that he hatched the idea, he gave some background information, he's encouraged, he's an aider and abettor. And I don't believe it's that classic situation where alleged antagonistic defenses really create prejudice.
>
> The district attorney is not trying to make Mr. Lee out as a triggerman or as a getaway driver, or as a safe cracker, so I don't feel that this issue of weakness carries much weight because the People's theory of the case, what's been presented, I don't think

---

[4] "Professor Moriarty is a fictional character is some of the Sherlock Holmes stories written by Sir Arthur Conan Doyle. Moriarty is a criminal mastermind whom Holmes describes as the 'Napoleon of crime.'" ("Professor Moriarty," Wikipedia, The Free Encyclopedia, accessed February 26, 2015, http://en.wikipedia.org/wiki/Professor_Moriarty.)

they're trying to harness Mr. Lee's culpability on the culpability of others. It's here's what he did, and legally this is why he's culpable under a felony murder theory.

(4 RT 689-690.)

B. Standard of Review

A trial court's denial of a motion to order that a defendant be tried separately from a codefendant is reviewed for abuse of discretion, in light of the circumstances known to the court at the time of the ruling. (*People v. Montes* (2014) 58 Cal.4th 809, 835; *People v. Turner* (1984) 37 Cal.3d 302, 313 ["Although what transpires at trial determines the prejudicial effect of an erroneous ruling on a motion for separate trials, '[whether] denial of a motion to sever the trial of a defendant from that of a codefendant constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion rather than on what subsequently develops.'"].) However, even if the court did not abuse its discretion, a reviewing court "may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*People v. Turner*, at p. 313; accord *Montes*, at p. 835.)

C. Governing Law

The Legislature has expressed a strong preference for joint trials. (*People v. Souza* (2012) 54 Cal.4th 90, 109; see § 1098.) Thus, defendants charged with the same crimes against the same victims must be tried jointly, unless the trial court orders separate trials. (*People v. Gamache* (2010) 48 Cal.4th 347, 381; *People v. Carasi* (2008) 44 Cal.4th 1263, 1296.) Here, the trial court was presented with a "classic case" for a joint trial, because both Anderson and Lee were charged with the same crimes against the same victim. (*Souza*, at p. 109 [defendants charged with having

committed "common crimes involving common events and victims" presents a "classic case" for a joint trial].)

This Court has stated that separate trials may be ordered where codefendants advance conflicting, or antagonistic, defenses. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1296.) However, a mere conflict in defenses is insufficient to require severance, "'even if the defendants are hostile or attempt to cast the blame on each other.'" (*People v. Hardy* (1992) 2 Cal.4th 86, 168.) "If the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.'" (*Ibid.*, italics in original.) Rather, the conflict must be "'so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" (*Ibid.*; see also *People v. Letner* (2010) 50 Cal.4th 99, 150 ["we have concluded that a trial court, in denying severance, abuses its discretion only when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty"], italics in original.) Accordingly, "'[a]ntagonistic defenses do not warrant severance unless the acceptance of one party's defense would preclude acquittal of the other party.'" (*People v. Montes*, *supra*, 58 Cal.4th at p. 835.) "'When, however, there exists *sufficient independent evidence* against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.'" (*Carasi*, at p. 1298, quoting *People v. Coffman and Marlow* (2004) 34 Cal. 4th 1, 41, italics in original.)

D. The Trial Court Properly Refused to Order Separate Trials of Anderson and Lee

In light of the foregoing principles, the trial court properly denied the severance motion for two reasons: Lee's defense was not antagonistic to

Anderson's defense, and there was substantial independent evidence demonstrating Anderson's guilt. These points are discussed in turn below.

At the time of the trial court's ruling, Lee's anticipated defense was not antagonistic to Anderson's defense. As previewed by his attorney, Lee's defense was that he was neither an aider and abettor nor a coconspirator to the crimes that resulted in the murder of Brucker, regardless of what he might have said about taking money from a safe. (See 4 RT 671, 680.) The success of this defense did not hinge on Anderson's participation in the murder; rather, it depended on simply convincing the jury that whoever committed the murder did so independently of Lee. Thus, a jury could do both of the following: find that Lee's talk about stealing money from a safe was wholly unrelated to, or too attenuated from, the actual commission of Brucker's murder to hold him criminally liable, and, accept Anderson's defense that he had nothing to do with the murder, and believe that persons other than Anderson, for example the "junkie gang" of Huhn and Handshoe as suggested by Lee's counsel (4 RT 671), perpetrated the murder in the course of a botched burglary and robbery. Under these circumstances, severance was not required. (See *People v. Hardy*, *supra*, 2 Cal.4th at pp. 168-169 [defenses are not "antagonistic," and severance is not required, unless "acceptance of one party's defense will preclude the acquittal of the other," even where expected defenses are technically conflicting in the sense that multiple defendants deny culpability and speculate that one or more codefendants are responsible].)

Moreover, at the time of the ruling, the record revealed there was substantial admissible evidence of Anderson's involvement in the murder independent of any conflict between the anticipated defenses of Lee and Anderson. Paulson testified at the preliminary hearing that in early April 2003, while at Handshoe's mobile home, he heard Anderson, Handshoe, and Huhn discuss plans to rob the owner of the El Cajon Speedway.

Handshoe said he would be a lookout, Huhn said he would open the safe, and Anderson said he would hold anyone hostage who appeared at the scene, and that he would "pistol-whip" the victim if he tried to do anything. (1 PHT[5] 164-167, 169; 2 PHT 235-236.)

Peretti testified that about 12:30 in the afternoon on the day of the murder, she went to Handshoe's mobile home where she saw Anderson, Handshoe, and Huhn. (3 PHT 462, 476.) Anderson was armed with a handgun, and wore a disguise, including a "salt and pepper" colored wig or hairpiece. (3 PHT 484-485, 490-491, 570, 657.) Anderson declared they were "going to come up on some money," and explained to Handshoe and Huhn how they were going to steal money from a safe located inside a house. (3 PHT 480-484.) Peretti then watched Anderson, Handshoe, and Huhn drive away in Anderson's Bronco. (3 PHT 488, 492-493.) A witness saw a similar Bronco coming out of Brucker's driveway. (6 PHT 1043-1044.) Huhn returned to the mobile home and told Peretti that Anderson knocked on the door of the house, told Brucker to get on the floor, and then shot Brucker in the chest after Brucker told him to "F off . . . and that he ain't getting anything from him." (3 PHT 489-500.)

Before he died, Brucker told a deputy sheriff that the person who shot him had "salt and pepper" colored hair. (2 PHT 332-333, 339.)

Shortly after the murder, Handshoe told an acquaintance, Robert Forchette, that he had gone to a house with Huhn and a person named Stressed Eric, and that Stressed Eric shot someone at the house. (2 PHT 389-393, 395.) Huhn told a friend, Melissa Adkins, that he had been present when the owner of the El Cajon Speedway owner had been shot, but that he was not the shooter. (5 PHT 885-887.) Peretti told Adkins that Handshoe, Huhn, and Stressed Eric had set out to rob Brucker, and that Huhn was

[5] PHT refers to the Preliminary Hearing Transcript.

standing right next to Stressed Eric when Brucker was shot. (5 PHT 887-888, 902-904, 907, 913.) Peretti testified that Stressed Eric was a nickname for Anderson. (3 PHT 648; 4 PHT 786.) The parties stipulated that Anderson has a tattoo that says "Stressed Eric" on his right forearm. (4 PHT 787.)

Anderson's former girlfriend, Charlene Hause, told investigators that she last saw Anderson in April 2003. At that time he was driving a white truck (she had previously only seen him driving the Ford Bronco) and had shaved off his moustache. (5 CT 931-932.) Anderson explained to Hause that he had done something and violated his parole, and that "'they knew his Bronco.'" (5 CT 932.) He also told Hause he was leaving for Las Vegas or Reno. (*Ibid.*)

The foregoing evidence constituted substantial evidence of Anderson's guilt, and did not depend on whether a jury would accept or reject Lee's defense.

Therefore, because the anticipated defenses were not antagonistic, and because there was substantial independent evidence of Anderson's guilt, the trial court properly denied Anderson's request to be tried separately from Lee.

E. Even if the Trial Court Abused its Discretion Under State Law by Denying the Motion to Sever, the Error Was Harmless

Even if the trial court should have granted the motion to sever, Anderson is not entitled to relief unless he can show prejudice. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 41 ["Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial."]; *People v. Watson* (1956) 46 Cal.2d 818, 836-837 [California Constitution precludes reversal

unless error results in a miscarriage of justice, which will be found only if, after an examination of the whole record, the court determines it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error]; Cal. Const. art. VI, § 13 ["No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].)

The joint trial here did not result in a miscarriage of justice. Lee offered no evidence designed to implicate Anderson in the murder; indeed, Lee did not testify or otherwise offer any affirmative evidence at all. And, as anticipated, Lee's defense strategy was to convince the jury that the evidence failed to show he was even aware of any actual plan to rob Brucker—much less that he aided and abetted such a plan; instead, he argued, the evidence suggested that the "trailer tribe" of Handshoe, Huhn, and Anderson committed the crime independent of Lee for the purpose of getting money to buy drugs. (See 29 RT 5139-5175 [closing statement by Lee's counsel].) As explained above, this defense was not antagonistic to Anderson's, and in fact did not undermine Anderson's ability to argue to the jury that he was not involved in the plan to rob Brucker. (See 30 RT 5188-5261 [closing statement of Anderson's counsel, in which she argued that the evidence offered by the prosecution was insufficient to prove Anderson's involvement; counsel never once referred to Lee or his defense, or otherwise suggested that the jury must reject Lee's defense in order to accept Anderson's defense].) In addition to the fact that Lee's defense did not interfere with Anderson's ability to present his own defense, the evidence presented against Anderson was strong, as discussed below.

Paulson testified that during the first week of April 2003, at Handshoe's mobile home, Anderson was present during a discussion about

a robbery that involved a safe. (17 RT 2876-2878.) During that discussion, Anderson said he could hold the victim hostage and "pistol whip" him if necessary. (17 RT 2879.)

Peretti testified to the following regarding the day of the murder: Anderson was at Handshoe's mobile home with guns and a disguise (16 RT 2500-2502, 2504, 2507-2510); Anderson talked about committing a robbery of a house with a red car and white car and a safe (16 RT 2510, 2512-2516); Anderson pulled a handgun from his waistband, pulled the slide back, and said, "Let's do this fast," after which he drove away in his Bronco with Handshoe and Huhn (16 RT 2520-2521, 2533-2534, 2538).

Handshoe testified that, on the day of the murder, Anderson was in Handshoe's mobile home with a gun and disguises, Anderson talked about burglarizing a house, and Anderson said something to the effect of, "We're going to do this right." (22 RT 3792-3793, 3857-3860, 3892-3894, 3911-3913). Handshoe also testified that Anderson drove him and Huhn to the Brucker residence where Anderson approached the front door with a .45 caliber handgun, and that a short time later, after a gunshot rang out, Anderson returned to the car and admitted he had "shot the guy." (22 RT 3751-3759.)

Police found a .45 caliber shell casing outside the front door of Brucker's house. (17 RT 2824, 2826-2827; 18 RT 3009-3010.)

Kenneth Leonard testified that he saw a Ford Bronco, the same model as Anderson's, coming out of the Brucker driveway the day of the murder. (18 RT 2980-2986, 2991; see 30 RT 5207.) Three other witnesses testified to seeing a Bronco being driven in the area the day of the murder. (18 RT 2999-3000, 3083-3085; 19 RT 3258-3264.)

Finally, the prosecutor presented evidence of the following: Anderson admitted to Northcutt he was involved in the murder, and threatened Northcutt that he "would be next" if he told anyone about Anderson's

involvement (24 RT 4169-4170); Anderson shaved his mustache, fled to Oregon in his roommate's truck, gave a false name to police in Oregon when he was stopped for speeding, and plotted to escape from jail after he was arrested (21 RT 3574-3575, 3582; 3583-3584; 23 RT 4008-4010, 4014-4016, 4033-4037, 4043, 4061-4063); the color of the wig that Peretti saw Anderson wearing when he left Handshoe's mobile home was consistent with Brucker's description of the hair color of the person who shot him (16 RT 2509-2510; 17 RT 2825, 2834-2836).

All of this evidence was independent of Lee's defense, and highly incriminating of Anderson.

Anderson disputes the strength of the evidence offered against him, arguing that it was "unconvincing" because "built on the testimony of three untrustworthy teenage witnesses," referring to Handshoe, Peretti, and Paulson. (AOB 42.) While each of these witnesses came with credibility issues, they were thoroughly cross-examined by three defense attorneys during the trial. And their testimony was substantially consistent, which tended to establish credibility. Also, as demonstrated immediately above, the prosecution presented other, credible evidence that corroborated important aspects of Handshoe's and Peretti's testimony regarding the day of the murder, and that independently incriminated Anderson. Ultimately, the testimony of the prosecution witnesses, combined with all the trial evidence, was compelling.

In light of the whole record, and for the above reasons, it is not reasonably probable that Anderson would have obtained a more favorable outcome if he had been tried separately from Lee. Therefore, reversal is unwarranted even if the trial court abused its discretion by denying the pretrial motion to sever.

F. The Joint Trial did not Result in a Grossly Unfair Trial That Requires Reversal Under the Due Process Clause of the Federal Constitution

A determination of whether the trial court properly denied the severance motion at the time it was made, and whether an improper denial was harmless, does not end the inquiry because, even when a trial court properly denies a pretrial motion for severance, a reviewing court must also consider the actual impact at trial of the joinder to determine whether "a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*People v. Turner*, *supra*, 37 Cal.3d at p. 313.)

Anderson contends that his trial was grossly unfair for two reasons: because the acceptance of Lee's defense by the jury necessarily signaled a rejection of his defense, and because, according to Anderson, "the trial appeared to have three prosecutors instead of one against Anderson. . . ." (AOB 41.) These arguments lack merit.

Anderson's claim that his trial was unfair because the jury's acquittal of Lee necessitated the conviction of Anderson is merely a reiteration of his assertion that the defenses were antagonistic. As explained previously, the defenses were not in fact antagonistic. Moreover, antagonistic defenses alone are insufficient to establish that a trial was unfair. (See, e.g., *People v. Turner*, *supra*, 37 Cal.3d at p. 313 [stating that "no denial of a fair trial results from the mere fact that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution"].)

Equally unpersuasive is Anderson's assertion that his trial was unfair because the attorneys for Lee and Huhn "support[ed] the credibility" of Peretti and Handshoe—witnesses whose testimony implicated Anderson. Anderson argues that because of this, "the trial appeared to have three prosecutors instead of one against Anderson," a circumstance that

Anderson concludes, ipse dixit, was unfair. (AOB 41.) This argument misses the mark. A trial is not unfair merely because a codefendant's counsel chooses not to attack the credibility of certain aspects of the prosecution's case that are incriminating of the defendant. Instead, the relevant inquiry must focus on specific and significant prejudice to the defendant, not on a more general "second prosecutor" theory. (See *United States v. Balter* (3rd Cir. 1996) 91 F.3d 427, 434.)

This point is illustrated in *People v. Jackson* (1996) 13 Cal.4th 1164. In that case, the defendant argued he was prejudiced by a joint trial because his codefendant's attorney served in effect as a second prosecutor by bringing out in cross-examination on a number of occasions testimony detrimental to the defendant. (*Id.* at p. 1208.) This Court rejected that claim by focusing on the fact that the defendant failed to identify any evidence elicited by his codefendant's attorney that would have been inadmissible at a separate trial. (*Ibid.*) This Court further observed: "The mere fact that a damaging cross-examination that the prosecution could have undertaken was performed instead by codefendant's counsel did not compromise any of defendant's constitutional or statutory rights." (*Ibid.*)

Likewise, in this case, Anderson has not identified any evidence elicited on cross-examination by Lee's or Huhn's attorney that would have been inadmissible against Anderson at a separate trial. Therefore, the mere fact that they did not help Anderson attack the credibility of certain aspects of the prosecution's case did not result in a violation of Anderson's due process rights.

Even if the consolidated trial resulted in a violation of due process, reversal is unwarranted under the harmless error test articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705], which applies to trial errors that violate the federal constitution. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-308 [111

S.Ct. 1246, 1263-1264, 113 L.Ed.2d 302, 329-330].) "The *Chapman* test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403 [111 S.Ct. 1884, 1892, 114 L.Ed.2d 432, 448].) For the same reasons discussed above in explaining why the consolidated trial did not result in a miscarriage of justice under California law, the record shows beyond a reasonable doubt that the consolidated trial did not contribute to the guilty verdicts against Anderson.

II. The Trial Court Properly Refused to Sever the Burglary Charges from the Murder and Conspiracy Charges Because Joinder Was Authorized by Section 954, There Was Cross-Admissibility of Evidence, and Anderson Failed to Make a Clear Showing That He Would Be Prejudiced by a Joint Trial

Anderson contends the trial court abused its discretion by denying his motion to sever the burglary charges from the murder and conspiracy charges, and that the consolidated trial was grossly unfair, in violation of his due process rights. (AOB 44-54.) To the contrary, the trial court properly denied the motion to sever the charges because joinder was authorized by section 954, there was cross-admissibility of evidence, and Anderson failed to clearly establish there was a substantial danger of prejudice from a joint trial. Moreover, the joint trial of the charges did not result in a grossly unfair trial in violation of Anderson's due process rights.

A. Trial Court Proceedings

Anderson filed a motion seeking to have the burglary charges tried separately from the murder and conspiracy charges. (3 CT 621-638; 6 CT 1345-1348; 4 RT 691-693, 696-709.) Anderson argued that joinder was prohibited by section 954 because the burglary charges were not connected in their commission to the murder and conspiracy charges, and they were a different class of crime than those charges. (3 CT 622-625.) Anderson

further argued that, even if joinder of the charges was permissible under section 954, the court should exercise its discretion to sever the charges to avoid prejudice to his case and to ensure a fair trial. (3 CT 625-637.)

The trial court denied Anderson's motion. (9 CT 1810, 1819; 4 RT 709-713; 6 RT 1110-1112.) The court rejected the argument that joinder was barred by section 954 because it concluded the burglary charges were the same class of crime as the murder and conspiracy charges within the meaning of that section. (4 RT 710.) The court further concluded Anderson had failed to establish that severance was otherwise required to protect him from suffering substantial prejudice at a joint trial. This conclusion was based on the court's findings that there was some "cross-admissibility" of evidence, the alleged burglaries were "garden-variety residential burglaries" that are not inflammatory, the evidence in support of the burglaries did not appear to be comparatively weak or strong in relation to the murder and conspiracy charges, and there was no likelihood of "prejudicial spill-over of evidence" from the burglary charges to the murder and conspiracy charges. (4 RT 710-713; 6 RT 1110-1112.)

B. Standard of Review

A trial court's denial of a motion to sever charges is reviewed for abuse of discretion in light of the record before the court when it made its ruling, and will be reversed only if its decision fell outside the bounds of reason. (*People v. Soper* (2009) 45 Cal.4th 759, 774.) However, even where a pretrial ruling denying severance was correct when made, reversal may be warranted if a defendant shows on appeal that the joinder actually resulted in "gross unfairness," amounting to a denial of due process. (*Id.* at p. 783; *People v. Arias* (1996) 13 Cal.4th 92, 127.)

C. Governing Law

In the interest of efficiency, "[t]he law prefers consolidation of charges," and where the offenses charged are of the "same class," or are "connected in their commission," a joint trial is authorized by section 954. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 771-772; *People v. Stanley* (2006) 39 Cal.4th 913, 933; *People v. Arias*, *supra*, 13 Cal.4th at p. 126.) However, a trial court retains discretion to order that charges be tried separately "in the interest of justice and for good cause shown." (§ 954.) "When exercising its discretion, the court must balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial." (*Arias*, at p. 126.) To show good cause for severance, a defendant must clearly establish there is a substantial danger of prejudice from joinder of the charges. (*Soper*, at p. 773.) The potential for prejudice necessarily depends on the particular circumstances of each case. (*People v. Vines* (2011) 51 Cal.4th 830, 855.)

As a general rule, joinder is proper when evidence of the offenses would be cross-admissible in separate trials, because an inference of prejudice "is thus dispelled." (*People v. Arias*, *supra*, 13 Cal.4th at p. 126; accord *People v. Soper*, *supra*, 45 Cal.4th at p. 774-775.) "Conversely, however, the absence of cross-admissibility does not, by itself, demonstrate prejudice." (*People v. Vines*, *supra*, 51 Cal.4th at p. 856.) Where evidence of joined crimes would not be cross-admissible in separate trials, a court must consider "'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citations.]" (*Soper*, at p. 775.) The following factors are relevant to that assessment: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of

the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. (*Ibid.*)

D. The Trial Court Properly Refused to Order a Separate Trial for the Burglary Charges

1. Joinder was authorized under Section 954

Joinder was authorized under section 954 because the underlying motive for all of the charged offenses tried to the jury was to feloniously take money or property, and the modus operandi was similar in each instance.

Section 954 authorizes a joint trial where all of the charged offenses were "connected together in their commission." (§ 954.) This Court has interpreted the language "connected together in their commission" to encompass offenses committed at different times and places against different victims, when there is a "common element of substantial importance" among them. (*People v. Matson* (1974) 13 Cal.3d 35, 39.) Thus, joinder is proper under section 954 when the charged offenses involve a felonious intent to obtain property (see *People v. Chessman* (1959) 52 Cal.2d 467, 492), or when they are committed pursuant to a similar modus operandi (see *People v. Matson*, *supra*, at p. 39).

For example, in *People v. Lucky* (1988) 45 Cal.3d 259, this Court approved the joint trial of charges under circumstances very similar to this case. In that case, the trial court held a consolidated trial on two counts of robbery, based on two separate incidents, along with charges of attempted robbery and capital murder stemming from a third incident. (*Id.* at p. 273.) This Court found that all the charged offenses were connected together in their commission because they were linked by a common element of substantial importance: "'[The] element of intent to feloniously obtain property runs like a single thread through the various offenses. . . .'" (*Id.* at

p. 276.) This Court further noted that the facts underlying the joined offenses shared certain characteristics: "the armed robber, usually joined by an accomplice, victimized small businesses which were managed by few employees, sold specialized merchandise, and were located in the same geographical area." (*Ibid.*)

In this case, like in *Lucky*, the element of intent to feloniously obtain property "runs like a single thread through the various offenses." Also like in *Lucky*, the modus operandi was similar in each instance, in that Anderson victimized residential owners during midday in the East County area of San Diego. Therefore, joinder was authorized under section 954.

2. The trial court properly concluded that joinder would not prejudice Anderson

Because a joint trial of the charges was authorized under section 954, Anderson has the burden to make a clear showing of prejudice, based on the record before the trial court at that time, to prevail on his claim that the trial court abused its discretion when it denied his motion to sever the charges. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774.) In the trial court, Anderson needed to make a particularly strong showing of potential prejudice—stronger than would normally be sufficient to exclude evidence of uncharged offenses at a separate trial—to justify severance of charges that were otherwise properly joined under section 954. (*Ibid.*) This is because the countervailing considerations of conserving judicial resources and public funds are present in the context of severance but absent in the context of admitting evidence of uncharged offenses at a separate trial. (*Ibid.*) "[T]hese considerations often weigh strongly against severance of properly joined charges." (*Ibid.*)

The first step in assessing prejudice is to determine whether the evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others; "if so, any

inference of prejudice is dispelled." (*People v. Vines*, *supra*, 51 Cal.4th at p. 856.) Based on the record before it, the trial court concluded the facts surrounding the burglary offenses would have been admissible in a separate trial of the murder and conspiracy charges as evidence of intent. As explained below, this conclusion was reasonable, and sufficient to dispel any inference of prejudice.

Anderson was charged with conspiracy to commit residential burglary and residential robbery. (1 CT 109.) To prove this charge, the prosecution needed to establish that Anderson conspired to commit one or both of these target offenses. (See 8 CT 1612 [jury instruction on conspiracy charge].) As to the murder charge, it was prosecuted solely on the theory that Brucker was killed during the commission or attempted commission of a robbery or burglary (see 8 CT 1601-1602 [instruction telling jury that to prove the murder charge the prosecution needed to prove that an unlawful killing occurred during the commission or attempted commission of a robbery or burglary]; 29 RT 5123-5124 [prosecutor argued to jury that Anderson was guilty of first degree murder under felony-murder rule because Brucker was killed in the course of an attempted burglary and/or robbery].) Accordingly, evidence tending to show that Anderson agreed with his coconspirators to commit, and in fact attempted to commit, a burglary of the Brucker residence would have been admissible in a separate trial of the conspiracy and the murder charges. As explained below, evidence of the Bell and Dolan burglaries was just such evidence.

Under Evidence Code section 1101, evidence of a defendant's prior crimes may be admissible in a trial on new charges when relevant to prove some fact other than his disposition to commit such an act. (*People v. Davis* (2009) 46 Cal.4th 539, 602; Evid. Code, § 1101, subd. (b).) For example, evidence of a defendant's prior acts may be admissible to prove that, if he committed the alleged act, he did so with the intent that comprises an

element of the charged offense. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.) To be admissible for this purpose, the prior conduct and the currently alleged act "need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance." (*People v. Yoeman* (2003) 31 Cal.4th 93, 121.) "'The recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . .'" (*People v. Scott* (2011) 52 Cal.4th 452, 471, quoting 2 Wigmore, Evidence (Chadbourne rev. ed. 1979) § 302, p. 241.) Further, "'if a person acts similarly in similar situations, he probably harbors the same intent in each instance.'" (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) "The inference to be drawn is not that the actor is disposed to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution." (*Ibid.*)

Evidence of other crimes may also be admissible to prove that a defendant committed a charged offense pursuant to the same design or plan he used to commit those other, uncharged offenses. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 393.) "'The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.'" (*Ibid.*, quoting 1A Wigmore, Evidence (Tillers rev. ed. 1983) § 102, p. 1666.) "The existence of such a design or plan . . . may be proved circumstantially by evidence that the defendant has performed acts having 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' (2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 304, p. 249, italics omitted.) Evidence of a common design or plan, therefore, is

not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*Id.* at pp. 393-394.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.)

"'[T]he difference between requiring similarity, for acts negativing innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity.'" (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

The information known to the trial court at the time of its ruling supports the conclusion that Anderson's conduct in committing the Bell and Dolan burglaries was sufficiently similar to his conduct in going to the Brucker residence not only to permit the inference that he probably harbored the same intent in each instance, i.e., to enter the home and steal property, but also to support the inference that all the offenses were manifestations of a common design or plan. The record showed that the crimes related to the Bell, Dolan, and Brucker residences shared the following significant characteristics: (1) they occurred during midday (3 PHT 462, 476; 5 PHT 927, 933-934, 942); (2) within approximately a three-month period (3 PHT 462; 5 PHT 989, 933); (3) in neighborhoods in the East County area of San Diego (see 3 PHT 44; 5 PHT 927, 933, 939); and (4) there is some evidence the perpetrator wore gloves to avoid leaving fingerprints (3 PHT 492, 581-583; 5 PHT 972-973, 982-983). Taken together, this evidence supports a reasonable conclusion that Anderson acted out a predetermined plan or scheme to commit residential burglaries during midday in certain neighborhoods, and that he murdered Brucker

during one such attempted burglary on April 14, 2003. (Cf. *People v. Scott*, *supra*, 52 Cal.4th at pp. 471-472.) Therefore, this evidence would have been admissible against Anderson in a separate trial of the conspiracy and murder charges to prove his intent and to establish that he committed the murder in the course of an attempted burglary, which was relevant both to prove the legal theory of murder presented by the prosecution and to establish the alleged special circumstances.

The admissibility of the burglaries to prove the conspiracy and murder charges is sufficient to dispel any inference of prejudice from joinder; "'two-way" cross-admissibility is not required.'" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1129, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221 [explaining that less than complete (or so-called two-way) cross-admissibility normally is sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever charged offenses].) But cross-admissibility need not stand alone in justifying the trial court's decision in this case, because no other factor relevant to the assessment of prejudice suggested that severance was required.

First, the trial court reasonably observed that the Bell and Dolan burglaries were "garden-variety residential burglaries" that were not inflammatory. (4 RT 713.) To be sure, the record at the time of the ruling showed that Anderson broke into the houses during the day while the residents were gone, and stole small items such as coins, jewelry, and jewelry boxes. (5 PHT 927-930, 942; 5 CT 931-932.)

Second, the trial court reasonably concluded that the evidence in support of the Bell and Dolan burglaries did not appear to be comparatively weak or strong in relation to the murder and conspiracy charges such that the totality of the evidence may alter the outcome as to some or all of the charges. (6 RT 1111.) As explained in Argument I, sub-argument D, the

record at the time of the ruling on the motion revealed that the evidence relating to the murder and conspiracy charges was strong. And, as demonstrated below, the record revealed the same with respect to the burglary charges.

As to the burglary of the Bell residence, Anderson's cell phone was found inside the house immediately afterward, and a jewelry box stolen from the home was later found in Anderson's residence. (5 PHT 928-929, 974-979; 5 CT 931.) As to the burglary of the Dolan residence, an off-duty police officer, Matthew Hansen, saw Anderson's Bronco coming out of the Dolan driveway shortly before the burglary was discovered. (5 PHT 934-936; 5 CT 931.) Anderson was seen driving his Ford Bronco that same day, and the day after the burglary. (5 PHT 936-940; 5 CT 931.) In addition, Anderson gave to an acquaintance a ring that had been stolen from the Dolan home, and, when he was later arrested in Oregon, was in possession of a handgun stolen from the Dolan home. (5 CT 931, 932.)

Finally, although the murder charge carried the death penalty, the evidence of the burglaries, as discussed above, would have been admissible to support the murder and conspiracy charge regardless of joinder. Therefore, the joint trial of the charges produced no additional prejudice in favor of capital punishment. (*People v. Zambrano*, 41 Cal.4th at p. 1130.)

For the foregoing reasons, Anderson has failed to make the clear showing of prejudice required to establish that the trial court abused its discretion in declining to sever the charges.

E. Even if the Trial Court Abused its Discretion Under State Law by Denying the Motion to Sever, the Error Was Harmless

Even if the trial court should have granted the motion to sever at the time it was made, Anderson is not entitled to relief unless the consolidated trial of the charges resulted in a miscarriage of justice. (See *People v.*

Coffman and Marlow, *supra*, 34 Cal. 4th at p. 41; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837; Cal. Const. art. VI, § 13.)

The consolidated trial of the charges did not result in a miscarriage of justice. As set forth above, there was some cross-admissibility of the evidence, which means separate trials would not have looked much different from the consolidated trial, especially with respect to the murder and conspiracy charges. Further, the evidence actually introduced at trial relating to the burglary charges was independently strong. Indeed, the trial evidence relating to the burglary charges tracked the evidence presented at the preliminary examination described above. (See 18 RT 3022-3024, 3069-3072; 19 RT 3158-3159, 3164, 3173, 3181-3183, 3195-3201, 3205-3207, 3220-3223, 3226, 3234, 3239; 21 RT 3606-3610; 23 RT 4066.) The trial evidence also included testimony that on April 30, 2003, Anderson left a voice message for Stevens's parole agent in which he expressed anger that Stevens had been returned to prison based on the presence of stolen property inside the Poway condominium (which included property stolen from the Bell residence), telling the agent, "It's all fucking mine. Come and get me." (21 RT 3629-3630, 3632-3633.) The trial evidence relating to the murder and conspiracy charges was also strong. (See Argument I, sub-argument E, *ante*.) Therefore, it is not reasonably probable that a result more favorable to Anderson would have been reached had the burglary charges been tried separately from the murder and conspiracy charges. Accordingly, reversal is unwarranted even if the trial court abused its discretion by denying the severance motion.

F. The Joint Trial did not Result in a Grossly Unfair Trial That Requires Reversal Under the Due Process Clause of the Federal Constitution

When reviewing the denial of a motion to sever charges, a reviewing court must also consider the actual impact at trial of the joinder to

determine whether "a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*People v. Bean* (1998) 46 Cal.3d 919, 940.) In determining whether a gross unfairness has occurred, a reviewing court looks to the evidence actually introduced at trial. (*People v. Thomas* (2012) 53 Cal.4th 771, 800-801.) As explained immediately above, the evidence introduced at trial was strong on all the charges. In addition, there is nothing in the record to indicate that consolidation of the charges resulted in a trial that was grossly unfair to Anderson, or had any impact on the verdicts. Therefore, the joint trial did not violate Anderson's due process rights, and even if it did, the violation was harmless beyond a reasonable doubt.

III. The Trial Court Properly Exercised Its Discretion to Allow Evidence of Anderson's Flight from San Diego, and His Plans to Escape from Jail, Because It Was Relevant to Show Consciousness of Guilt

Anderson contends the trial court abused its discretion by allowing evidence of his flight from California and of his plans to escape from the Harney County jail in Oregon. Respondent disagrees because the trial court reasonably concluded that the challenged evidence was relevant to establish consciousness of guilt, and that it was not unduly prejudicial. Even if the court abused its discretion by allowing the evidence, the error did not result in a miscarriage of justice and therefore reversal is not warranted.

A. Trial Court Proceedings

Anderson filed a motion in limine to exclude evidence of his flight from California and of his plans to escape from an Oregon jail. (4 CT 758-767.) He acknowledged that such evidence could be relevant to show a consciousness of guilt, but argued the evidence should be excluded in this case because its probative value was outweighed by the potential for undue prejudice. (*Ibid.*; see Evid. Code, § 352.) Anderson pointed out that he did

not leave San Diego until after he became aware there was going to be a parole search of his residence, which contained property taken during the burglary of the Bell house. (4 CT 762.) He also pointed out that he "already had three strikes [on his record] and therefore faced a life sentence upon any additional felony conviction." (4 CT 763.) Anderson argued these circumstances showed he fled San Diego out of concern over being prosecuted for burglary or possession of stolen property and being sentenced to 25-years-to-life under the three strikes law, as opposed to out of concern over being apprehended for the Brucker murder. (4 CT 762-763.) Anderson further argued that forcing him to offer evidence that he had three strike offenses on his record to rebut the inference that his flight and escape plans were a result of a consciousness of guilt related to the murder of Brucker would be unduly prejudicial. (4 CT 763-764.) Lastly, with respect to his escape plans, Anderson argued that the nature of the plans themselves, which involved "razor blades, handcuff keys and . . . causing overt violence to jail guards, if necessary," would be unduly prejudicial. (4 CT 766.)

At the hearing on the motion, Anderson reiterated the argument that the evidence did not support the conclusion that he fled, or made plans to escape from jail, because of the Brucker murder, and that it would be unduly prejudicial if he were forced to offer evidence to explain his flight and escape plans as relating to the fact that he had previously suffered three convictions for strike offenses. (6 RT 1030-1034.) He further argued that if evidence of his flight and escape plans were to be admitted, some of the details should be excluded. In particular, he argued that items found in his possession when he was arrested in Oregon that suggest he was planning to apply for a passport in another name, and the details of the escape plans, should be excluded because they go "far beyond the evidence that would be necessary to establish consciousness of guilt. . . ." (6 RT 1040.)

The trial court denied Anderson's motion to exclude the evidence. The court found that based on the prosecution's offer of proof, there appeared to be substantial evidence of flight from which a jury could reasonably infer a consciousness of guilt. (6 RT 1037.) It further concluded that the probative value of that evidence was high and that, standing alone, there was no potential for undue prejudice. (6 RT 1037-1038.) The court acknowledged there would likely be prejudice if the defense attempted to explain Anderson's flight by disclosing his criminal history, but concluded that was simply a factor the defense would need to consider in deciding whether to offer such evidence. (6 RT 1038.) The court also explained that evidence suggesting an intention to obtain a passport and flee the country was probative and not unduly prejudicial: "There is, in my mind at least, a clear distinction between fleeing to San Bernardino, fleeing to Nevada, and fleeing to Canada. I – I don't see that that's cumulative or unnecessarily prejudicial. And it appears to me to be probative of these issues that are, that courts have found, can be offered to show consciousness of guilt." (6 RT 1042.)

B. Standard of Review

An appellate court reviews a trial court's decision to admit evidence using the deferential abuse of discretion standard. (*People v. Scott*, *supra*, 52 Cal.4th at p. 491.) "Judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason.'" (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 957.) An abuse of discretion can not be found if there exists "a reasonable or fairly debatable justification under the law for the trial court's decision . . . ." (*Ibid.*) A judgment may be reversed for an alleged abuse of discretion only if in the circumstances of the case, viewed in the light most favorable to the decision, "the decision exceeds 'the bounds of reason' [citation], and

therefore a judge could not reasonably have reached that decision under applicable law." (*Ibid.*; accord *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479 ["The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."].) Anderson bears the burden to prove the trial court abused its discretion. (*Cahill*, at p. 957.)

C. The Trial Court Properly Exercised Its Discretion by Admitting Evidence that was Relevant to Establish Anderson's Consciousness of Guilt

Evidence of a defendant's flight, or that he was planning an escape from custody, may permit an inference of consciousness of guilt. (*People v. Perry* (1972) 7 Cal.3d 756, 771, 778; see also *People v. Morris* (1991) 53 Cal.3d 152, 196 ["Evidence of a planned escape permits an inference of consciousness of guilty, even if the escape was not actually attempted."].) Anderson acknowledges this, but contends that the evidence of such conduct in this case was irrelevant because the circumstances demonstrate that his flight from California and his plans to escape from jail in Oregon were for reasons other than the Brucker murder. (AOB 60, 63-64.) In support of this contention, Anderson points out that when he left town police had not yet suspected he was involved in the murder, his condominium had just been searched (which contained property that could link him to the Bell burglary), and he told his former girlfriend that he was leaving to avoid a parole violation. (AOB 62.) With respect to his plans to escape from jail in Oregon, Anderson adds that he was not being held there for the Brucker murder. (AOB 63.) Anderson's contention lacks merit.

The existence of explanations, other than consciousness of guilt of the crime charged, for conduct which may be interpreted as flight merely goes to the weight of the evidence, not to its admissibility (*People v. Perry*,

supra, 7 Cal.3d at pp. 773-774); "[i]t is the jury's function to determine which of several possible reasons actually explains why a defendant fled" (*id.* at p. 772). The same is true for evidence of plans to escape from custody. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1126; *People v. Morris*, *supra*, 53 Cal.3d at pp. 195-196; *People v. Remiro* (1979) 89 Cal.App.3d 809, 845.) As long as there is some evidence that could tend to connect a defendant's flight or escape plans with the commission of the charged crime, a trial court's decision to admit the evidence should not be disturbed on appeal. (See *Perry*, at p. 774; Evid. Code, § 210 [relevant evidence includes evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."].)

Here, there is sufficient evidence from which a jury could reasonably infer that Anderson's flight and escape plans were connected with Brucker's murder. Prior to Anderson leaving town, a flier had been distributed at the El Cajon Speedway, and posted on the Crime Stoppers website, offering a reward for information leading to the arrest of the person who murdered Brucker. (26 RT 4506, 4514-4516.) There was also evidence that Anderson had threatened Handshoe, Huhn, and Northcutt that they "would be next" if they said anything about his involvement in the murder, reflecting his concern that persons with knowledge of his involvement could bring suspicion upon him. (22 RT 3761; 24 RT 4169-4170.) Finally, Anderson fled using his roommate's truck instead of his Bronco (which had been seen coming out of the Brucker driveway the day of the murder), and told his former girlfriend just before leaving town that he was not driving his Bronco because "they" knew it was his. (21 RT 3574, 3583-3584.)

Anderson also contends that even if the evidence was relevant, its potential for undue prejudice outweighed its probative value because, in

order for Anderson to attempt to rebut the inference of a consciousness of guilt in the Brucker murder, he would be forced to reveal to the jury that he had previously suffered at least two prior strike convictions. (AOB 63.) This argument lacks merit. Anderson's ability to offer an alternative explanation for his conduct did not depend on introducing evidence that he would be facing a life sentence as a third-striker for any future felony conviction. The evidence of the Bell and Dolan burglaries, the fact that Anderson was on parole, his awareness that his condominium had been searched, and his statement to Hause that he was fleeing because of a parole violation provided an ample foundation to make that argument. Moreover, Anderson offers no authority for the proposition that, in deciding whether to admit evidence offered by the prosecution, a trial court must consider the potentially inflammatory nature of evidence a defendant may choose to offer to rebut the prosecution evidence.

Finally, with respect to the evidence of his escape plans, Anderson contends the potential for undue prejudice outweighed the probative value because it showed him to be a criminal "inclined to stealing the identities of others and using violence, exactly the type of person who would commit the current offenses." (AOB 63.) The trial court reasonably rejected this argument.

Evidence Code section 352 vests the trial court with wide discretion to exclude otherwise admissible evidence if, among other reasons, its probative value is substantially outweighed by the probability that its admission will "create substantial danger of undue prejudice." (Evid. Code, § 352.) "Prejudice is not so sweeping as to include any evidence the opponent finds inconvenient." (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.) "The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) Rather,

evidence is unduly prejudicial under Evidence Code section 352 only when it "uniquely tends to evoke an emotional bias against the defendant as an individual and . . . has very little effect on the issues. [Citations]." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1119.)

The case of *People v. Remiro*, *supra*, 89 Cal.App.3d 809, applied these principles to circumstances that are similar to those here. In that case, the defendant and his codefendant were prosecuted for murder and attempted murder. About a month before trial began, the defendants attempted forcibly to escape from jail. Before they were subdued, the defendant had knocked a guard to the ground, gouged him in the eye, taken his keys, and inserted a key in the lock on a gun locker. The codefendant had knocked another guard to the ground, stabbed him in the throat with a pencil and hit him repeatedly. (*Id.* at p. 845.) The *Remiro* court rejected an argument that evidence of the attempted escape should have been excluded as unduly inflammatory because "[e]vidence of the defendants' assault on their jailers was essential to prove the escape attempt and to permit the jury to assess the effect and value of the evidence on the issue of consciousness of guilt." (*Ibid.*)

Citing *Remiro*, the trial court here concluded the challenged evidence should be admitted. (6 RT 1038.) That conclusion was within the bounds of reason. The details surrounding Anderson's flight from California and his plans to escape from the Haney County jail were essential to convey to the jury the nature and extent of the effort Anderson was investing, or planning to invest, in his attempt to avoid arrest, and to permit the jury to assess the value of the evidence on the issue of consciousness of guilt. At the same time, there is nothing about the challenged evidence, in light of the other evidence offered at trial, that uniquely tends to evoke an emotional bias against Anderson as an individual. Accordingly, it cannot be said that the trial court abused its broad discretion in permitting the evidence.

D. Any Error in the Admission of Evidence Was Harmless During the Guilt Phase of the Trial

Assuming, arguendo, the evidence should have been excluded, the failure to do so was harmless. Under California law, the erroneous admission of evidence does not warrant reversal unless the error resulted in a "miscarriage of justice." (Cal. Const. art. VI, § 13; Evid. Code, § 353, subd. (b).) A miscarriage of justice will be found only if, after an examination of the whole record, the court determines it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 76 [erroneous admission of evidence is reviewed under *Watson* standard].)

The case against Anderson was strong. Both Peretti and Paulson testified to being present when Anderson discussed plans to rob to the owner of the El Cajon Speedway (in Peretti's case, this discussion occurred the same day as the murder); a Bronco similar to Anderson's was seen leaving the victim's house around the time of the murder; Handshoe testified that Anderson drove his Bronco to the Brucker residence, approached the residence on foot armed with a .45 caliber handgun, returned to the Bronco minutes later, and admitted he "shot the guy"; police found a .45 caliber shell casing near Brucker's front door; Peretti's description of Anderson's wig matched the description of the hair of the shooter that Brucker gave to police; and Anderson threatened Handshoe, Huhn, and Northcutt that they would be next if they revealed his involvement in the murder. Thus, even if the evidence of Anderson's flight and plans to escape jail had been excluded, there is no reasonable probability that the outcome of the trial would have been more favorable to Anderson.

Anderson contends the stricter harmless error standard for federal constitutional error should apply because the admission of the evidence violated his constitutional right to due process of law. (AOB 64.) Respondent disagrees. The admission of evidence will violate the federal constitution only when it "so infuse[s] the trial with unfairness as to deny due process of law." (*Estelle v. McGuire* (1991) 502 U.S. 62, 75 [112 S.Ct. 475, 484, 116 L.Ed.2d 385, 401]; accord *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair."]; *Jammal v. Van de Kamp* (9th Cir. 1993) 926 F.2d 918, 920 ["Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'"].) As demonstrated above, the trial court's exercise of discretion in admitting the evidence was neither arbitrary nor capricious, nor did it exceed the bounds of reason. And since the evidence was admitted for a permissible purpose and relevant to a contested issue, i.e., to establish Anderson's identity as the murderer by showing consciousness of guilt, Anderson's trial was not fundamentally unfair and his due process rights were not violated. (See, e.g., *Estelle v. McGuire*, at p. 70; *Jammal v. Van de Kamp*, at p. 420; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1010 ["The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights.' [Citation.]"].)

In any event, the admission of the evidence was harmless even under the federal standard. "The *Chapman* test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt*, *supra*, 500 U.S. at pp. 402-403.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue

in question, as revealed in the record." (*Id.* at p. 403.) In light of all the evidence discussed above directly linking Anderson to the murder, there is no reasonable doubt that the admission of evidence of Anderson's flight and escape plans was relatively unimportant, and did not contribute to the guilt verdict.

E. By Failing to Object or to Request a Limiting Instruction at Trial, Anderson Forfeited Any Claim That Evidence of His Flight from California and Plans to Escape from Jail Was Erroneously Admitted at the Penalty Phase; Any Error Was Harmless

Anderson claims that even if an erroneous admission of the challenged evidence at the guilt phase did not result in prejudice with respect to the guilt verdict, it nonetheless resulted in prejudice with respect to the penalty verdict. (AOB 66-67.) This claim is misguided. Evidence that is inadmissible as to guilt is not invariable inadmissible as to penalty. In this case, for example, evidence of Anderson's criminality in 1995 was not admissible in the guilt phase (see Evid. Code, § 1101, subd. (a)), but was properly admitted at the penalty phase (see Pen. Code, § 190.3, subds. (b) & (c)). In any event, any error in the admission of the challenged evidence was not prejudicial at the penalty phase such that reversal of the death sentence is warranted.

Anderson does not assert or otherwise argue that the evidence of Anderson's flight and escape plans was inadmissible at the penalty phase; instead, his argument assumes that if it was inadmissible at the guilt phase it necessarily would have been inadmissible at the penalty phase. But the evidence might have been admissible, for example, under section 190.3, subdivision (b), as evidence of criminal activity that involved the use or attempted use of force or violence or the express or implied threat to use force or violence (Anderson's flight from California in Stevens's truck involved criminal activity because Anderson was a felon and he possessed

firearms inside the truck). Further, Anderson did not request a limiting instruction directing the jury to disregard such evidence during the penalty phase, nor did he object to the prosecutor's reference to the evidence during argument. (34 RT 5455-5456 [only instructional issue identified by defense counsel related to whether jury should be told which statutory factors are considered aggravating versus mitigating]; 35 RT 5494-5496 [defense counsel did not seek limiting instruction during conference regarding penalty phase instructions]; 36 RT 5693-5694, 5698 [no objection during argument].) Therefore, Anderson failed to preserve the issue for appeal. (See *People v. Barnett*, *supra*, 17 Cal.4th at p. 1168 [stating that defendant should have sought a limiting instruction during the penalty phase directing the jury to disregard evidence of his nonviolent escape admitted during the guilt phase]; *People v. Quartermain* (1997)16 Cal.4th 600, 630 [finding that by failing to request a limiting instruction, the defendant failed to preserve for appeal a challenge to the jury's consideration during the penalty phase of evidence admitted during the guilt phase that defendant had used racial epithets].)

Even if the evidence was inadmissible during the penalty phase, its admission was not prejudicial. The state standard of review for error at the penalty phase is a more exacting standard than that for state law errors at the guilt phase. (*People v. Hamilton* (2009) 45 Cal.4th 863, 917.) "'[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.'" (*Ibid.*, quoting *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) "'When evidence has been erroneously received at the penalty phase, this court should reverse the death sentence if it is "the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live

or die.""" (*Hamilton*, at p. 917, quoting *People v. Danielson* (1992) 3 Cal.4th 691, 738.) The "reasonable possibility" test articulated in *Brown* is in substance and effect the same standard as the one employed for federal constitutional error articulated in *Chapman*. (*Hamilton*, at p. 917.)

Here, in context of all the other admissible evidence, the evidence of Anderson's flight and escape plans was not prejudicial. During argument, the prosecutor correctly identified as aggravating factors Anderson's prior violent crimes and criminal convictions, and the circumstances of Brucker's murder; the references to Anderson's flight and escape plans was merely cumulative. (36 RT 5692-5697.) The prosecutor argued there were no mitigating circumstances (36 RT 5692, 5697); indeed, Anderson did not present any evidence of mitigating circumstances, he simply proclaimed his innocence (35 RT 5623). Under these circumstances, there was no reasonable possibility that the admission of the flight and escape evidence affected the penalty verdict.

IV. THE TRIAL COURT PROPERLY ALLOWED HANDSHOE TO TESTIFY BECAUSE HIS PLEA AGREEMENT WAS NOT UNDULY COERCIVE

Anderson contends the admission of Handshoe's testimony violated his constitutional rights to due process, a fair trial, and a fair and reliable guilt and penalty determination. (AOB 67-78.) Respondent disagrees. Handshoe properly testified because his plea agreement required only that he testify truthfully and, therefore, was not unduly coercive. Even if Handshoe should not have been allowed to testify under California law, the admission of his testimony did not violate due process, or, alternatively, any violation was harmless.

A. Trial Court Proceedings

Pursuant to a negotiated agreement, the district attorney allowed Handshoe to avoid a trial on the charges against him by pleading guilty to

voluntary manslaughter and attempted residential robbery, and by admitting that he used a gun in the course of the offenses. (9 CT 1829-1830; 43 CT 9008-9009.) In exchange for being allowed to plead guilty to these charges, Handshoe agreed to cooperate in the prosecution of his codefendants by providing information to law enforcement officers and by testifying in court or before a grand jury about the Brucker murder and any related matters. (43 CT 9008-9009.) Included in the written plea agreement is the following language:

> On April 11, 2005, defendant gave a statement to investigators regarding his knowledge of the circumstances surrounding the attempted robbery/burglary and murder of STEPHEN BRUCKER. Defendant confirms that his statement is true and accurate as to his observations, his actions, and the actions of ERIC ANDERSON, APOLLO HUHN and RANDY LEE. Defendant agrees to submit to subsequent interviews if deemed necessary.
>
> Overriding all else, it is understood that this agreement extracts from BRANDON HANDSHOE an obligation to do nothing more other than to plead guilty to the listed crimes and to tell the truth. **At all times the defendant shall tell the truth, and nothing other than the truth, both during the investigation and on the witness stand. Defendant shall tell the truth no matter who asks the questions – investigators, prosecutors, judges or defense attorneys.** It is further understood that defendant shall lose the benefits of this agreement for any intentional deviation from the truth, and if a false statement occurs while he is on the witness stand, he shall be subjected to prosecution for perjury.
>
> This agreement is automatically voided if BRANDON HANDSHOE violates his obligation to tell the truth or refuses to testify in any grand jury or court proceeding. However, everything defendant has told law enforcement officers after the commencement of this agreement can be used against him.

(43 CT 9008-9009, emphasis in original.)

Anderson filed a motion seeking an order to prevent Handshoe from testifying against him. (7 CT 1428-1431; 43 CT 8940-8941.) The basis of the motion was that the first paragraph quoted above made the agreement "explicitly conditioned upon the truthfulness of his April 11 statement." (7 CT 1429; 43 CT 8941.) Anderson argued that the "combination of this explicit condition and Handshoe's promise to testify truthfully . . . binds Handshoe to testify in accordance with his pretrial statement to the authorities," which violates the principle established in *People v. Medina* (1974) 41 Cal.App.3d 438, at page 455, that a defendant "is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." (7 CT 1428-1429; 43 CT 8940-8941; see also 13 RT 2182 [Anderson argued at a hearing on the motion that any testimony from Handshoe would be "coerced" under the terms of the agreement].)

The trial court denied the motion. The court found the plea agreement required Handshoe only to testify truthfully, and that it did not require him to testify in conformity with his prior statement. (13 RT 2233-2234; 15 RT 2275-2276.)

B. Standard of Review

An appellate court reviews de novo whether an agreement under which a witness testified was coercive, and whether the defendant was deprived of a fair trial by the introduction of the testimony. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1010.) In conducting such a review, factual conflicts should generally be resolved in favor of the judgment. (*Ibid.*)

C. Governing Law

The admissibility of a witness's testimony that is secured by a plea agreement depends on the terms of the agreement. When a witness agrees

to plead guilty to lesser offenses in exchange for his testimony at trial, and the agreement with the prosecution places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted and inadmissible. (*People v. Garrison* (1989) 47 Cal.3d 746, 768, citing *People v. Medina, supra,* 41 Cal.App.3d at p. 455.) "Such a 'strong compulsion' may be created by a condition '"that the witness not materially or substantially change her testimony from her tape-recorded statement already given to . . . law enforcement officers."'" (*People v. Boyer* (2006) 38 Cal.4th 412, 455.)

"'On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid.'" (*People v. Homick* (2012) 55 Cal.4th 816, 862.) The assumption that the witness will receive the benefit of his bargain only if his testimony is beneficial or valuable to the prosecution is insufficient to undermine the testimony: "'What is improper . . . is not that what is expected from the informant's testimony . . . will be favorable to the People's case, but that the testimony must be confined to a predetermined formulation or rendered acceptable only if it produces a given result, that is to say, a conviction.' [Citation.]" (*People v. Garrison, supra,* 47 Cal.3d at p. 769.)

Thus, this Court has upheld the admission of testimony where the agreement "simply suggested the prosecution *believed* the prior statement to *be* the truth, and where the witness understood that his or her sole obligation was to testify fully and fairly." (*People v. Boyer, supra,* 38 Cal.4th at p. 455, italics in original.) "Unless the bargain is *expressly contingent* on the witness sticking to a particular version," the principle announced in *Medina* is not violated. (*Boyer*, at p. 456; see also *People v. Homick, supra,* 55 Cal.4th at p. 863 [stating that the principle announced in *Medina* is violated "only when the agreement requires the witness to testify

to prior statements 'regardless of their truth,' but not when the truthfulness of those statements is the mutually shared understanding of the witness and the prosecution as the basis for the plea bargain."].)

D. Handshoe's Testimony Was Properly Admitted Because His Plea Agreement Required Only That He Testify Truthfully

Anderson contends the agreement between Handshoe and the prosecution "compelled Handshoe to testify in a particular way, i.e., to conform to his April 11, 2005, statement." (AOB 71.) Anderson reaches this conclusion by reasoning that Handshoe's promise to tell the truth, and his confirmation that his April 11 statement was truthful, meant "that Handshoe's testimony was not to differ from his April 11th statement or else the benefits to him from the agreement would be lost and he would be subject to a perjury prosecution." (AOB 72.)

Anderson's conclusion is a non sequitur. That Handshoe confirmed his prior statement was truthful and promised to testify truthfully in the future supports the logical expectation of consistency between the two, but only because both are represented to be rooted in truth, which is non-malleable. But the expectation of consistency does not derive from, nor does it create, an obligation for Handshoe to conform his trial testimony to his prior statement simply for the sake of conformity and regardless of the truth as Anderson suggests. Indeed, the following language quoted from the agreement establishes that telling the truth, as opposed to mere conformity with his prior statement, was the only condition to receiving the benefits of the bargain:

> Overriding all else, it is understood that this agreement extracts from BRANDON HANDSHOE an obligation to do nothing more other than to plead guilty to the listed crimes and to tell the truth. **At all times the defendant shall tell the truth, and nothing other than the truth, both during the investigation and on the witness stand. Defendant shall tell the truth no**

> **matter who asks the questions – investigators, prosecutors, judges or defense attorneys.** It is further understood that defendant shall lose the benefits of this agreement for any intentional deviation from the truth, and if a false statement occurs while he is on the witness stand, he shall be subjected to prosecution for perjury.

(43 CT 9009, emphasis in original.)

The terms of the plea agreement in this case are distinguishable from terms that have been found to be coercive.

For example, in *People v. Medina*, *supra*, 41 Cal.App.3d 438, orders pursuant to section 1324 granting immunity to three witnesses were "subject to the conditions that the witness not materially or substantially change her testimony from her tape-recorded statement already given to the law enforcement officers on May 10, 1972, and not resort to silence, whether or not under order of contempt, nor feign lapse of memory to at least that much given in the aforementioned tape-recorded statement, for otherwise this order of immunity will be void and of no effect." (*Id.* at p. 450.) These conditions went "far beyond" requiring the witnesses to testify "fully and fairly as to their knowledge of the facts out of which the charges arose." (*Id.* at p. 456.) Indeed, the effect of these conditions was to place each of the witnesses "in a position of dire peril" because, regardless of the truth of the testimony, "[i]f his testimony "materially or substantially" differed from the prior recorded statement he became liable to prosecution for first degree murder and, having disclosed his participation, stood little chance of escaping conviction." (*Id.* at p. 452.) Thus, the language explicitly conditioning immunity "upon the testimony being 'the same as [the witness] had already told the police'" was properly deemed coercive. (*Id.* at p. 455.)

And in *People v. Green* (1951) 102 Cal.App.2d 831, "an accomplice was induced to testify by the promise that he would be granted immunity

from prosecution if his testimony at the preliminary hearing resulted in the defendant's being held to answer." (*People v. Garrison*, *supra*, 47 Cal.3d at p. 769.) Because the promised benefit would be given only if the testimony produced a given result, the testimony was considered "impure, dubious, and 'tainted beyond redemption.'" (*Id.* at p. 769.)

Here, in contrast, the agreement was not contingent upon Handshoe sticking to a particular version of events, nor was it dependent upon a particular outcome. Instead, the agreement expressly required that Handshoe only testify to the truth and nothing but the truth. Therefore, the agreement was not unduly coercive and the trial court properly allowed Handshoe to testify.

E. Even If Handshoe's Testimony Was The Result of a Coercive Plea Agreement, No Due Process Violation Resulted from Its Admission Because the Prosecution's Case Did Not Depend Substantially on That Testimony

Even if Handshoe's plea agreement can be considered unduly coercive, the admission of his testimony did not result in a violation of Anderson's due process rights. *Medina* held that two conditions must be present to result in an unfair trial: the accomplice witness must be placed under a strong compulsion to testify in a particular fashion, and the prosecution's case must depend substantially on that testimony. (*People v. Medina*, *supra*, 41 Cal.App.3d at p. 455.) In *Medina*, the court found that the testimony of the three accomplice witnesses "was the only evidence which could conceivably have influenced the jury to reach a guilty verdict." (*Id.* at p. 456.) Here, in contrast, Handshoe's testimony was not the *sine qua non* of the prosecution's case against Anderson; rather, it was mostly cumulative of Peretti's testimony, and there was additional independent evidence of Anderson's guilt such that it cannot be said that the prosecution's case depended substantially on Handshoe's testimony.

The prosecution presented substantial evidence independent of Handshoe's testimony that supported the jury's guilty verdict. In particular, Peretti testified that shortly before the murder she was present in Handshoe's mobile home while Anderson planned with Handshoe and Huhn to commit an armed robbery/burglary of a house that contained a safe. (16 RT 2500-2503, 2510-2515, 2535-2536, 2640, 2699.) Anderson had guns and wore a salt and pepper colored wig. (16 RT 2504, 2507-2510, 2621.) Peretti watched as Anderson, Handshoe and Huhn drove away in Anderson's Bronco. (16 RT 2520-2522.) Witnesses saw a Bronco similar to Anderson's driving on the street where Brucker lived; one witness saw the Bronco actually coming out of Brucker's driveway. (18 RT 2979-2986, 2991, 2999-3000, 3083-3087, 3090; 19 RT 3259-3265; 24 RT 4170.) Before he died, Brucker told a deputy sheriff that the person who shot him had salt and pepper colored hair. (17 RT 2835-2836.) After the murder, Anderson threatened to harm Northcutt if he revealed his involvement in the murder. (24 RT 4169-4170.) Finally, Anderson changed his appearance and fled town ten days after the murder, in a vehicle other than his Bronco. (21 RT 3574-3575.) Thus, the prosecution's case did not depend substantially on Handshoe's testimony. To be sure, Handshoe did not agree to testify for the prosecution until after jury selection had begun, and the case was proceeding to trial on the basis of evidence that was independent of Handshoe's testimony.

Moreover, the terms of the plea agreement were disclosed to the jury (both through his testimony and by the admission of the written plea agreement as an exhibit), and Handshoe was subjected to meaningful cross-examination, including questioning relating to the plea agreement. (22 RT 3749-3751, 3803-3810, 3875-3879, 3902.) Therefore, the jury was allowed to factor the impact of the agreement into its assessment of Handshoe's credibility.

For all these reasons, the admission of relevant testimony by Handshoe did not violate the due process clause. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"]; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 75 [the admission of evidence will violate the federal constitution only when it "so infuse[s] the trial with unfairness as to deny due process of law."].)

F. Any Error Was Harmless

Assuming, arguendo, that the admission of Handshoe's testimony violated due process, reversal is not required because the violation was harmless beyond a reasonable doubt. (See *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 306-308 [federal harmless error standard applies to trial errors that violate the constitution].) As stated above, Handshoe's testimony relating to Anderson's role in the murder was largely cumulative to Peretti's testimony, the only material difference being when Handshoe testified to his observations after he left the mobile home with Anderson and Huhn. But even that testimony was largely cumulative to other evidence; namely, eyewitness accounts of a Bronco similar to Anderson's near the Brucker home—including coming out of the Brucker driveway—and Brucker's description of his killer's hair color, which matched the color of the wig Anderson was seen wearing when he left the mobile home to commit the robbery. Thus, there was substantial evidence independent of Handshoe's testimony proving that Anderson murdered Brucker. Therefore, any error in the admission of Handshoe's testimony was "unimportant in relation to everything else the jury considered on the issue in question." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403.)

For similar reasons, the evidence was likewise harmless in relation to the penalty verdict. Anderson asserts Handshoe's testimony about

Anderson's "role in the crimes" was prejudicial at the penalty phase because that testimony "may well have been what persuaded the jury to decide he was not only guilty but the most culpable defendant and should be punished [to] the maximum extent possible." (AOB 77-78.) This speculation is untenable in light of the whole record, which otherwise strongly supported the notion that Anderson was the leader and driving force behind the murder, and that he was the person who actually shot Brucker. First, Anderson was several years older than Handshoe and Huhn, and had spent time in prison. Second, Peretti's testimony about Anderson's conduct in the mobile home before the murder suggested that Anderson was the "heavy" of the bunch, and that Handshoe and Huhn were afraid of him. Third, Brucker told Deputy Miller that the shooter had salt and pepper hair, which matched the description of the wig Anderson wore when he left the mobile home. Finally, Brucker described the shooter to Deputy Miller as being older than the other man who was at his door when he was shot. Therefore, the evidence invariably pointed to Anderson as the most culpable of the perpetrators, and Handshoe's testimony was "unimportant in relation to everything else the jury considered on the issue in question." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403.)

V. THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF A DEFENSE WITNESS BECAUSE THE PROFFERED TESTIMONY WAS IRRELEVANT

Anderson contends the trial court abused its discretion when it refused his request to present testimony from Andrea Finch that Handshoe, Huhn, and Lee had access to guns and disguises from a third person in the summer of 2002. (AOB 78-84.) To the contrary, because the offered testimony was irrelevant, the trial court acted within its discretion when it refused to allow it. Alternatively, any error was harmless.

A. Trial Court Proceedings

During its case-in-chief, Anderson offered the testimony of Andrea Finch, who dated Ronnie Densford between 1992 and 2000, and continued "hanging out" at his house until the summer of 2002. (26 RT 4613, 4615.) According to Anderson's offer of proof, Finch would have testified that for some period of time until the summer of 2002, Handshoe and Huhn were close friends of Densford and hung out at Densford's house. During that period of time, "there was access to weapons, specifically large-caliber automatic weapons, there was access to disguises, and there was access to vehicles." (26 RT 4614.) Finch would further testify that she saw Densford display a large-caliber pistol in his waistband in the presence of Handshoe and Huhn, and that Densford was a mechanic who had access to all types of vehicles. (26 RT 4616.) Defense counsel explained this evidence was not being offered to establish third-party culpability, but to show that Handshoe and Huhn "had access to all of the items that have been described as having been used in this particular crime through someone other than Eric Anderson." (26 RT 4614-4615.) Upon questioning by the court, defense counsel admitted that the guns and disguises observed by Finch belonged to Densford, not Handshoe or Huhn, and that Finch's observations of these items ended in the summer of 2002 when she stopped hanging out with Densford. (26 RT 4615.)

The court refused to allow the evidence on the basis that, because Finch's observations ended in the summer of 2002, it was not relevant to the events occurring in April 2003. (26 RT 4615.) The court further stated, "I'm finding as to the probative value of summer of '02, a third party exhibiting a firearm has limited probative value and an undue consumption of time." (26 RT 4616.) Finally, the court found the suggestion that the Bronco used in the murder was tied to Densford because he was a mechanic

and had access to a lot of vehicles in the summer of 2002 was speculative. (26 RT 4616.)

Ultimately, Finch testified for the defense that she had spent her whole life in the area close to Riós Canyon, and that a Ford Bronco is a common vehicle in that area. (26 RT 4618-4619.)

B. Standard of Review

A trial court's decision to exclude evidence is reviewed for abuse of discretion, and may not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827, 828; Cal. Const. art. VI, § 13; Evid. Code, § 354.)

C. Governing Law

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.) A trial court "has considerable discretion in determining the relevance of evidence." (*People v. Williams* (2008) 43 Cal.4th 584, 634.) Similarly, a trial court has "broad discretion" to exclude even relevant evidence for the policy reasons articulated in Evidence Code section 352. (*People v. Merriman* (2014) 60 Cal.4th 1, 60; see Evid. Code, §§ 351, 352.)

D. The Trial Court Properly Excluded Irrelevant Evidence

The trial court's decision to exclude the proffered evidence fell well within the court's discretion. The basis of the court's decision was that the offered evidence was stale and could only support speculative inferences in support of the defense. Given the roughly seven-month gap between the

Brucker murder and Finch's last observation of Densford interacting with Handshoe and Huhn, and the fact that there was no alleged uniqueness about the gun, disguises, or vehicles to which Densford had access that could tie them to the actual gun, disguises, and vehicle used in the murder, the court's determination that the evidence had little if any relevance, and was not worth the time it would take to present it, was eminently reasonable. Anderson offers no persuasive argument to the contrary; he simply concludes, ipse dixit, that Finch's testimony would have made it less likely jurors would have rejected his defense that he was not involved. (AOB 80.)

E. Any Error Was Harmless

Even if the evidence was improperly excluded, it did not result in a miscarriage of justice and therefore does not provide a basis under California law to reverse the judgment. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; Cal. Const., art. VI, § 13; Evid. Code, § 354.) Nor is there a basis to reverse the judgment on federal constitutional grounds. Anderson claims that the exclusion of the evidence violated his due process right to present a defense, and that, therefore, the error is subject to the harmless error standard articulated in *Chapman v. California*, *supra*, 386 U.S. at p. 24. (AOB 81.) Respondent disagrees.

Due process requires states to afford criminal defendants "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 2146, 90 L.Ed.2d 636].) That opportunity would be effectively denied if the state were permitted, in the absence of any valid state justification, "'to exclude competent, reliable evidence when such evidence is central to the defendant's claim of innocence.'" (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [116 S.Ct. 2013, 135 L.Ed.2d 361]; quoting *Crane*, at p. 690.) Here, however, as explained above, the trial court reasonably and justifiably excluded the evidence,

which had little if any probative value. Thus, even if the court erred under California's rules of evidence, the error did not violate a federal Constitutional right. As this Court has explained:

> [The defendant's] attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* [. . .] and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension [Citation]."

(*People v. Boyette* (2002) 29 Cal.4th 381, 427-428; see also *People v. Bacon* (2010) 50 Cal.4th 1082 [stating that "only evidentiary error amounting to a complete preclusion of a defense violates a defendant's federal constitutional right to present a defense"].)

Finally, even if the decision to exclude the proffered testimony violated Anderson's due process rights, the error was harmless beyond a reasonable doubt. The probative value of the offered testimony was speculative at best, and would have done nothing to undermine the strong evidence of Anderson's guilt offered by the prosecution.

VI. THE TRIAL COURT PROPERLY REFUSED TO ORDER THAT PERETTI PROVIDE A URINE SAMPLE FOR DRUG TESTING BECAUSE THERE WAS NO PROBABLE CAUSE TO BELIEVE SHE WAS UNDER THE INFLUENCE OF A DRUG WHILE TESTIFYING

Anderson contends the trial court's refusal to order drug testing for Peretti violated his constitutional rights to confront and cross-examine

witnesses, to present a defense, and to a fair trial. (AOB 84-91.) This contention lacks merit because there was no probable cause to believe that Peretti was under the influence of a drug. Alternatively, any error was harmless and reversal is unwarranted.

A. Trial Court Proceedings

During a break in the direct examination of Peretti, defense counsel stated she had "a concern as to whether Ms. Peretti may be under the influence as she is testifying today," and requested the court to order that Peretti provide a urine sample for drug testing. (16 RT 2546.) Counsel stated that Peretti's "demeanor is such that she's constantly leaning, constantly locking her jaw, and is scratching herself. Given what I know of her history, I think it is – it would be quite likely that she is under the influence. And I think if she is, that the jurors would have a right to know about that." (*Ibid.*) The prosecutor objected on the basis there was no authority for the court to order drug testing. (16 RT 2547.) The court denied the request. (16 RT 2548.)

B. Standard of Review

"The resolution of mixed questions of law and fact, like probable cause, usually is examined independently [citation], and the resolution of a question of fact, like any such question underlying probable cause, always is examined for substantial evidence [citation]." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 257.)

C. Governing Law

A defendant has a constitutional right "to be confronted with the witnesses against him." (U.S. Const., Amend. VI; Cal. Const., art. I, § 15.) The "main and essential purpose" of this right is to provide an opportunity for cross-examination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683]; see *Davis v. Alaska* (1974)

415 U.S. 308, 315-316 [94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 353].) A defendant's confrontation rights do not entitle him "on demand to subject a witness to a court-ordered physical intrusion or chemical test to determine whether he is under the influence of an intoxicating substance." (*People v. Melton* (1988) 44 Cal.3d 713, 737.) Witnesses, like defendants, have a constitutional right against unreasonable bodily searches, and that right cannot be violated on the authority of a defendant's confrontation rights. (*Id.* at p. 738.)

However, this Court has suggested that a trial court could order a witness to provide a urine or blood sample for drug testing if the circumstances satisfied the test for "court-ordered intrusions beneath the body's surface" articulated in *People v. Scott* (1978) 21 Cal.3d 284. (*People v. Earp* (1999) 20 Cal.4th 826, 882 [blood sample]; *People v. Melton, supra,* 44 Cal.3d at p. 738, 739, fn. 7 [blood or urine sample].) In *Scott,* this Court held that a trial court may authorize a search involving a "bodily intrusion" only upon a finding of "probable cause to believe the intrusion will reveal evidence of a crime," and only after applying a balancing test "to determine whether the character of the requested search is appropriate" under the particular circumstances of the case. (*Scott,* at p. 293.) This additional balancing test "weighs the degree of intrusion against the likelihood and importance of recovering the evidence." (*Melton,* at p. 738.) "The necessary additional showing may be very slight where only a minimal intrusion, such as a blood test, is planned. But Scott makes clear that no intrusion may be ordered on a showing less than probable cause." (*Ibid.*)

D. The Trial Court Properly Refused to Order Drug Testing Because There Was No Probable Cause to Believe Peretti Was Testifying While Under the Influence of a Drug

The record does not establish probable cause to believe that Peretti was testifying under the influence of drugs. An evaluation of whether probable cause exists must consider the totality of the circumstances. (*People v. Earp*, *supra*, 20 Cal.4th at p. 882.) Here, Peretti testified that she stopped using methamphetamine eight months before the trial. (16 RT 2574.) There was no other evidence offered on the topic. Thus, like in *Melton*, the only thing in the record that could possibly support the notion that Peretti was under the influence of drugs was defense counsel's suspicion. (*People v. Melton*, *supra*, 44 Cal.3d at p. 738.) Absent an admission or other credible evidence that Peretti ingested drugs, counsel's suspicion relating to Peretti's demeanor is insufficient to establish probable cause. (See *ibid.*; *People v. Dunkel* (1977) 71 Cal.App.3d 928, 932 ["The crucial test for probable cause to arrest for drug use depends upon the manifestations of drug use identified by an *experienced* police officer." Italics in original].) Accordingly, the trial court properly refused to order Peretti to provide a urine sample.

E. Any Error Was Harmless

Even if the trial court erred when it refused to order drug testing for Peretti, the error was harmless under both the state and federal standards. Anderson argues to the contrary, asserting that Peretti's credibility was crucial to the prosecution's case and that, had drug testing shown Peretti was under the influence during her testimony, her credibility would have been damaged to the point that a more favorable outcome to Anderson was reasonably probable. (AOB 88-91.) This assertion lacks merit.

First, nothing in the record establishes that drug testing would have in fact revealed Peretti was under the influence of drugs; the record shows only the suspicion of Anderson's attorney. Thus, Anderson's assertion of prejudice is based on mere speculation.

Second, even if Peretti were under the influence, the record does not support Anderson's conclusion that evidence of this fact would have "severely minimized her credibility" with the jury. (AOB 90.) It is safe to say that the evidence had already otherwise established that Peretti's credibility was less than stellar. For example, Peretti admitted during cross-examination that she had lied to Huhn about her age when she first met him, telling him she was 18 when she was not even 15. (16 RT 249-2499, 2654-2655.) She also admitted that she initially lied to her parents about Huhn's role in the murder. (16 RT 2551, 2683.) Peretti further admitted that, during some of her many statements to police, she "lied a lot," and specifically identified as a "pretty big" lie her statements about Huhn's involvement. (16 RT 2551, 2646-2647.) Patricia Ritterbush, one of Peretti's friends, testified she had witnessed Peretti make up stories about things that did not happen, and that Peretti was a liar. (26 RT 4557.) Patricia Colgan, one of the persons who frequently spent time at Handshoe's mobile home, testified that Peretti "lies a lot." (18 RT 3123-3124, 3137.) During closing statements, the prosecutor acknowledged that the witnesses were not angels, and stated rhetorically that he would not be urging the jury to nominate Peretti for "mother of the year and good citizen." (29 RT 5082.)

Finally, important parts of Peretti's testimony were corroborated by other evidence. For instance, Handshoe corroborated her claim that shortly before the murder, while at Handshoe's mobile home, Anderson drew something on a piece of paper and talked about committing the robbery. (22 RT 3761-3762, 3792-3793, 3835, 3889, 3912-3913; 23 RT 3955-3956.) Handshoe also corroborated Peretti's testimony that Anderson had a gun,

and that he wore a wig and a hat. (22 RT 3761-3762, 3792-3793, 3857-3860, 3911.)

Based on the foregoing, even if Peretti were under the influence of methamphetamine while testifying, and even if the court's refusal to order a drug test was erroneous, with respect to both the guilt and penalty phases of the trial, the record establishes "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403.)

VII. The Trial Court Properly Allowed the Jury to Hear the Sound of Anderson's Ford Bronco because the Sound Was Relevant Circumstantial Evidence of Anderson's Participation in the Crimes

Anderson contends the trial court erred when it allowed the jury to assemble outside the courthouse to view Anderson's Bronco and to listen to the sound of the engine. (AOB 91-100.) Respondent disagrees. Witnesses testified about the appearance and sound of the Bronco they saw near the Brucker residence the day of the murder. Seeing and hearing the Bronco was relevant to the jury's determination of whether the Bronco that was seen and heard by the witnesses was in fact the Bronco that belonged to Anderson. Accordingly, the trial court did not abuse its discretion. Alternatively, any error was harmless.

A. Trial Court Proceedings

During its case-in-chief, the prosecutor asked the court to allow the jury to hear the sound of the engine of Anderson's Bronco because witnesses testified that it was loud, and because he believed it would benefit the jurors to hear the engine for themselves. (21 RT 3593.) Anderson objected on the ground that the loudness of the engine was not being disputed; instead, the dispute centered around the cause of the loudness: "Is it a defective muffler, or is it a modified exhaust system, as

Mr. Vangorkum thought it was?" (21 RT 3592.) Anderson argued that hearing the engine would not be helpful in resolving that issue. (21 RT 3593.) Anderson further argued that because the Bronco had been sitting outside in the elements, and not run, for approximately two years it would not sound the same as it did at the time of the murder. (21 RT 3592-3593, 3594-3595.) The prosecutor countered by offering that the detective could establish that the Bronco sounds similar to the way it sounded when it was impounded shortly after the murder. (21 RT 3595.) Anderson also expressed concern about transporting the Bronco from the sheriff's impound yard to the courthouse based on information that the muffler was rusted and loose, and was being held in place by a wire. (21 RT 3592, 3656-3657.) Finally, Anderson objected on the basis that "the conditions under which this experiment is going to be undertaking are very, very dissimilar" to the conditions under which the Bronco was observed on the day of the murder. (22 RT 3659.) The prosecutor clarified he did not plan to conduct an experiment, and that the Bronco "is simply going to be started so that the jurors have an opportunity to hear the loudness or lack thereof of the vehicle." (22 RT 3661.)

The trial court overruled the objection:

> I see this as simply a tidbit of circumstantial evidence. It's relevant in terms of there's been testimony that this particular Ford Bronco has some unique characteristics. So, to me, it's similar to any type of eyewitness identification issue. [¶] If a witness says, 'all I can tell you, it was a medium-sized, white male,' that's not very helpful, not persuasive. If the witness says, 'it was a medium-sized, white male with a husky voice,' that's another tidbit of circumstantial evidence, and I see that's what the people are trying to present. As to the weight to give to this, might be another issue.

(21 RT 3596.)

Before the jury was taken outside to see the Bronco, Detective Goldberg testified that the Bronco belonged to Anderson, and that it was

impounded on May 13, 2003. Since that time, the Bronco had been sitting in a sheriff's impound lot in the City of El Cajon. Arrangements were made to have the Bronco transported to the courthouse to be started for the jury's benefit. (22 RT 3667-3668.) After Detective Goldberg's testimony, the court adjourned and then reconvened outside the courthouse near the Bronco. (22 RT 3680.)

Defense counsel raised more objections. She noted that the Bronco was on a flatbed tow truck with a metal floor, and sat approximately four feet off the ground. "If this vehicle is started up in the position that it is in, the sound is going to be reverberating off the metal that it's placed . . . on top of, . . . It's going to sound a lot louder." (22 RT 3681.) Counsel also complained that a building was situated about 40 feet from the right side of the Bronco, and another building was "even closer" to the front of the Bronco. Counsel argued that these conditions were not similar to those when the truck was seen and heard by witnesses on the day of the murder. (22 RT 3681.) The court overruled the objections. (22 RT 3683.) The court did, however, grant Anderson's request to have the jury look at the undercarriage of the Bronco, in particular at the exhaust system, given that it was on a raised platform and in plain sight. (22 RT 3682-3684.)

The Bronco was started for the jury. (22 RT 3684.)

B. Standard of Review

A trial court's decision to admit evidence is reviewed on appeal using the deferential abuse of discretion standard. (*People v. Scott*, *supra*, 52 Cal.4th at p. 491.)

C. The Trial Court Properly Exercised Its Discretion by Allowing the Jury to Hear the Sound of Anderson's Bronco Because It Was Relevant to Establishing the Identity of the Murderer

Anderson contends the court abused its discretion by allowing the jurors to hear the sound of the Bronco because the conditions under which they heard it were different from those on the day of the murder, and because the Bronco had been "sitting outside, unprotected and exposed for two years." (AOB 95.) For these reasons, Anderson argues, allowing the jury to see and hear the Bronco was misleading and irrelevant. (AOB 95, 97.) Anderson's argument is unpersuasive; the evidence tended to establish Anderson's identity as the murderer and therefore was relevant to a material issue at trial.

Evidence offered at a trial can be anything "presented to the senses," including sounds. (Evid. Code, § 140; Cal. Law Revision Com. com., Deering's Ann. Code Evid. (2004 ed.) foll. § 140, p. 15.) As with evidence of other things presented to the senses, evidence of a sound must be relevant to be admissible. (Evid. Code, § 350.) Relevant evidence includes evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

The sound of Anderson's Bronco was relevant to identify Brucker's killer, which was the principal issue contested at trial. Vangorkum and Hartnett described the sound of the Bronco they had seen speeding near Brucker's house the day of the murder as "loud" and "very loud." (18 RT 3002, 3086.) The defense presented evidence to try to convince the jury that it was not Anderson's Bronco. (See, e.g., 27 RT 4769, 4792-4793 [Stevens testified Anderson drove a white Ford truck the day of the murder, and that Anderson's Bronco was parked at their condominium in Poway], 4851-4852 [evidence that in April 2003 there were more than 2000 older model

Ford Broncos registered to people in the East County area of San Diego].) If Anderson's Bronco sounded loud or very loud, that would be one piece of evidence that could support the prosecution's theory that the Bronco seen by the witnesses belonged to Anderson, and that Anderson was driving it; if it did not sound loud, that would be one piece of evidence that could support the defense theory that the Bronco seen by the witnesses did not belong to Anderson and that someone other than Anderson was driving it. Therefore, the sound of Anderson's Bronco had some tendency in reason to prove or disprove a disputed fact that was material to the determination of the case.

Anderson complains that the conditions under which the jury heard the Bronco were different than the conditions on the day of the murder, and that the Bronco had been sitting in an impound yard for two years. But these facts are not dispositive; they were obvious to the jury, and only affected the weight of the evidence, not its admissibility. (See *People v. Alcala* (1992) 4 Cal.4th 742, 797 [finding that under broad definition of relevant evidence, trial court could properly determine that evidence could have some tendency in reason to prove a disputed issue of fact, despite the relatively weak probative value of the evidence]; *People v. Price* (1991) 1 Cal.4th 324, 434 [finding that although relevance of challenged evidence was comparatively weak, it was properly admitted because it had some tendency in reason to establish a contested issue].)

In support of his position that the evidence was irrelevant, Anderson characterizes the evidence as a "demonstration," and relies on *People v. Boyd* (1990) 222 Cal.App.3d 541, and *People v. Vaiza* (1966) 244 Cal.App.2d 121. Neither case is on point.

In *People v. Vaiza, supra,* 244 Cal.App.2d 121, the defendant was charged with assaulting a peace officer with a deadly weapon; namely, a pistol. (*Id.* at p. 122.) The alleged assault occurred after two policemen

stopped the defendant as he walked along a street about 2 o'clock in the morning. (*Id.* at p. 123.) The police saw what the defendant held in his hand "for only a small space of time, in poor light," before the defendant turned and ran. (*Id.* at pp. 123, 125.) The primary issue contested at trial was whether the defendant pointed an actual pistol at the officer, or whether he pointed a toy pistol as testified to by the defendant. (*Id.* at p. 125.) The trial court allowed the prosecution to introduce four photographs designed to show lighting conditions at the scene, and at the time, of the crime. However, the photographs were taken at approximately 7:30 in the evening many months after the crime. The Court of Appeal noted that "[a]t 7:30 p.m., most people are at home with residential lights blazing, cars moving about with headlights on, and porch lights in evidence; the lighting is not the same in an area of this kind at 2 o'clock in the morning." (*Id.* at p. 127.) Indeed, during cross-examination of one of the officers regarding the pictures, the officer could not say whether certain lights that appeared in the pictures were lit at the time of the alleged assault. (*Ibid.*) The court concluded that "[w]hen four of the pictures were offered *solely* to show the lighting conditions at the time of the crime, it was incumbent upon the prosecution to lay a proper foundation at least by having the pictures taken at the same hour of the morning as the incident." (*Ibid.*) Because the prosecution failed to meet that minimum foundation, the trial court abused its discretion by allowing the photographs. (*Ibid.*)

In *People v. Boyd*, *supra*, 222 Cal.App.3d 541, the defendant and a codefendant were charged with the robbery and murder of a pizza delivery man that occurred about 12:50 in the morning outside an apartment complex. (*Id.* at pp. 548-549.) Identity was an issue at trial, and both defendants testified they did not participate in the charged crimes. (*Id.* at pp. 554-556.) During the trial, the defendants sought to introduce a film that purportedly reproduced the lighting conditions at the crime scene, for

the purpose of demonstrating that one of the percipient witnesses could not possibly have seen the events clearly enough to identify the perpetrators. The defense offered evidence at a foundational hearing to establish that the filming occurred during a time of night, and during a stage of the moon, that was similar to when the crimes occurred. (*Id.* at p. 565.) Nonetheless, the trial court refused to allow the defendants to show the film to the jury on the ground that it believed the film did not accurately represent what the human eye could see under the circumstances, and because no witness testified that the film was an accurate representation of the lighting conditions on the night of the crimes. (*Ibid.*) The *Boyd* court affirmed the ruling. It pointed out various factors affecting the lighting conditions the night of the murder that were not verified or replicated in the film, and found, therefore, that the trial court reasonably concluded that the lighting conditions portrayed on the film were not sufficiently similar to the lighting conditions on the night of the crime. (*Id.* at p. 566.)

Vaiza and *Boyd* are inapposite. In each of those cases, the issue involved a party's offer of demonstrative evidence for the purpose of conveying to the jury the lighting conditions that existed at the time and place of a crime. (See *People v. Boyd*, *supra*, 222 Cal.App.3d at p. 566; *People v. Vaiza*, *supra*, 244 Cal.App.2d at pp. 126-127.) To serve that purpose, the lighting conditions depicted by the evidence needed to be shown to be substantially similar to those existing at the time of the crime. In both cases, however, the proponent of the evidence failed to sufficiently establish that foundation. Here, in contrast, the prosecution offered evidence (the sound of Anderson's Bronco) that was not merely demonstrative of surrounding conditions. Instead, the evidence was a characteristic of a car actually seized in the course of the investigation—a characteristic that could be compared to descriptions of the same

characteristic of the car seen driving near the victim's home the day of the murder.

D. Any Error Was Harmless

Anderson asserts that the alleged error should be subjected to the federal harmless error test because the error violated his constitutional right to a fair trial. (AOB 98.) This assertion is untenable. Even if the sound of the car should not have been admitted in evidence, there is no credible basis to conclude that its admission violated Anderson's constitutional rights. (See *Estelle v. McGuire*, *supra*, 502 U.S. at p. 75 [stating the admission of evidence will violate the federal constitution only when it "so infuse[s] the trial with unfairness as to deny due process of law."].) Therefore, if the evidence should not have been admitted, only the state harmless error standard applies.

In any event, the admission of the challenged evidence was harmless under either standard. While the sound of Anderson's Bronco was relevant to establishing the identity of the killer, its significance in contributing to the identification of Anderson was minimal in the face of other overwhelming evidence. For example, Vangorkum testified unequivocally that the photographs of Anderson's Bronco in Exhibit 20 depicted the same Bronco he saw the day of the murder, and Peretti and Handshoe both identified Anderson as being involved in the murder (16 RT 2500 et seq.; 18 RT 3085; 22 RT 3749 et seq.) In light of the whole record, there is no reasonable doubt that any error in the admission of the sound of the Bronco did not contribute to the guilty verdicts. Likewise, the sound of the Bronco was not "the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die,""" and therefore any error in its admission cannot serve as a basis to reverse the penalty verdict. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 917.)

VIII. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO IMPEACH A DEFENSE WITNESS WITH EVIDENCE OF HIS PRIOR FELONY CONVICTIONS BECAUSE THEY WERE RELEVANT TO HIS CREDIBILITY

Anderson contends the trial court abused its discretion by allowing the prosecution to impeach defense witness James Stevens with certain prior felony convictions. (AOB 101-107.) According to Anderson, evidence of those prior convictions had minimal value, which was outweighed by the potential for prejudice. (AOB 104.) Respondent disagrees. The trial court's decision to allow impeachment with the prior convictions was well within the bounds of its discretion because the prior convictions were relevant to Stevens's credibility and the potential for undue prejudice to Anderson was de minimis.

A. Trial Court Proceedings

Stevens was called as a witness by the defense. Before Stevens took the stand, the defense asked the court to limit the prosecution's ability to impeach Stevens with his prior felony convictions. Stevens's criminal history included five convictions for auto theft; two in 1986, and one in 1987, 1992, and 1993, respectively. (27 RT 4709.) Steven also suffered prior convictions for escape in 1986 and armed robbery in 1996. (*Ibid.*) Defense counsel asked to limit impeachment to the convictions occurring after 1992 because "I don't think it is necessary to go all the way back to '86, which is almost 20 years old." (27 RT 4709.) She further asked to exclude reference to the fact that Stevens used a gun during the 1996 robbery on the basis that "it is more prejudicial than probative." (27 RT 4709, 4714.) Finally, defense counsel stated she did not believe that the crime of escape involved moral turpitude, and that, therefore, it should not be used for impeachment. (27 RT 4709.)

The trial court refused to limit impeachment in the ways Anderson requested. It found that an escape did involve moral turpitude and therefore could be used for impeachment. (27 RT 4714; see *People v. Wheeler* (1992) 4 Cal.4th 284, 296, & fn. 6. [prior felony conviction must involve moral turpitude to be admissible for impeachment].) With respect to the armed robbery conviction, the court ruled that Stevens could be impeached with that prior conviction, including the fact that he used a gun. The court explained: "It is my belief that if the firearm was pled and admitted, that constitutes a specific incident of readiness to do evil." (27 RT 4715.) The court further stated: "I am going to weigh it pursuant to [Evidence Code section] 352. And my belief is that that is a separate act that would constitute moral turpitude; the use of a weapon in the course of a felony offense." (27 RT 4715.) With respect to the convictions occurring before 1993, the court stated "the fact that they go back 20 years, I find is not – does not neutralize the probative value of it because it looks like for ten years, up until the 1996 [robbery], it was an uninterrupted sequence of criminal activity." (27 RT 4715.)

During his cross-examination, the prosecutor impeached Stevens by having him admit that he had suffered the five convictions for auto theft described above, as well as the 1986 conviction for escape and the 1996 conviction for "robbery with the use of a firearm." (27 RT 4800-4801.)

B. Standard of Review

A trial court's decision to allow impeachment with a prior felony conviction is reviewed for abuse of discretion, that is, whether the court exceeded the bounds of reason. (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

C. The Trial Court Properly Allowed the Prosecution to Impeach Stevens With His Prior Felony Convictions Because They Were Relevant to His Credibility and Where Unlikely to Cause Any Undue Prejudice to Anderson

It is well established that a witness may be impeached with a prior felony conviction showing moral turpitude, subject to the court's discretion under Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 306; *People v. Clair*, *supra*, 2 Cal.4th at pp. 653-654; Cal. Const., art. I, § 28, subd. (f)(4); Evid. Code, § 788.) Moral turpitude means a "readiness to do evil" or a "moral depravity of any kind." (*People v. Lang* (1989) 49 Cal.3d 991, 1009; *Castro*, at pp. 314-315.) This rule reflects the principle that impeachment with such a prior conviction provides the trier of fact with relevant information concerning a witness's character and credibility. (See *Castro*, at pp. 313-316; *People v. Wheeler*, *supra*, 4 Cal.4th at p. 295 ["Misconduct involving moral turpitude may suggest a willingness to lie"]; *People v. Dewey* (1996) 42 Cal.App.4th 216, 221 [same].)

Crimes directly involving dishonesty lend themselves easily to the inference that a witness' character includes a readiness to lie in a particular case, and that he has lied in fact. (*People v. Castro*, *supra*, 38 Cal.3d at p. 315; *People v. Chavez* (2000) 84 Cal.App.4th 25, 28; *People v. Thornton* (1992) 3 Cal.App.4th 419, 422.) Crimes that involve moral turpitude other than dishonesty, although perhaps less compelling, nonetheless provide a basis for inferring that a witness is more likely to be dishonest than a witness about whom no such thing is known. (*Castro*, at p. 315; *Chavez*, at pp. 28-29.) "[I]t is undeniable that a witness' moral depravity of any kind has some 'tendency in reason' . . . to shake one's confidence in his honesty." (*Castro*, at p. 315.)

Stevens has suffered prior convictions for auto theft, escape, and armed robbery. Each of these crimes have been found to involve moral

turpitude. (*People v. Lang*, *supra*, 49 Cal.3d at p. 1009 [escape without force]; *People v. Rodgers* (1987) 240 Cal.App.3d 258, 260 [auto theft]; *People v. Stewart* (1985) 171 Cal.App.3d 59, 64 [robbery].) The use of a gun during a robbery further indicates the moral depravity of the act. (See, e.g., *People v. Cavazos* (1985) 172 Cal.App.3d 589, 595 ["It is the use of the deadly weapon which elevates the assault to a crime of moral turpitude"].) Therefore, each of those convictions was relevant to Stevens's credibility, and was admissible subject to the court's discretion under Evidence Code section 352.

Pursuant to Evidence Code section 352, a court has the discretion to prevent impeachment with a prior conviction if the probative value of the prior conviction is substantially outweighed by the potential for undue prejudice. (*People v. Clair*, *supra*, 2 Cal.4th at p. 654.) In exercising this discretion, a trial court should be guided, but not bound, by the factors set forth in *People v. Beagle* (1972) 6 Cal.3d 441. Thus, a court should generally consider: 1) whether the prior conviction reflects on honesty and integrity; 2) whether it is near or remote in time; 3) whether it was suffered for the same or substantially similar conduct for which the defendant is on trial; and 4) what effect admission would have on the defendant's decision to testify. (*Castro*, 38 Cal.3d at p. 307; *Beagle*, at pp. 453-454.) When the witness subject to impeachment is not the defendant, a court should focus on whether the conviction reflects on honesty and whether it is near in time. (*People v. Clair*, *supra*, 2 Cal.4th at p. 654.) The nearness or remoteness in time of a prior conviction is a relevant consideration because "'the remoteness detracts significantly from the value of this evidence in impeaching . . . credibility.'" (*People v. Woodard* (1979) 23 Cal.3d 329, 337, quoting *People v. Antick* (1975) 15 Cal.3d 79, 99.) "A conviction, '"[even] one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally

be excluded on the ground of remoteness.'"'" (*Woodard*, at p. 336, footnote omitted.)

In his opening brief, Anderson focuses on the relative remoteness of the prior convictions and, citing *People v. Pitts* (1990) 223 Cal.App.3d 1547, suggests that the court should have adopted a 10-year period as a presumptive cut-off date for prior convictions, which would have resulted in the exclusion of all but the 1996 armed robbery conviction. (AOB 103.) Pitts is inapposite. In that case, the court found that the trial court did not abuse its discretion by applying a presumptive standard of remoteness of 10 years; it did not establish, however, that not applying a presumptive 10-year-period for remoteness constituted an abuse of discretion. To be sure, "[t]here is no consensus among courts as to how remote a conviction must be before it is too remote." (*People v. Burns* (1987) 189 Cal.App.3d 734, 738.) Further,

> convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior. [Citations.] In fact, in *People v. Green* (1995) 34 Cal. App. 4th 165, 183 [40 Cal. Rptr. 2d 239], the court admitted a 20-year-old prior conviction, reasoning that defendant's 1973 conviction was followed by five additional convictions in 1978, 1985, 1987, 1988, and 1989. The court reasoned that "the systematic occurrence of [Anderson's] priors over a 20-year period create[d] a pattern that [was] relevant to [his] credibility." [Citation.] The fact that the intervening convictions were in and of themselves probative on the issue of defendant's honesty and credibility mitigates in favor of admission of the remote prior.

(*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.)

Here, the trial court considered the age of the convictions in deciding whether to exclude them, and concluded their significance was not substantially reduced by any remoteness in time because they reflected "an uninterrupted sequence of criminal activity"; in other words, Stevens had

not led a legally blameless life that might render a remote conviction no longer relevant to an assessment of credibility. (27 RT 4715.) In light of the foregoing authorities, the trial court's decision to allow impeachment with Stevens's prior convictions that were more than 10 years old did not constitute an abuse of discretion.

With respect to the 1996 armed robbery conviction, Anderson suggests that it should have been excluded because its relevance to Stevens's credibility was minimal. Anderson offers no argument in support of this assertion; instead, he simply cites to this Court's opinion in *People v. Fries* (1979) 24 Cal.3d 222, at page 229, which includes the observation that "convictions for theft offenses such as 'robbery and burglary, are somewhat less relevant' on the issue of credibility than are crimes such as perjury [citation] and hence are entitled to 'somewhat less' weight." But the general observation that a robbery conviction may be "somewhat less relevant" on the issue of credibility than a perjury conviction says nothing about the proper assessment of the probative value of Stevens's armed robbery conviction for the purposes of impeachment in the context of this case. As noted above, robbery is a crime involving moral turpitude. (*People v. Stewart*, *supra*, 171 Cal.App.3d at p. 64 ["it is beyond dispute that robbery necessarily involves moral turpitude or the '"readiness to do evil,"' and evinces a character trait which can reasonably be characterized as '"immoral."'"].) As such, it is relevant to a jury's assessment of whether to believe a witness's testimony. (*People v. Castro*, *supra*, 38 Cal.3d at p. 315 ["it is undeniable that a witness' moral depravity of any kind has some 'tendency in reason' (Evid. Code, § 210) to shake one's confidence in his honesty."].) And in this case, the 1996 armed robbery conviction capped a 10-year period in which Stevens committed seven crimes of moral turpitude, and resulted in his being incarcerated in prison until 2000, just five years before his trial testimony. Under these circumstances,

Anderson's assertion that the robbery conviction had minimal probative value is unpersuasive.

In addition to asserting that Stevens's prior convictions had minimal probative value, Anderson also asserts that the priors were "prejudicial and cumulative" because the jury already heard that Stevens met Anderson in prison (thereby indicating that Stevens had been convicted of a crime), and they portrayed Stevens as a long-time criminal. (AOB 103.) This argument, too, is unpersuasive. The prejudice implicated by the weighing process under Evidence Code section 352 is not the prejudice or damage that naturally flows from relevant evidence—in other words, as relevant here, from the natural implications from the fact that Stevens had previously suffered seven felony convictions involving moral turpitude over a period of about 10 years, i.e., that he was a long-time criminal and therefore may not be trustworthy—but the prejudice that "uniquely tends to evoke an emotional bias against the defendant as an individual and . . . has very little effect on the issues. [Citations]." (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1119.) Anderson has not articulated how learning that Stevens had suffered these prior convictions would tend uniquely to evoke in the jurors an emotional bias against Anderson as an individual, and there is no obvious reason to think that it would. Accordingly, Anderson has failed to show that the trial court abused its discretion by allowing Stevens to be impeached with his prior convictions. (See *People v. Hinton* (2006) 37 Cal.4th 839, 888 ["No witness . . . is entitled to a false aura of veracity."].)

D. Any Error Was Harmless

Even if the trial court should have limited the prosecution's ability to impeach Stevens with certain prior convictions, reversal is unwarranted because impeachment of Stevens with all his prior convictions did not result in a miscarriage of justice. The state harmless error test applies here because any erroneous admission of Stevens's prior convictions did not

result in a fundamentally unfair trial under the circumstances of this case (see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 75 [the admission of evidence will violate the federal constitution only when it "so infuse[s] the trial with unfairness as to deny due process of law."]); indeed, Anderson does not assert otherwise.

The evidence related to Stevens's criminal history—not Anderson's. Accordingly, there was no risk the evidence would reflect poorly on Anderson. Moreover, as discussed thoroughly in preceding arguments, there was strong evidence of Anderson's guilt. Therefore, it is not reasonably probable that Anderson would have received a different outcome at the guilt phase if Stevens had been impeached with one prior felony conviction instead of seven. Likewise, evidence of Stevens's prior convictions was not """the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die,""" and therefore any error in its admission cannot serve as a basis to reverse the penalty verdict. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 917.)

IX. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF A HEARSAY STATEMENT PURSUANT TO THE EXCEPTION TO THE HEARSAY RULE FOR PRIOR INCONSISTENT STATEMENTS

Anderson contends the trial court abused its discretion when it allowed the prosecution to introduce a hearsay statement made by Travis Northcutt under the exception to the hearsay rule for prior inconsistent statements (see Evid. Code, § 1235). (AOB 107-117.) Anderson forfeited this argument by failing to make a timely and specific objection on this ground in the trial court. Even if not forfeited, the trial court properly exercised its discretion. Alternatively, even if the court should have excluded the evidence, the error was harmless.

A. Trial Court Proceedings

The prosecution called Travis Northcutt as a witness. (20 RT 3435.) Before doing so, the prosecutor told the court, "I believe Travis Northcutt is going to do whatever he can to throw a monkey wrench into the works here; that he doesn't want to testify." (20 RT 3434.) Upon taking the stand, Northcutt said he wanted "to take the Fifth." (20 RT 3436.) Upon inquiry by the court, Northcutt explained that he just didn't want to be there and didn't want to say anything, and that he "figured taking the Fifth would make it so I didn't have to talk . . . ." (20 RT 3502.) Based on Northcutt's explanation, and an offer of proof by the prosecutor, the court ruled there was no basis to find that Northcutt could refuse to answer questions under the Fifth Amendment. (20 RT 3436-3438, 3499-3503.) Northcutt proceeded to answer questions asked of him in front of the jury, but was generally evasive to the point that the prosecutor asked the court to declare him a hostile witness, and the court granted the prosecutor permission to ask leading questions. (20 RT 3505-3506.)

During direct examination, Northcutt testified that prior to April 2003, he lived with Anderson and Stevens in a condominium in Poway. (20 RT 3505-3506.) Northcutt denied that Anderson raised with him "the subject of committing a crime involving a safe." (20 RT 3506.) He also denied that he ever saw Anderson with a "goofy hairpiece." (20 RT 3508.) Northcutt further testified that he did not remember, or did not recall, the following: Telling Investigator Baker that Anderson told him he was "coming along and that something big was going to happen, a big hit that involved a safe, and that [Anderson] then asked if [Northcutt] wanted to be part of it" (20 RT 3506); seeing a news report of the murder of the owner of the El Cajon Speedway while at the condominium (20 RT 3506-3507); telling Investigator Baker that he saw such a television news report in the presence of Anderson (20 RT 3507); telling Investigator Baker that Anderson told

him "to keep [his] fucking mouth shut; that [he was] the – only the third person to know that [Anderson] was involved and that [he] would be next if [he] didn't keep [his] mouth shut" (20 RT 3507, 3510-3511); telling Investigator Baker that he had seen Anderson wearing a "salt-and-pepper, goofy-looking hairpiece" (20 RT 3508, 3511); and telling Investigator Baker that Anderson drove a Bronco most of the time (20 RT 3512).

During cross-examination by Lee's counsel, Northcutt testified that he talked to investigator Baker twice. (20 RT 3512.) During the second interview, he "more or less" told investigator Baker that everything he said during the first interview was a lie. (20 RT 3513.)

During cross-examination by Anderson's counsel, Northcutt testified he did not care for Anderson at all. (20 RT 3515.) He also stated he did not recall much of anything he told investigator Baker because he had been drinking excessively and smoking marijuana. (20 RT 3519.) However, Northcutt remembered that, during the second interview, Investigator Baker told him he would likely be asked during a trial whether Anderson said he was involved in something big involving a safe and whether Anderson had asked him if he wanted to be involved. Northcutt testified variously that "that would have never happened," "It never happened," and "it couldn't possibly" have happened. (20 RT 3520-3521.)

The prosecution later impeached Northcutt's testimony through Investigator Baker. Baker testified that he talked to Northcutt in September 2004. (24 RT 4167-4168.) The prosecutor started to ask Baker if Northcutt told him that Anderson told Northcutt "that he was coming along and --". At that point, the defense objected on the ground that the question was leading. (24 RT 4169.) The following colloquy occurred:

> Mr. McAllister: It's impeachment, your honor.
>
> The Court: The – I think this is a question that was asked of Mr. Northcutt and –

Ms. Vandenbosch: Okay.

The Court: --and my ruling is that there is the foundation for prior inconsistent statement.

(24 RT 4169.)

Without further objection by Anderson, Investigator Baker proceeded to testify that Northcutt told him that Anderson said "he was coming along and that something big was going to happen, a big hit that involved a safe and that he asked Travis Northcutt if he wanted to be part of it." (24 RT 4169.) Investigator Baker also testified that Northcutt told him that, while in the presence of Anderson and Stevens, he saw a newscast regarding the murder of the El Cajon Speedway owner and that Anderson told him to "keep his fucking mouth shut," that Northcutt was only the third person to know that he was involved, and that if he didn't keep his mouth shut he would be next. (24 RT 4169-4170.) Finally, Northcutt told Investigator Baker that he had seen Anderson wearing a goofy hairpiece, and that Anderson drove a Ford Bronco most of the time. (24 RT 4170.)

B. Anderson Forfeited This Claim By Failing To Raise It In The Trial Court

In this appeal, Anderson asserts that Investigator Baker's testimony that Northcutt told him Anderson said "he was coming along and that something big was going to happen, a big hit that involved a safe . . . ," and that Anderson asked Northcutt "if he wanted to be part of it," contained two levels of hearsay statements (Anderson's out-of-court statement to Northcutt, and Northcutt's out-of-court statement to Investigator Baker), and that there was not an applicable exception to the hearsay rule to overcome both hearsay statements so as to make Investigator Baker's testimony admissible. (AOB 109-114; see *People v. Zapien*, *supra*, 4 Cal.4th at pp. 951-953 [stating rule that admission of multiple hearsay is proper where each hearsay statement meets the requirements of an

exception to the hearsay rule]; Evid. Code, § 1201 [same].) However, Anderson did not raise a hearsay objection to the admission of Investigator Baker's testimony in the trial court. Instead, Anderson only objected to the form of the question, asserting that it was leading. (24 RT 4169.) Then, after the prosecutor said he was offering the evidence as impeachment, and while the court was explaining that the evidence fell within an exception to the hearsay rule, Anderson's counsel said "Okay," and did not thereafter quarrel with the court's explanation for admitting the evidence or otherwise object to the admission of Investigator Baker's testimony. Anderson's initial objection to the form the prosecutor's question was insufficient to preserve a hearsay argument for purposes of appeal. (*People v. Williams*, *supra*, 43 Cal.4th at p. 620 ["[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal," internal quotation marks omitted]; *People v. Seijas* (2005) 36 Cal.4th 291, 301 ["We have long held that a party who does not object to a ruling generally forfeits the right to complain of that ruling on appeal."]; e.g., *People v. Green* (1980) 27 Cal.3d 1, 22 [objection on ground that questions were leading did not preserve appellate argument that the evidence was impermissible evidence of other crimes].)

C. Standard of Review

A trial court's decision to admit evidence is reviewed for abuse of discretion. (*People v. Scott*, *supra*, 52 Cal.4th at p. 491.)

D. The Trial Court Properly Allowed Investigator Baker To Testify To Northcutt's Statements Regarding What Anderson Had Said To Him Because An Exception To The Hearsay Rule Applied To Both Levels Of Hearsay

Under the hearsay rule, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is not admissible unless an exception to the hearsay rule applies. (Evid. Code, § 1200.) Where proffered evidence contains multiple levels of hearsay, an exception for each level must be satisfied. (*Id.*, § 1201.)

The challenged testimony of Investigator Baker included two levels of hearsay: Anderson's statements to Northcutt, and Northcutt's statements to Investigator Baker. As to Anderson's alleged statements to Northcutt, the record suggests that the parties agreed in the trial court that such statements would fall within the exception to the hearsay rule found at Evidence Code section 1220, which addresses admissions by a party. (20 RT 3432.) In his opening brief, Anderson does not challenge this notion, and limits his argument to the assertion that "no hearsay exception applied for Northcutt's statement to Baker." (AOB 111.) In particular, Anderson contends that the exception for prior inconsistent statements, set forth in Evidence Code section 1235, does not apply. (AOB 1112-1114.)

Evidence Code section 1235 provides, in relevant part, that "[e]vidence 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 . . . ." In *People v. Johnson* (1992) 3 Cal.4th 1183, at page 1219, this Court stated the "'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony" (italics in original), and observed that normally "the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event." This Court cautioned, however, that

this rule did not operate mechanically, and explained that "'[i]nconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.'" (*Ibid.*) This Court further clarified that "[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*Id.* at pp. 1219-1220.)

The precise evidence challenged by Anderson in this appeal is Northcutt's out-of-court statement to Investigator Baker that Anderson told him "he was coming along and that something big was going to happen, a big hit that involved a safe and that he asked Travis Northcutt if he wanted to be part of it." (24 RT 4169; see AOB 108-109.) Under *Johnson*, the question then becomes whether this statement was, in effect, inconsistent with Northcutt's trial testimony; if it was, then it qualified as a prior inconsistent statement and was admissible on that basis as an exception to the hearsay rule.

The record establishes that Northcutt's out-of-court statement was indeed inconsistent with his trial testimony. On direct examination, the prosecutor asked Northcutt: "during the time that you lived [with him], did Mr. Anderson bring up the subject of committing a crime involving a safe?", to which Northcutt responded, "No." (20 RT 3506.) Then, during cross-examination, Anderson's counsel asked Northcutt about the idea of Anderson "telling you that he was involved in something big and that it involved a safe and that – and asking you if you wanted to be involved with it." (20 RT 3520-3521.) Northcutt responded, "That would have never happened." (20 RT 3521.) Counsel asked if Northcutt told Investigator Baker shortly before the trial "that you weren't even sure if [Anderson]

actually told you this and that you may have just thought it up." (20 RT 3521.) North responded, "Yes, it never happened." (20 RT 3521) Counsel followed up, "It never happened?", to which Northcutt responded, "No. It couldn't possibly, no no." (20 RT 3521.) This testimony is plainly contradicted, and thereby inconsistent with, Northcutt's statement to Investigator Baker that Anderson told him "a big hit" involving a safe was going to happen, and that Anderson asked him if he wanted to be a part of it.

Anderson ignores or minimizes the above testimony of Northcutt—testimony that amounts to affirmative denials that Anderson told him about committing a crime involving a safe or that Anderson asked him if he wanted to participate—and focuses instead on Northcutt's testimony that he did not recall telling Investigator Baker about Anderson's statements. (AOB 113-114; see 20 RT 3506, 3510.) This focus is misplaced. The relevant fact sought to be proved by the prosecutor was that Anderson made statements to Northcutt about planning to commit a crime involving a safe; whether Northcutt relayed Anderson's statements to Investigator Baker was not the point. The questions put to Northcutt about what he told Investigator Baker were designed merely to remind him of his statement to Investigator Baker, and to provide him a chance to explain the inconsistency between that statement (i.e., the statement that Anderson told him about a hit involving a safe and asked if he wanted to participate) and his trial testimony (i.e., that Anderson did not tell him about a hit involving a safe or ask if he wanted to participate). Northcutt's responses about not remembering what he told Investigator Baker do not change the fact that, when asked on direct on cross-examination whether Anderson told him about a crime involving a safe and asked him if he wanted to participate, Northcutt flatly denied that Anderson made such statements.

Even if Northcutt's claim of lack of recall about relaying Anderson's statements to Investigator Baker were relevant to this analysis, his claim did not preclude impeachment of Northcutt with his prior statements to Investigator Baker. Anderson argues that a witness's testimony that he does not recall an event is not inconsistent with a prior statement about that event. (AOB 112.) While this position is generally correct, it fails to acknowledge that a witness's claim of lack of recall should not be blindly accepted: "When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1219.) Thus, if there is a reasonable basis in the record for concluding that the witness is being evasive and untruthful, admission of his prior statements is proper. (*Id.* at pp. 1219-1220.)

Here, the record supports a reasonable inference that Northcutt was evasive and untruthful when he claimed he could not recall telling Investigator Baker about Anderson's statements. Before calling Northcutt as a witness, the prosecutor stated his belief that Northcutt "is going to do whatever he can to throw a monkey wrench into the works here; that he doesn't want to testify. I can't guarantee you what he will and won't say." (20 RT 3434.) And when Northcutt first took the stand, he asked to invoke his Fifth Amendment right to remain silent. (20 RT 3436.) Upon inquiry by the court, Northcutt candidly said that he didn't want to be there, and that he didn't want to say anything. (20 RT 3502.) After being ordered to testify, Northcutt failed to provide straightforward answers. The following excerpt from the reporter's transcript, which documents a portion of the prosecutor's direct examination near the beginning of Northcutt's testimony, illustrates the point:

Q. How long have you known Eric Anderson?

A. I have no idea.

Q. At some point in time, prior to April of 2003, were you and Mr. Anderson roommates together?

A. Yes.

Q. And did you also have another roommate?

A. Yes.

Q. And what was that roommate's name?

A. I don't recall.

Q. Would the name James Stevens sound familiar?

A. Sounds pretty good.

Q. During that time that you and Mr. Anderson were roommates, where – where did you share a home? In other words, what was the address of where you were living?

A. Oh, I have no clue.

Q. Okay. And what part of the county was it?

A. Inland.

Q. And when you say "inland," sir, what particular community or town?

A. A small one.

Mr. McAllister: Your honor, may I ask that this witness be declared a hostile witness?

The Court: You can ask him leading questions.

(20 RT 3505-3506.)

Northcutt's reticence continued throughout his time on the witness stand.

Based on the foregoing, there is a reasonable basis in the record to conclude that Northcutt's claim of lack of recall was evasive and untruthful,

and therefore inconsistency between his testimony and his prior statements is implied.

E. Any Error Was Harmless

Anderson asserts, without explanation, that the alleged error resulted in a violation of his federal Constitutional right to a fair trial during the guilt phase, and therefore that it should be subjected to the federal harmless error test articulated in *Chapman v. California*, *supra*, 386 U.S. 18. (AOB 115.) Respondent disagrees. Anderson's admission to Northcutt was clearly relevant to the contested issue at trial of whether Anderson was involved in the murder of Brucker. And Northcutt appeared as a witness at the trial, and was subject to cross-examination by Anderson. For these reasons, any error under state evidentiary rules did not result in a constitutional violation. (See *People v. Dement* (2011) 53 Cal.4th 1, 23 ["When a declarant 'appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.'"]; *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1010 ["The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights.' [Citation.]"]; *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"]; *Jammal v. Van de Kamp*, *supra*, 926 F.2d at p. 920 ["Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process."].) Therefore, if the evidence should not have been admitted, only the state harmless error standard applies.

Under state law, reversal is not required for the erroneous admission of evidence unless it resulted in a miscarriage of justice. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 76; Cal. Const. art. VI, § 13; Evid. Code, § 353, subd. (b).) A miscarriage of justice will be found only if, after an examination of the whole record, the court determines it is reasonably

probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

In light of the whole record, it is not reasonably probable that Anderson would have received a more favorable verdict if Investigator Baker had not been allowed to testified to Northcutt's prior statements. The prosecution's case against Anderson was multi-faceted. It included direct evidence of Anderson's planning and executing the charged crimes as testified to by Peretti, Handshoe, and Paulson. It also included several items of circumstantial evidence. For example: four witnesses saw a Bronco similar to Anderson's in the area of Brucker's house the day of the murder; Brucker's description of his killer's hair color matched the color of the wig Anderson was wearing when he left Handshoe's mobile home; and Anderson changed his appearance and fled to Oregon in a car that was not his Bronco days after the murder. As discussed above in preceding arguments, the combined strength of the prosecution's case was strong. While Anderson's statement to Northcutt was another piece of evidence that supported the prosecution's case, it was cumulative to more compelling evidence, and only marginally contributed to the proof against Anderson.

Anderson also contends the evidence was prejudicial during the penalty phase of the trial because it showed that he participated in the planning of the crimes. (AOB 117.) However, like in the guilt phase, this evidence was cumulative of more compelling evidence showing that Anderson participated in the planning of the crimes; namely, the testimony of Peretti, Paulson, and Handshoe. Therefore, there is no realistic possibility that the jury would have rendered a different verdict had the trial court excluded the evidence of Northcutt's out-of-court statements. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 917 ["'[W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will

affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred.'"].)

For these same reasons, even if analyzed under the *Chapman* standard, any error was harmless at both the guilt and penalty phases of the trial.

X. THE TRIAL COURT PROPERLY ALLOWED EVIDENCE, OVER ANDERSON'S HEARSAY OBJECTION, THAT ANDERSON WAS IDENTIFIED BY LAW ENFORCEMENT AS A SUSPECT THREE DAYS AFTER THE MURDER BECAUSE THE EVIDENCE DID NOT AMOUNT TO HEARSAY

Anderson contends the trial court abused its discretion when it allowed the prosecution to introduce evidence that Anderson was identified as a potential suspect in the Brucker murder on April 17, 2003 (three days after the murder) because the evidence amounted to inadmissible hearsay. (AOB 118-123.) Respondent disagrees. The evidence was not offered to prove the truth of an out-of-court statement and therefore was not hearsay evidence. Any error was harmless.

A. Trial Court Proceedings

During its case-in-chief, the People presented evidence that Anderson fled from San Diego on April 24, 2003, for the purpose of supporting the inference that Anderson harbored consciousness of guilt for the Brucker murder. (21 RT 3574-3575.) To counter this evidence, the defense called Detective Goldberg as a witness to testify that, also on April 24, 2003, the San Diego Union-Tribune newspaper published an article indicating law enforcement officials were looking for two suspects in connection with the Brucker murder. (26 RT 4581, 4583.) The article described the suspects as two women between the ages of 17 and 25 who were associated with a gray Toyota "Forerunner" or "Prerunner" type of truck. (26 RT 4583.) A second article was published on May 10, 2003, which indicated police had cleared

the two females of involvement in the murder, and that the investigation was "wide open" and police were seeking information from the public. (26 RT 4584-4585.) According to the defense, this evidence, along with the evidence that parole agents searched Anderson's condominium on April 24, 2003, tended to undermine the prosecution's consciousness-of-guilt explanation for Anderson's flight, and tended to show that Anderson fled the state because of his concern about being returned to prison for parole violations unrelated to the Brucker murder. (26 RT 4582.)

In response to the testimony of Detective Goldberg offered by the defense, the prosecution asked Detective Goldberg the following question on cross-examination: "The first time that the person you now know as Eric Anderson was identified to law enforcement came through the crime stopper tip, didn't it?" (26 RT 4594.) Anderson objected to the question on the ground that it called for hearsay. After the prosecution clarified it was offering the evidence "not for the truth of the matter of the tip" but to establish the progress and the timing of the investigation, the court overruled the objection: "I'm going to allow it for the limited purpose, not for the truth of the tip, but the timing of the tip and what happened next." (26 RT 5494.) Thereafter, Detective Goldberg testified that "[w]e received information in regards to Mr. Anderson on [April 17] via his – his nickname," and that "by his nickname Mr. Anderson was identified as a potential suspect." (26 RT 4594-4595.)

B. Standard of Review

A trial court's decision to admit evidence is reviewed for an abuse of discretion. (*People v. Scott, supra*, 52 Cal.4th at p. 491.)

C. The Trial Court Properly Allowed Detective Goldberg to Testify That Anderson Was Identified as a Suspect on April 17, 2003, Because That Evidence Was Not Offered to Prove the Truth of any Out-Of-Court Statement

"Hearsay, of course, is evidence of an out-of-court statement offered by its proponent to prove what it states." (*People v. Alvarez* (1996) 14 Cal.4th 155, 185.) As a corollary to this rule, an out-of-court statement is not hearsay evidence if it is not admitted for the truth of the matter stated. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068.) Thus, to properly analyze any hearsay issue, there must be an examination of the challenged evidence to identify whether it contained any out-of-court statement, and the purpose for which any such statement was admitted.

Here, the challenged evidence contains two assertions of fact: The first is the explicit assertion that law enforcement received a tip on April 17, 2003; the second is the implicit assertion that Anderson was involved in the murder of Brucker. The first assertion was made by Detective Goldberg himself while testifying and therefore does not amount to an out-of-court statement. The second assertion was made by an unidentified third person on April 17, and therefore constitutes an out-of-court statement. However, that out-of-court statement, regardless of its truth, was offered simply to establish that Anderson became a suspect in the murder on April 17, which was several days before April 24 when Anderson fled San Diego; it was not offered to prove that Anderson in fact committed the murder. Therefore, Detective Goldberg's testimony did not constitute hearsay evidence.

Anderson's argument that the evidence amounted to hearsay focuses on the first assertion identified above: "Contrary to what the trial court decided, the detective's response was a statement offered for its truth since jurors would have to regard the April 17th date as true in order to ascertain the timing of the investigation." (AOB 119.) While this is true enough,

Detective Goldberg's assertion that the tip was received on April 17 was a direct assertion by Goldberg himself while testifying at the trial. Nonetheless, Anderson suggests that Goldberg's testimony on that point was not based on his personal knowledge, but instead reflected what he had been told by others. (AOB 119.) This is speculation. Had that been a concern at trial, Anderson could have asked Goldberg while he was testifying how he knew about the tip, but Anderson did not do so. Anderson did, however, elicit testimony from Detective Goldberg that he had been involved in the murder investigation "pretty much since it's [*sic*] happened." (26 RT 4577.) On this record, there is no reasonable basis to conclude that Detective Goldberg did not have personal knowledge of the fact that the tip identifying Anderson as a suspect was received on April 17.

D. Any Error Was Harmless

Anderson contends, without explanation, that the allegedly erroneous admission of Goldberg's testimony resulted in a violation of his federal constitutional rights during the guilt phase, and therefore is subject to the harmless error standard in *Chapman v. California*, *supra*, 386 U.S. 18. (AOB 120.) Respondent disagrees. The testimony was relevant to rebut evidence introduced by the defense regarding whether Anderson was considered a suspect before he fled town. Accordingly, if the admission of the testimony was error because it amounted to hearsay as claimed by Anderson, the error violated nothing more than state evidentiary rules, and therefore is subject to only the state standard for harmless error. (See *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1010 ["The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights.' [Citation.]"]; *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"]; *Jammal v. Van de Kamp*, *supra*, 926 F.2d at p. 920 ["Only if there

are *no* permissible inferences the jury may draw from the evidence can its admission violate due process."].)

Under state law, reversal is not required for the erroneous admission of evidence unless it resulted in a miscarriage of justice. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 76; Cal. Const. art. VI, § 13; Evid. Code, § 353, subd. (b).) A miscarriage of justice will be found only if, after an examination of the whole record, the court determines it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The testimony of Detective Goldberg about receiving the tip on April 17 is patently unimportant to the determination of Anderson's guilt in relation to the other evidence presented at trial. Therefore, even if improperly admitted, the evidence did not result in a miscarriage of justice.

Anderson also contends the alleged error was prejudicial at the penalty phase. (AOB 122-123.) Respondent disagrees. The evidence of the tip was not """the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die,""" and therefore any error in its admission cannot serve as a basis to reverse the penalty verdict. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 917.)

XI. CUMULATIVE EFFECT OF EVIDENTIARY ERRORS

Anderson contends the cumulative effect of the above-alleged evidentiary errors resulted in an unfair trial in violation of his due process rights. (AOB 123-126; see *People v. Hill* (1998) 17 Cal.4th 800, 844 [stating that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error."].) But as demonstrated above, no evidentiary error occurred, and even if there were an error, it was harmless. Consideration of the cumulative effect of any possible errors would not alter the conclusion that Anderson was not prejudiced by the asserted errors, and that he

received a fair trial. (See, e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 567-568.)

XII. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT PERETTI AND PAULSON WERE ACCOMPLICES AS A MATTER OF LAW BECAUSE THAT DETERMINATION DEPENDED ON MATERIAL FACTS THAT WERE IN DISPUTE

Anderson contends the trial court erred by refusing to instruct the jury that Peretti and Paulson were accomplices to the Brucker murder as a matter of law because their presence at the mobile home when Anderson, Handshoe, and Huhn planned the crimes permits only the single logical inference that they were in fact accomplices. (AOB 126-134.) Respondent disagrees. In light of the whole record, another logical inference is that Peretti and Paulson were present at Handshoe's mobile home during those times simply because they wanted to do drugs and hang out with their friends. Moreover, neither Peretti nor Paulson were present at the crime scene, and Anderson does not point to any evidence in the record to show that either of them shared the perpetrators' criminal intent. Nor does Anderson point to any evidence that conclusively shows either Peretti or Paulson promoted, encouraged, or assisted the perpetrators in committing the crimes. For these reasons, the trial court correctly refused to instruct the jury that Peretti and Paulson were accomplices as a matter of law.

A. Trial Court Proceedings

The court decided as a matter of law that Handshoe was an accomplice to the Brucker murder, and so instructed the jury. (28 RT 5064; see 8 CT 1614.) Anderson requested the court to also find that Peretti and Paulson were accomplices as a matter of law, but the court refused that request on the basis that the evidence did not indisputably lead to that conclusion. (28 RT 4998-5004; 7 CT 1460-1461.) Instead, the court instructed the jury on the definition of an accomplice found in CALJIC No.

3.10, and directed the jury, using the standardized language of CALJIC No. 3.19, that it must determine whether Peretti and Paulson were accomplices. (28 RT 5064; see 8 CT 1613, 1614-1615.)

B. Standard of Review

Claims of instructional error are reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

C. Governing Law

A defendant may not be convicted solely on the testimony of an accomplice. (Pen. Code, § 1111.) To sustain a conviction, accomplice testimony must be corroborated by "other evidence as shall tend to connect the defendant with the commission of the offense. . . ." (*Ibid.*) An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial . . . ." (*Ibid.*) Who determines whether a witness is an accomplice depends on the state of the evidence: "if the material facts are in dispute, the question is factual and lies in the domain of the jury; conversely, if the facts are not in dispute the question is legal and to be determined by the trial judge." (*People v. Hoover* (1974) 12 Cal.3d 875, 880; accord *People v. Sully* (1991) 53 Cal.3d 1195, 1227 ["Accomplice status is a question of fact for the jury unless the evidence permits only a single inference."]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 759 [stating that only when facts relating to accomplice status "are clear and undisputed may the court determine that the witness is or is not an accomplice as a matter of law"].) In either case, where there is substantial evidence that a witness is an accomplice, the trial court must instruct the jury that his testimony should be viewed with caution and that a conviction may not be based on his testimony unless it is corroborated by other evidence connecting the defendant to the charged offense. (*People v. Boyer*, *supra*, 38 Cal.4th at p. 466; *People v. Zapien*, *supra*, 4 Cal.4th at p. 982.)

To qualify as an accomplice, a witness must be chargeable with the crime as a principal and not merely as an accessory after the fact. (*People v. Sully*, *supra*, 53 Cal.3d at p. 1227; see Pen. Code, §§ 31 & 32.) "An aider and abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and shares the perpetrator's criminal purpose." (*Sully*, at p. 1227.) "An aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) It is not sufficient to establish aider and abettor liability where the person "merely gives assistance with knowledge of the perpetrator's criminal purpose." (*Sully*, at p. 1227.)

D. The Trial Court Properly Refused to Instruct the Jury That Peretti and Paulson Were Accomplice as a Matter of Law Because the Evidence Permitted Different Conclusions on That Issue

Anderson contends "the logical inference from the evidence was that Peretti and Paulson were accomplices." (AOB 129.) He points to Peretti's and Paulson's presence at one or more "meetings" in the months preceding the murder, during which details of the proposed burglary were discussed. He also points to evidence that Peretti was present at Handshoe's mobile home immediately before the crimes as the final preparations were made and while there were discussions about what they would do with the loot, that Peretti gave misleading information to the police after the murder, and that she was given immunity in order to secure her testimony. Anderson acknowledges that neither Peretti nor Paulson handled weapons or were present at the scene, but observes that those factors are not dispositive. He then asserts that Peretti and Paulson were not credible witnesses, and may have attempted to shift blame away from themselves. Ultimately, Anderson

concludes: "In essence, given Paulson and Peretti not only knew but associated with the defendants, there was no reasonable explanation for their presence with them during the planning stages unless part of and encouraging the group." (AOB 131.)

Anderson's argument that the evidence permits only the single inference that Paulson and Peretti were accomplices to the charged crimes is unpersuasive. With respect to Paulson, the only evidence of his alleged involvement in the crimes that Anderson points to in the record is the fact that Paulson was present on three occasions when various combinations of alleged conspirators discussed the idea of robbing the owner of the El Cajon Speedway. But Paulson's presence during such discussions does not amount to clear and undisputed evidence that he promoted, encouraged, or assisted the perpetrators, or that he shared the perpetrators' criminal purpose. Uncontested evidence established that over the several-month period of time during which these three discussions took place, Paulson considered Handshoe and Huhn to be good friends. (17 RT 2911-2912.) Paulson frequently hung out with them (and sometimes Lee), and they consumed drugs together. (16 RT 2561; 17 RT 2893, 2898-2899, 2906.) Thus, the evidence demonstrated that Paulson had reasons to be with the defendants other than to plan a crime. In addition, there was no evidence that Paulson directly participated in the crimes in any fashion, that he otherwise committed an act that encouraged or assisted others in the commission of the crimes, or that he shared the perpetrators' criminal purpose. To be sure, Paulson expressly testified that when the topic was raised, he decided that he did not want to be involved in the proposed criminal activity. (17 RT 2873, 2959.) Therefore, the record does not support the conclusion advanced by Anderson that Paulson's presence during three discussions of the crime necessarily signaled his participation in the crimes as an aider and abettor.

A similar analysis applies to Peretti. She was Huhn's girlfriend and a fellow drug-addict; therefore, like Paulson, she had reasons to be with Huhn and his friends other than to plan a robbery, and her presence among them when they happened to talk about it did not necessarily reflect her participation as an accomplice. Further, Peretti testified she went to Handshoe's mobile home the day of the murder with the intention of going out with Huhn to eat and to see a movie. (16 RT 2501, 2667.) When she arrived, she got the sense they did not want her there, and that Handshoe told Anderson it was okay because she was Huhn's girlfriend. (16 RT 2503-2504.) Finally, Peretti testified she did not want any of them to go to commit the planned robbery, and that she told Huhn she did not want him to go. (16 RT 2698-2699.) Thus, the evidence was not clear and undisputed that Peretti was an accomplice.

Anderson does not address the specific evidence discussed above suggesting that Paulson and Peretti were not accomplices. He does, however, make the general assertion that "[e]ven if there were evidence inconsistent with their status as accomplices, this was not enough to make an instruction on accomplice as a matter of law inapplicable." (AOB 130.) In support of this assertion, Anderson cites the single case of *People v. Medina*, *supra*, 41 Cal.App.3d at pages 443-444. But *Medina* is inapposite; it does not state the proposition for which Anderson cites it, and does not even address the issue of accomplice instructions. Instead, the court in *Medina* reversed murder judgments against two defendants on the ground that orders granting conditional immunity to the three principal prosecution witnesses denied the defendants a fair trial. (*Id.* at p. 449.)

E. Any Error Was Harmless Because the Evidence Sufficiently Corroborated Peretti's and Paulson's Testimony

Even assuming the trial court erred by failing to instruct that Peretti and Paulson were accomplices as a matter of law, the error was harmless because the record reveals there was ample evidence of corroboration. (*People v. Whalen* (2013) 56 Cal.4th 1, 60 [failure to instruct that a witness is an accomplice as a matter of law is harmless if there is sufficient corroborating evidence in the record].) """Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. . . ." The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.""" (*People v. Hartsch* (2010) 49 Cal.4th 472, 499.) "The required corroboration must come from a source other than another accomplice." (*People v. Price*, *supra*, 1 Cal.4th at p. 444.)

In this case, several pieces of evidence that were independent of Peretti's and Paulson's testimony (and independent of Handshoe's testimony—Handshoe being another accomplice) tended to connect Anderson to the crime. Beginning in January 2003, Anderson was seen "quite frequently" at Handshoe's trailer by one of Handshoe's neighbors. (19 RT 3267-3269, 3278-3279.) The day of the murder, witnesses saw a Ford Bronco that looked similar to Anderson's coming out of Brucker's driveway (18 RT 2980-2986, 2991; see 30 RT 5207), and speeding near Brucker's home (18 RT 3000, 3002, 3086, 3090). Northcutt told Investigator Baker the following: he had seen Anderson wearing a "goofy" hairpiece and that Anderson drove the Ford Bronco most of the time (24 RT 4170); Anderson told him "something big" was going to happen and that it involved a safe (24 RT 4169, 4183); while watching a newscast with

Anderson about Brucker's murder, Anderson admitted he had been involved, and then threatened Northcutt that he "would be next" if he said anything (24 RT 4169-4170). Hause (Anderson's former girlfriend) testified that ten days after the murder, Anderson explained to her that he was leaving San Diego because of a parole violation and that he was driving the white truck because "they" knew his Bronco. (21 RT 3574-3575, 3582, 3583-3584.) Hause also testified that Anderson had shaved the mustache he had worn since at least January. (21 RT 3575.) Finally, cell phone records showed there were several calls between Anderson's cell phone and Handshoe's mobile home the day of the murder and the surrounding days. (16 RT 2499, 2500; 20 RT 3304-3308, 3316-3321, 3327-3332.) This evidence sufficiently corroborated the testimony of Peretti and Paulson implicating Anderson in the conspiracy and murder.

XIII. THE EVIDENCE SUFFICIENTLY CORROBORATED THE TESTIMONY OF PERETTI AND PAULSON

In Argument XIII, Anderson repeats the assertion he made in Argument XII that the alleged erroneous refusal to instruct the jury that Peretti and Paulson were accomplices as a matter of law was prejudicial and requires reversal. (AOB 135-138.) To the contrary, for the reasons stated in the harmless error section of the above argument, the evidence sufficiently corroborated the testimony of Peretti and Paulson. Therefore, even if the court erred by failing to instruct the jury they were accomplices as a matter of law, the error was harmless and reversal is unwarranted. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 60 [failure to instruct that a witness is an accomplice as a matter of law is harmless if there is sufficient corroborating evidence in the record].)

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LAW OF ACCESSORY LIABILITY BECAUSE IT WAS RELEVANT TO ISSUES RAISED BY THE EVIDENCE

Anderson contends the trial court erred by instructing the jury on the law of accessory liability. (AOB 138-142.) According to Anderson, there was insufficient evidence to support this theory, and therefore the instruction should not have been given. Respondent disagrees. The instruction was properly given because substantial evidence supported the theory that Peretti was an accessory, and the legal principles related to accessory liability where relevant to the issues raised by the evidence. Even if the instruction was unwarranted, it was harmless.

A. Trial Court Proceedings

Prior to closing arguments, the trial court instructed the jury on the legal principles relating to accomplices, including the definition of an accomplice and the rule that testimony of an accomplice must be corroborated before it can be relied on to support a conviction. (29 RT 5062-5064, 5071.) An accomplice was defined as "a person who, by reason of aiding and abetting or by being a member of [a] criminal conspiracy, was subject to prosecution for the identical offenses" charged against a defendant. (29 RT 5062.) The court directed the jury that it was to determine whether Peretti was an accomplice. (29 RT 5064.)

The defense argued to the jury that Peretti was an accomplice whose testimony needed to be corroborated. (30 RT 5193-5195.) That argument was based on the evidence that Peretti was present in Handshoe's mobile home shortly before Brucker was murdered, at a time when Anderson, Handshoe, and Huhn were planning a robbery, and that she discussed with them using some of the expected gains from the robbery to go shopping. (30 RT 5193-5194; see 16 RT 2500-2502, 2510-2518, 2535-2536, 2699, 2704; 22 RT 3792-3795.) Defense counsel also pointed to the evidence that

after Brucker was killed Peretti did not report the murder (she went to the mall with Huhn), and she lied to police several times to conceal Huhn's involvement. (30 RT 5194-5195; see 16 RT 2551, 2645-2647.) Finally, the defense pointed to the fact that Peretti had been granted immunity. (30 RT 5195; see 16 RT 2653.)

After the defense argument, the prosecutor asked the court to instruct the jury on the definition of an accessory. (30 RT 5263.) The prosecutor explained that, "without the jury being aware of the fact that there is another criminal liability theory here, and that is accessory [after] the fact, they're going to be influenced to believe that if she was given immunity, it was because she was an accomplice, and I just don't think that's fair under the facts of this case." (30 RT 5265.) The trial court agreed that the evidence justified giving an instruction on the law of accessory liability. (30 RT 5269.) To avoid confusion for the jury and to place the instructions in context, the court decided to reread an instruction that defined principals in a crime (CALJIC Nos. 3.00), along with the instruction on accessory liability (CALJIC No. 6.40). Thus, before the prosecutor presented his rebuttal argument, the court instructed the jury as follows:

> Before Mr. McAllister closes the argument, I need to go back and address a legal instruction – actually, plural. I'm going to reread one instruction that you've already heard. I'm not emphasizing this at all, but I'm reading it so that I can read another instruction that kind of goes with it that I overlooked.
>
> Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty.
>
> Principals include: one, those who directly and actively commit or attempt to commit the act constituting the crime, or, two, those who aid and abet the commission or attempted commission of the crime.

> Every person who, after a felony has been committed, harbors, conceals, or aids a principal in that felony with the specific intent that the principal may avoid or escape from arrest, trial, conviction, or punishment, having knowledge that the principal has committed that felony or has been charged with that felony, or convicted thereof, is guilty of the crime of accessory to a felony, in violation of Penal Code section 32. An accessory to a felony is not, by that fact alone, a principal in that felony.

(30 RT 5272-5273; 8 CT 1605, 1607.)

In his rebuttal argument, the prosecutor argued that Peretti was not an accomplice; instead, he argued, she was merely an accessory based on her conduct of lying to police after the murder in an attempt to conceal Huhn's involvement. (30 RT 5278-5279.)

B. Standard of Review

Claims of instructional error are reviewed de novo. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1210.)

C. Governing Law

A trial court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) """The principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]"' (*Ibid.*) Conversely, "[g]iving an instruction that is correct as to the law but irrelevant or inapplicable is error." (*People v. Cross* (2008) 45 Cal.4th 58, 67.) As discussed below, the law of accessory liability was closely and openly connected with the facts, and was necessary to assist the jury in understanding the case.

D. The Trial Court Properly Instructed the Jury on the Law Of Accessory Liability Because It Was Relevant to Establish That Peretti's Grant of Immunity Did Not Necessarily Mean That She Was An Accomplice to the Crimes Charged

The prosecutor was right: under the facts of the case, the jury needed to be aware not only of Peretti's potential liability as a principal under an accomplice theory of liability, but also of Peretti's potential liability as an accessory; otherwise, the jury could have been misled about the significance of certain evidence.

When the defense pointed to Peretti's immunity as a factor in support of the argument that she was an accomplice, the jury had not been instructed on the law of accessory liability. Thus, in determining the significance of the grant of immunity, the jury could have logically deduced that Peretti's immunity necessarily resulted from her potential liability as an accomplice, the only theory of liability presented to them at that time. But the evidence implicated another explanation—that is, the immunity could have resulted from Peretti's potential liability as an accessory only.

This alternative explanation was plausible because there was substantial evidence to support the conclusion that Peretti did not aid and abet the crimes, and therefore that she was not an accomplice. Specifically, Peretti testified that she went to Handshoe's mobile home that day with the intention of going out with Huhn to eat and to see a movie, that she did not want them to commit the robbery they were planning, and that she specifically told Huhn she did not want him to go. (16 RT 2501, 2667, 2698-2699.) Moreover, Peretti remained behind at Handshoe's mobile home when the others left to commit the planned crimes.

Anderson's contention that the evidence was insufficient to implicate accessory liability is unpersuasive. "'The crime of accessory consists of the following elements: (1) someone other than the accused, that is, a principal,

must have committed a specific, completed felony; (2) the accused must have harbored, concealed, or aided the principal; (3) with knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment.'" (*People v. Nuckles* (2013) 56 Cal.4th 601, 607.) There was substantial evidence of each of these elements.

The first element is not in dispute, and the record manifestly contains substantial evidence that Huhn was a principal in the murder of Brucker. There was also substantial evidence of the remaining three elements. Peretti testified that when Huhn returned to the mobile home, she could tell from his demeanor that something "bad" had happened, and she had a discussion with Huhn about it. (16 RT 2644-2645.) Peretti also admitted that she lied to police by telling them that Huhn did not go along with the others, and she explained that she told that lie because Huhn was the father of her child and she loved him. (16 RT 2551, 2646-2647.) This evidence, which shows that Peretti initially provided a false alibi for Huhn, is sufficient to support liability as an accessory. (*People v. Plengsantip* (2007) 148 Cal.App.4th 825, 836 ["It is clear that certain lies or 'affirmative falsehoods' to authorities, when made with the requisite knowledge and intent, will constitute the aid or concealment contemplated by section 32."]; see, e.g., *People v. Duty* (1969) 269 Cal.App.2d 97, 101-104 [upholding conviction for being an accessory based on statements by the defendant that a principal in an offense was with him and nowhere near the vicinity of the crime when it was committed].)

E. Any Error Was Harmless

Even if the instruction on accessory liability was erroneously given, Anderson is not entitled to relief unless he can show that the error resulted in a miscarriage of justice. (See *People v. Flood* (1998) 18 Cal.4th 470, 487 [stating principle that California's harmless error rule applies to all types of

instructional error].) The trial court instructed the jury with CALJIC No. 17.31, which informed them that some instructions may not apply: "The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some of the instructions apply will depend upon what you find the facts to be. Disregard any instruction which applies to facts determined by you not to exist." (30 RT 5338; 8 CT 1622.) The instruction was not inherently prejudicial to Anderson, and in light of the whole record, it is not reasonably probable that a result more favorable to Anderson would have been reached at the guilt phase if the instruction had not been given. (See *People v. Cross*, *supra*, 45 Cal.4th at p. 67 ["Giving an irrelevant or inapplicable instruction is generally only a technical error which does not constitute ground for reversal."].) Likewise, there is no "'reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict'" at the penalty phase had the instruction not been given. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 917.)

XV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT MUST DECIDE THE CASE BASED ONLY ON THE EVIDENCE FORMALLY PRESENTED DURING THE TRIAL PROCEEDINGS

Anderson contends the trial court failed to adequately respond to a juror's question about whether, in assessing a witness's credibility, he could consider his observations of that witness outside the courtroom. (AOB 143-151.) Respondent disagrees. The trial court's response to the question was consistent with the law, and did not deprive Anderson of a fair trial.

A. Trial Court Proceedings

At the end of the first day of Peretti's testimony, the court held a hearing outside the presence of the jury to address a note it had received from juror number 12, in which the juror asked the following question: "Can I figure a person's attitude and demeanor outside of the court room:

[¶] i.e. specific witness actions in courts [*sic*] main area outside of main entrance." (7 CT 1434.) Juror number 12 was brought into the courtroom, and the court began by stating that the short answer to the question was "no," and explained that the "instructions that I gave in terms of demeanor means demeanor while testifying." (16 RT 2719.) The court proceeded to inquire whether the juror had seen something that prompted the question. The juror responded that he saw a witness in the "common area" outside the courtroom who appeared to be "in a much more joyous and, you know, very high levity than what I would expect of somebody who is in this kind of magnitude of a case. And it just didn't really appeal that, you know, can I weigh that the same way, where they're really happy here but yet they're completely opposite? And that's where I just wasn't sure, if you could, you know, take that kind of opinion or not. I wanted to get a resolution. It won't affect me. I just wanted to know what the right answer was." (16 RT 2719.)

Upon inquiry by Lee's counsel, the juror said the witness he was referring to was Peretti. (16 RT 2721.) He further revealed that two other jurors observed Peretti's demeanor, and that the three of them discussed that "that doesn't seem, you know, the same demeanor that they should have, and that's where we left it. It was like, okay, can we weigh it or not? And that was it." (16 RT 2721.)

The court told juror number 12 that it was "going to ensure that the witnesses and the rest of the jurors understand that there is not to be any mingling," and confirmed with him that his observations outside the courtroom would not affect his evaluation of Peretti's testimony. (16 RT 2720.)

After juror number 12 was excused, one of Anderson's attorney's argued that Peretti's credibility—or more accurately her lack of credibility—was important to the defense and that a juror should be allowed to consider her demeanor outside the courtroom. He then stated: "If

a witness who has just testified and is crying on the witness stand is seen seconds later in the hallway laughing it up, I think that is something that a juror should be able to consider in evaluating the credibility of the testimony that's been presented." (16 RT 2722.) The court invited counsel to offer a special instruction to that effect. (16 RT 2722.)

Counsel for Anderson also told the court that they saw Peretti, while she was seated in the back of the courtroom after her testimony that day, endeavor to make eye contact with, and smile at, each juror as they left the courtroom. (16 RT 2722-2723.)

To resolve these issues, the court proposed admonishing the jurors the next morning "as to what can be considered and not considered as evidence in this case, and that they're to give wide berth to witnesses. And I will indicate to them that it is my order that witnesses not communicate with them directly or indirectly, body language or otherwise. That that is something that will interfere with the fact finding process." (16 RT 2723.) Anderson did not object to this proposed course of action; he simply asked that Peretti also be admonished. The court agreed to do so. (16 RT 2723.)

The following morning, the court instructed the jury as follows:

> It is important to recognize that a witness is allowed to communicate with a trial juror only through the question and answer procedure. The taking of testimony in the courtroom. [¶] If, at any time, you feel that a witness is attempting to communicate outside this approved procedure, you must tell me. Simply write a note and hand it to the bailiff. Further, if you see a witness at a location other than a witness stand and the witness is engaged in conduct that may influence you in your role as a trial juror, you must tell me. Again, a simple note, hand it to the bailiff. [¶] And a reminder, and this is a reminder because I've already given you these legal instructions when I offered some preliminary legal instructions at the time of opening statements. You must determine the facts in this case from the evidence received in this trial and not from any other source. Evidence means testimony, writings, material objects, or anything presented to the senses that are offered to prove the existence or

> nonexistence of a fact. In determining the credibility of a witness, you may consider demeanor of the witness while testifying and the manner in which the witness testifies.

(17 RT 2726-2737.)

Anderson raised no objection to the court's admonition.

Later, during a conference concerning jury instructions, the court indicated Anderson had offered a special instruction addressing this issue. The court stated the proposed instruction would be marked as a formally proposed instruction; however, Anderson does not cite to the record where the proposed instruction appears, and respondent's review of the record failed to find it. Nonetheless, the court described the "essence" of the instruction to be that jurors "can consider the demeanor of the witness present in the courthouse for the purpose of testifying." (25 RT 4446.) Anderson's counsel agreed with this description of the proposed instruction. (25 RT 4446.) In pressing for the instruction, counsel observed the "basic rule" is that the jury can consider anything that has a tendency in reason to impact credibility, and argued that a juror should therefore be allowed to consider a witness' demeanor outside the courtroom. (25 RT 4446.)

The court tentatively decided not to give the proposed instruction, citing two reasons: First, because not all of the jurors would necessarily witness the same behavior of a witness outside the courtroom; and second, because the parties had already agreed that the court should instruct the jury with CALJIC No. 1.00, "which states first you must determine what facts have been proved from the evidence received in the trial and not from any other source, and I don't believe that definition of trial extends to the hallway or the patio." (25 RT 4446-4447.) The court emphasized its ruling was only tentative, and that Anderson could pursue the issue later if he

wanted to. (25 RT 4447.) When he was given the opportunity to raise the issue again, Anderson did not do so. (28 RT 5020-5024.)

B. Standard of Review

The legal adequacy of an instruction is reviewed de novo. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1210; see *People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.) In considering whether error occurred, a reviewing court determines whether, in light of all the instructions, there is a "reasonable likelihood" that the jury misunderstood the applicable law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525.)

C. The Trial Court Properly Responded to Juror Number 12's Question

Anderson asserts the jury asked the court whether jurors could consider a witness's demeanor in the courthouse in assessing credibility, and that the court failed to directly answer the question and "ultimately [gave] no guidance on the matter." (AOB 147-148.) Anderson suggest that, as a result, the jurors "were left with the impression" that they could not "pay attention in the courtroom or discuss[] during deliberations a juror's observations in the courtroom." (AOB 148.) Therefore, Anderson argues, the trial court's decision not to instruct the jury with his proposed instruction violated the court's duty under Penal Code section 1138 to inform the jury, upon the jury's request, of any point of law, and violated his "right to a fair trial conducted substantially in accordance with law." (AOB 147, citing *People v. Frye* (1998) 18 Cal.4th 894, 1007.) Anderson's argument is flawed.

First, this was not a question from the jury; rather, it was a question from a single juror on his own behalf.

Second, contrary to Anderson's assertion, the court directly answered the juror's question. Juror number 12 wanted to know if he could consider his observations of Peretti's demeanor in the common area outside the

courtroom in assessing her credibility. (16 RT 2719.) The court responded that the short answer was "no," and explained that the "instructions that I gave in terms of demeanor means demeanor while testifying." (16 RT 2719.)

Third, section 1138 is not implicated, and could not have been violated under these circumstances. That section requires the trial court, "[a]fter the jury have retired for deliberation," to respond to any request by the jury for information on a point of law. (Pen. Code, § 1138.) As noted above, the question from juror number 12 was not a question from the jury. Further, the question came before the jury began deliberation, not after. Therefore, section 1138 did not govern the court's responsibility with respect to the question from juror number 12.

Fourth, the failure to give the proposed instruction, which in essence would have told the jury it could "consider the demeanor of the witness present in the *courthouse* for the purpose of testifying" (25 RT 4446, italics added), did not leave the jurors, in light of other instructions, with the incorrect impression that they were forbidden from considering a witness's demeanor inside the *courtroom*. Twice during the trial, once at the beginning and once at the end, the court instructed the jury that it may consider, in assessing the credibility of a witness, "the demeanor and manner of the witness while testifying." (15 RT 2313-2314; 29 RT 5037.) Because witnesses necessarily testify inside the courtroom, jurors would have had no reason to think they could not rely on their observations of witnesses inside the courtroom in assessing their credibility.

Finally, nothing about the court's handling of this issue denied Anderson a fair trial. The court's instruction to all the jurors that the demeanor and manner of a witness while testifying could be considered in assessing credibility was a correct statement of the law: "'The words used are by no means all that we rely on in making up our minds about the truth

of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness.'" (*People v. Adams* (1993) 19 Cal.App.4th 412, 438, quoting *Dyer v. MacDougall* (2nd Cir. 1952) 201 F.2d 265, 269; see also *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358 ["A witness's demeanor is '"part of the evidence"'"].) In contrast, Anderson cites no authority for the proposition that to ensure a fair trial, an individual juror must be allowed to consider, during deliberation, impressions of a witness gained during a chance encounter with that witness outside the trial proceedings. To be sure, the law is to the contrary. (See *Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78] ["Due process means a jury capable and willing to decide the case solely on the evidence before it, . . ."]; *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [85 S.Ct. 546, 550, 13 L.Ed.2d 424, 429] ["In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108 ["'Jurors in a criminal action are sworn to render a true verdict according to the evidence. They cannot, under the oath which they take, receive impressions from any other source.'"].)

D. Any Error Was Harmless

Anderson contends that, absent the alleged error in the court's failure to give the instruction proposed by the defense, the jury likely would have concluded "Peretti was not a credible witness and rejected her testimony." (AOB 151.) This position is untenable.

First, it is based on the assumption that the failure to give the proposed instruction inappropriately limited the jury's ability to consider relevant evidence relating to a witness's credibility. (See AOB 147-148.) But as discussed above, the court's response correctly informed the jury that it must determine the facts from the evidence received in the trial and not from any other source.

Second, during closing argument, defense counsel did in fact point to Peretti's demeanor to support her argument that Peretti was not a credible witness: "You saw her demeanor on the witness stand. You saw the way she laughed, the way she giggled. Mr. Roake pointed out the body movements, the scratching. You saw her demeanor. You saw how seriously she seemed to be taking these proceedings. That, her demeanor, is something that you can consider in determining whether she's a credible witness or not." (30 RT 5239.)

Finally, in light of the whole record, Peretti's demeanor was a relatively insignificant factor in determining her credibility. The prosecutor acknowledged in his argument that the witnesses were not angels, and stated rhetorically that he would not be urging the jury to nominate Peretti for "mother of the year and good citizen." (29 RT 5082.) Peretti admitted during cross-examination that she lied to Huhn about her age when she first met him, telling him she was 18 when she was not even 15. (16 RT 249-2499, 2654-2655.) She also admitted that she initially lied to her parents and to police about Huhn's role in the murder. (16 RT 2551, 2646-2647, 2683.) Patricia Ritterbush, one of Peretti's friends, testified she had witnessed Peretti make up stories about things that did not happen, and that Peretti was a liar. (26 RT 4557.) Patricia Colgan, one of the persons who frequently spent time at Handshoe's mobile home, testified that Peretti "lies a lot." (18 RT 3123-3124, 3137.)

Based on the foregoing, it appears "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'" (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403), and therefore is harmless under any standard.

XVI. The Record Does Not Support Anderson's Claim That the Prosecutor Committed Misconduct During the Trial

Anderson contends the prosecutor engaged in three instances of misconduct during the trial. In particular, he asserts the prosecutor personally vouched for the People's case, misstated the evidence, and asked a witness argumentative questions. (AOB 152-164.) The record belies this contention. Alternatively, any error was harmless.

A. Trial Court Proceedings

Two instances of alleged misconduct occurred during the prosecutor's argument to the jury in the guilt phase of the trial. Anderson first points to the following statement of the prosecutor: "I told you when I started this argument that the two defendant – but for the two defendants in this room, Steven Brucker would be alive today. I believe with all my heart that I've provided you with the evidence to prove that that is true." (30 RT 5330.) During a break following the prosecutor's argument, Anderson objected to this statement on the ground that it constituted vouching. (30 RT 5333.) The court disagreed: "I don't believe that was vouching for the credibility of any particular witness. I believe it was establishing that, in terms of the case that has been presented, the evidence that has been presented, the People have presented, and he was arguing he has presented a comprehensive case. [¶] I don't believe it could be interpreted that Mr. McAllister has inside information, that he is communicating on what the jurors should rely in determining the credibility of any particular witness." (30 RT 5334.)

Anderson next points to certain statements the prosecutor made during his rebuttal argument that related to Handshoe's plea agreement. The challenged statements were made while the prosecutor was addressing the evidence that supported the theory that Lee was an aider and abettor to the Brucker murder. (See 30 RT 5285-5295.) At one point, the prosecutor was explaining that Handshoe had no reason to falsely identify Lee as having been the person who first raised the idea of robbing the owner of the El Cajon Speedway:

> Handshoe, you have to ask yourself again: Why lie about Randy Lee? How does it help Brandon Handshoe? How does it help Brandon Handshoe to lie about Randy Lee? It just doesn't help.
>
> You see, this is that common-sense analysis. It just doesn't help Brandon Handshoe to say, "yeah, I went along on the crime, and Eric shot the guy, and Apollo went up to the door with Eric, and I was the get-away person, and I stood there with a walkie-talkie, waiting to notify Eric if somebody was coming, but somehow it's going to help me to say Rand Lee was involved, that Randy Lee came up with the idea."
>
> It doesn't make Brandon Handshoe any less liable to say that. It doesn't help Apollo. Doesn't help Brandon. Doesn't help Eric Anderson. Doesn't help anybody.
>
> I know the defense argument is: Look, the People made a deal. Those nasty prosecutors made a deal with Brandon Handshoe so he could avoid life without the possibility of parole. Instead, he's going to get the walk in the park of 17 years in state prison.
>
> Is it a lesser sentence? You be it is. You bet it is. Is it still a significant sentence? You bet it is. But, you know, the thing about Brandon Handshoe's 'deal' with the People is that it was done when it was done, and it was done before he testified on the stand. And he could have blamed this crime on Martians, and it wouldn't have changed his 17-year sentence.

(30 RT 5295-5296.)

Anderson objected at that point on the ground that the prosecutor's remarks misstated the evidence. The court responded by reminding the jury that the prosecutor's statements were argument, and advising them that they will have a copy of the plea agreement. It further stated that the prosecutor would be allowed to argue his viewpoint on what the plea agreement means. (30 RT 5296.) The prosecutor continued:

> This would not have changed his sentence, if he came in and said Martians.
>
> Now, if you could make a case for perjury, if you could say, 'oh, geez, he perjured himself,' yeah, you can do a prosecution for perjury, which is what we call a low-level felony, couple years maximum in state prison or something like that.
>
> The point is: The deal was struck, and no matter what he said, he was getting 17 years. If he came in and said it was Martians that did it, the deal that he was going to testify and get 17 years was a done deal. It can't go up, it can't go down; that's the way it is.
>
> So you have to ask yourself: If that's true – and it is – then why would he lie? Why would he lie?
>
> Well, he has motivations for lying, too. He does. I mean, it's the old concept of angels for actors in this group. He has motivations for lying because he still wants to do whatever he can to help Apollo Huhn. He still wants to do whatever he can to help Randy Lee.
>
> Now, I submit to you, ladies and gentlemen, that's why he's talking to us about statements that Randy Lee made to him at different times. And during his debriefing, he tells us what Randy Lee says, and then when we come to court, it's not just, "well, he said, 'you keep me out of this, and I'll put money on your books and take care of your family.'"
>
> It becomes, "you keep me out of this and prove my innocence, and I'll put money on the books and take care of your

> family." That's an addition, and it's an addition because he still wants to help his buddies.

(30 RT 5296-5297.)

Anderson objected again during the break at the end of the prosecutor's argument. He asserted that the plea agreement was revocable if Handshoe did not testify truthfully, and therefore the prosecutor's argument that Handshoe "could have told a tale that was not true" and still receive the promised sentence was false and misleading. (30 RT 5332-5333.) The court rejected the notion that misconduct occurred:

> [W]hen the objection was made, it did appear to me that it might have been a characterization that was not borne out by the language of the agreement itself. And it could be, however, that any reasonable person reviewing that would conclude that what is the truth and what is not the truth is going to be hard to establish; and, therefore, it would be difficult to revoke that agreement.
>
> My response was to leave that decision in the hands of the jurors, simply because the agreement, the precise language of that, is going to be accessible. They can interpret and determine if it was mischaracterized by Mr. McAllister.

(30 RT 5333-5334.)

The final instance of alleged misconduct involves the prosecutor's cross-examination of Stevens. In an attempt to impeach Stevens by establishing the existence of a bias in favor of Anderson, the prosecutor asked Stevens, "Is it fair to say that you'll do whatever it takes to help Mr. Anderson avoid responsibility for his actions in this case?" (27 RT 4806.) The following colloquy occurred:

> A. No. It's – I – I took an oath here and I'm planning on telling the truth.
>
> Q. Now, you took an oath so that you wouldn't perjure yourself?
>
> A. That's correct.

Ms. Vandenbosch: Objection, argumentative your honor.

The Court: This is – do it in terms of those foundational questions. The question and answer stands as to the oath. Nor more oath questions.

Mr. McAllister: Okay.

By Mr. McAllister:

Q. Well, what you're telling us here is that you, who has been convicted of these felony offenses that you've told us about, just won't perjure yourself.

Ms. Vandenbosch: Your Honor, argumentative.

The Witness: Sir, I do not plan on telling any lies. I am telling the truth, honest to God.

The Court: Okay. He's telling – he indicates that he's telling the truth. [¶] Mr. McAllister, next question.

(27 RT 4806-4807.) The prosecutor moved on to other topics.

B. Standard of Review

Claims of prosecutorial misconduct are reviewed de novo. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 860.)

C. The Prosecutor Behaved Appropriately in Each of the Instances Cited by Anderson

A prosecutor's conduct violates the federal Constitution when it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L. Ed. 2d 144, 106 S. Ct. 2464], quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [40 L.Ed.2d 431, 94 S.Ct. 1868]; accord *People v. Dykes* (2013) 46 Cal.4th 731, 760.) Conduct that does not result in an unfair trial—and therefore that does not violate the federal Constitution—may still violate California law, but only if it involves "deceptive or reprehensible methods" designed to persuade the trial court or the jury.

(*People v. Riggs* (2008) 44 Cal.4th 248, 298.) When a claim of misconduct is based on a prosecutor's remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the remarks in an improper or erroneous manner. (*People v. Frye*, *supra*, 18 Cal.4th at p. 970.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*Ibid.*) For the reasons discussed below, the conduct of the prosecutor challenged by Anderson was neither deceptive nor reprehensible, nor did it render the trial unfair.

1. The prosecutor did not inappropriately vouch for his case

Anderson contends the prosecutor engaged in inappropriate "vouching" when he told the jury he "believe[d] with all my heart that I've provided you with the evidence to prove" that Anderson was responsible for Brucker's death. (30 RT 5330.) Respondent disagrees; this statement did not amount to misconduct.

"The general rule is that improper vouching for the strength of the prosecution's case '"involves an attempt to bolster a witness by reference to facts outside the record."'" (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) Consequently, prosecutors may not invoke "their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it." (*Id.* at pp. 206-207.) For example, a prosecutor may not compare a defendant's case negatively to other cases the prosecutor knows about or has tried, nor may he offer a personal opinion when it is based solely on his experience or on other facts outside the record. (*Id.* at p. 207; see, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 757 [prosecutor's comment to jury that "*no case that I have ever seen* has this amount of overwhelming evidence pointing to the defendant's guilt" was improper] (italics in original).)

On the other hand, it is not misconduct "to ask the jury to believe the prosecution's version of events as drawn from the evidence." (*People v. Huggins*, *supra*, 38 Cal.4th at p. 207.) "Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument, . . ." (*Ibid.*) Thus, in *Huggins*, the prosecutor did not commit misconduct when he argued, regarding the defense's version of events, "None of this can be true. Please believe me. He has lied through his teeth in trying to sell this story to you." (*Id.* at p. 206.) Moreover, "a prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment both on its quality and the credibility of witnesses." (*People v. Padilla* (1995) 11 Cal.4th 891, 945.)

Here, the prosecutor's statement amounted to nothing more than a statement of his opinion that the evidence proved Anderson was responsible for Brucker's murder. The fact that he used the phrase "with all my heart" did not transform the character of that statement from a proper opinion about the state of the evidence into improper vouching; it merely expressed sincerity. Further, as the trial court rightly pointed out, the prosecutor's statement did not suggest that the jury should credit his opinion about the state of the evidence based on "inside information" that only the prosecutor knew of. (30 RT 5334.) Therefore, the prosecutor's statement did not constitute improper vouching. (See *People v. Green*, *supra*, 27 Cal.3d at p. 35 [stating that the concern over vouching is "the risk that the jury will infer that the prosecutor's belief is based at least in part on proof of guilt that was not—and perhaps could not have been—introduced at the trial"].) Anderson's reliance on two cases to support his argument to the contrary is misplaced because, in those cases, unlike here, the prosecutor either

expressed his personal belief as to the reliability of a witness (*People v. Cotton* (1959) 169 Cal.App.2d 1, 2-3), or "pledged in support of the veracity of two witnesses' testimony" the "faith and integrity" of the district attorney's office and the police department (*People v. Adams* (1960) 182 Cal.App.2d 27, 34-35).

2. The prosecutor did not mischaracterize the evidence

Anderson also contends that the prosecutor committed misconduct by mischaracterizing the nature of the plea agreement between the district attorney's office and Handshoe. (AOB 158; see *People v. Hill, supra*, 17 Cal.4th at p. 823 ["mischaracterizing the evidence is misconduct"].) According to Anderson, the prosecutor's comments conveyed to the jury that Handshoe would receive the benefit of the plea bargain even if he lied during his testimony, which directly contradicts the terms of the bargain. (See 43 Supp. CT 9009 [copy of plea agreement which states that Handshoe "shall lose the benefits of this agreement for any intentional deviation from the truth, and if a false statement occurs while he is on the witness stand, he shall be subjected to prosecution for perjury," and that "[t]his agreement is automatically voided if BRANDON HANDSHOE violates his obligation to tell the truth"].) Anderson's contention may be superficially appealing based on the words used by the prosecutor. However, when placed in context of the broader argument the prosecutor was making, Anderson's contention loses its force, and there is no reasonable likelihood that the jury understood the comments in an improper manner.

The prosecutor's comments arose at a time in his rebuttal statement when he was arguing that the evidence was sufficient to prove that Lee acted as an aider and abettor in the Brucker murder. In particular, immediately preceding his discussion of Handshoe's testimony, the

prosecutor addressed the testimony of Peretti and Paulson, and argued that their testimony implicating Lee was credible. (30 RT 5285-5293, 5295.) Among the ways he endeavored to make this point, the prosecutor asked rhetorically how lying about Lee's involvement would have helped either Peretti or Paulson, and what motive they would have had to falsely implicate Lee. (30 RT 5291-5292.) He proceeded to use the same technique to argue for Handshoe's credibility. The prosecutor then addressed Handshoe's plea agreement because Anderson's counsel had argued that the agreement provided Handshoe a motive to lie. Anderson's attorney told the jury:

> And Brandon Handshoe is a prime example of why an accomplice testimony [sic] is so untrustworthy and is so tainted. You have a young man who was 19 at the time of his arrest. You have a young man who has spent the last two years in custody, the last two years, knowing he is facing a sentence of life without the possibility of parole, the possibility of never getting out of custody.
>
> He has spent those two years trying to reach a plea bargain, trying desperately to reach a plea bargain, and he knows the only hope of him getting anything other than life without the possibility of parole is giving the prosecution what he knows they want to hear, because he's been sitting at all the court hearings throughout the preliminary hearings for the last two years. He knows what they want, and he's bound and determined to give it to them, to get what he wants.

(30 RT 5192.)

To rebut the suggestion that the veracity of Handshoe's testimony was suspect in light of his plea agreement, the prosecutor made the statements that Anderson challenges here. Viewed in this context, the prosecutor's statements are properly understood as nothing more than pointing out, correctly, that Handshoe could not secure a better sentence by "giving the prosecution what he knows they want to hear" during his testimony,

because the sentence had been set before he testified. Therefore, the prosecutor did not mischaracterize the plea agreement.

Nor should this Court infer that the jury misunderstood the prosecutor's point. The plea agreement was admitted in evidence, and plainly states that Handshoe "shall lose the benefits of this agreement for any intentional deviation from the truth, . . ." (43 Supp. CT 9009.) The court directed the jury's attention to the plea agreement when Anderson objected to the prosecutor's remarks. (30 RT 5296.) Further, Handshoe testified that he had already been promised a sentence of 17 years in exchange for agreeing to testify truthfully, and that a failure to testify truthfully would violate the terms of his plea bargain. (22 RT 3807-3808.) In light of these facts, and given the context of the prosecutor's comments as discussed above, there is not a reasonable likelihood that the jury understood, or applied in an erroneous manner, the prosecutor's remarks.

3. The prosecutor did not ask argumentative questions

Lastly, Anderson contends the prosecutor committed misconduct by asking argumentative questions during cross-examination of Stevens. Argumentative questions are those "designed to engage the witness in an argument rather than to elicit facts within the witness's knowledge." (*People v. Mayfield* (1997) 14 Cal.4th 668, 755.) A prosecutor should refrain from asking such questions. (*People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236.) At the same time, "A prosecutor does not commit misconduct by challenging the credibility of a defense witness . . . ." (*People v. Earp*, *supra*, 20 Cal.4th at p. 894.)

Here, the prosecutor was attempting to elicit from Stevens that he was biased in favor of Anderson, and to clarify, after Stevens raised the issue, Steven's attitude toward the giving of testimony—i.e., whether he was willing to lie to help Anderson or committed to unerringly tell the truth.

Both topics were relevant to Stevens' credibility and therefore proper subjects for cross-examination. (See Evid. Code, § 780, subds. (f) & (j) [factors relevant to a witness's credibility include the existence of a bias, interest, or other motive, and the witness's attitude toward the giving of testimony].)

D. Any Error Was Harmless

Assuming, arguendo, that any or all of the challenged conduct amounted to misconduct, it did not result in a miscarriage of justice. The prosecutor's isolated comment, "I believe with all my heart that I've provided you with the evidence to prove" that Anderson was responsible for Brucker's death (30 RT 5330), was patently unimportant to the jury's verdict when viewed in context of the entire record. So too was the form of the two questions put to Stevens about whether he was willing to commit perjury. As to the prosecutor's alleged misstatement about Handshoe's plea agreement, defense counsel immediately objected to the statement, and the trial court admonished the jury that the prosecutor was merely stating his viewpoint about the meaning of the agreement. Further, the agreement itself was admitted in evidence and therefore available for the jury to review for itself. (30 RT 5296.) Therefore, there is no reasonable doubt that the alleged instances of misconduct, either in isolation or combined, did not affect the outcome of the trial. Accordingly, any error committed by the prosecutor was harmless under both *Chapman v. California*, *supra*, 386 U.S. at page 24, and *People v. Watson*, *supra*, 46 Cal.2d at page 836.

XVII. THE TRIAL COURT DID NOT ERR BY FAILING TO CONDUCT AN INQUIRY INTO THE IMPARTIALITY OF THE MEMBERS OF ANDERSON'S JURY AFTER THERE WERE PUBLISHED ACCOUNTS OF THE VERDICT IN HUHN'S CASE

Anderson contends he is entitled to a new trial because, while the jury that heard his case (referred to in the record as the Lavender jury) was still

deliberating, the court accepted and recorded the verdict of the jury that heard Huhn's case (the Gold jury), and because the court did not thereafter inquire into whether the members of the Lavender jury became aware of the verdict in Huhn's case. (AOB 165-172.) Respondent disagrees. Following the recording of the verdict against Huhn, the trial court exercised sound discretion in taking steps to ensure the impartiality of the jurors in Anderson's case. Any error was harmless.

A. Trial Court Proceedings

The Gold jury began deliberating the case against Huhn on Monday morning, June 20, 2005. (9 CT 1901.) That afternoon, while closing arguments were ongoing in the case against Anderson, defense counsel requested that, in the event the Gold jury reached a verdict before the Lavender jury did, the verdict in Huhn's case be sealed until the jury in Anderson's case concluded deliberation. (29 RT 5181.) The purpose of that request was to ensure that the members of Anderson's jury were not exposed to or influenced by the verdict in Huhn's case. (See 29 RT 5182; 40 RT 5808.) The prosecutor objected to the proposed course of sealing the verdict because Huhn indicated he would not waive his rights to have the jurors polled about their verdict. (29 RT 5180-5182; see Pen. Code, § 1163 ["When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation."].) The concern was that if the verdict was sealed and the polling of the juror's delayed, something could happen to one or more of the jurors that would prevent them from affirming their verdict and thereby prevent the recording of the verdict. (See 29 RT 5182 [trial court summing up the concern of the People as, "If there is a verdict and we're going to seal it, how do we ensure that that

becomes an official verdict at some point in time, should there be a loss of a juror?"].)

Anderson's jury began deliberation on Wednesday, June 22, 2005. (9 CT 1911.)

On Thursday, June 23, the Gold jury sent a note to the court stating that it had reached verdicts on the charges against Huhn. (9 CT 1916.) Anderson's jury was still deliberating. The court discussed with the prosecutor and Huhn's counsel how to proceed with the verdict in light of Anderson's request that it be sealed until his jury completed deliberation. Neither Anderson nor his attorneys were present. The court stated its preference to seal the verdict and order the jurors to return on the following Wednesday, June 29, to announce the verdict. (40 RT 5815-5816.) Huhn's attorney stated she preferred to have the verdicts announced and recorded without delay, and stated that Huhn is not willing to waive any rights regarding polling the jurors or having the verdict recorded that day. (40 RT 5813-5814, 5816.) In light of Huhn's refusal to agree to the court's proposal and waive any rights implicated thereby, the prosecutor also objected to the court's proposed course of action and requested that the verdicts be verified and recorded without delay. (40 RT 5811-5818.)

The court concluded that without a waiver of rights from Huhn, it was required by Penal Code section 1147 to bring the jury into the courtroom and announce the verdict without delay. (40 RT 5819.) That section states in full: "When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried."

The court proceeded in open court to hear and record the verdict in Huhn's case. (32 RT 5381, 5383.) That afternoon, when Anderson's jury finished deliberating for the day, the court allowed the jury to separate for a

three day weekend, and ordered them to return on Monday. Before it released the jury, the court gave the following admonishment:

> Do not discuss anything concerning the case with anyone. I'm going to repeat that. Do not discuss anything regarding the case with anyone. That means family members, spouses, brothers, sisters, neighbors, you cannot talk about this case at all.
>
> The only time you can talk about this case is when you return Monday morning and you're back in the jury room with all 12 jurors present.
>
> Do not read, view, listen to any account or discussion of the case reported in the news media. Please be cautious. This is a long period of time where you're going to be away from the courthouse. Don't let any family member coax you into looking at something that they feel might be associated with the case. Be cautious, don't scan the headlines, just ignore them, if you would, the local section, regarding any type of criminal case.
>
> Do not visit or view the premises or place where the offenses charged were allegedly committed or any other place or premise involved in the case. Do not conduct any study or investigate any of the issue raised during the trial or deliberations to this point. Do not consult any reference work or internet source for assistance on any issue pertaining to the case. In other words, don't do any homework. All the work on this case is to be done in the jury room with all of your fellow jurors present.
>
> Any uncertainty about the scope of these orders? If there is, please let me know, because it is so important that you abide by these.

(32 RT 5388-5389.)

The jurors returned on Monday morning and resumed deliberation. (9 CT 1924-1925.) Meanwhile, the court convened a hearing with Anderson and all counsel present. Anderson's counsel indicated his objection to the fact that he had not been notified when Huhn's jury reached a verdict and that he was not provided an opportunity to object to the taking and recording of the verdict on that day. He further objected that "there were no

precautions taken to isolate our deliberating panel from the chance of being tainted by publicity surrounding the Huhn verdict." (33 RT 5419.)

Anderson offered as exhibits two articles about the Huhn verdict. One was an online article published at 4:00 p.m. on Thursday, June 23, the day the verdict was recorded. The second article was published in the newspaper on Friday, June 24. (33 RT 5418.) According to Anderson's counsel, both articles referred to Anderson "in particularly demeaning terms, again using the 'Stressed Eric' nomenclature." And the newspaper article indicated that Huhn participated in the attempted robbery only because he was afraid of Anderson, who was characterized in the article as a "maniac with a gun." (33 RT 5422.)

Later that afternoon, the jury indicated it had reached a verdict. The verdict was thereafter announced and recorded. (33 RT 5424-5433; 9 CT 1926.)

B. Standard of Review

"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court." (*People v. Ray* (1996) 13 Cal.4th 313, 343.)

C. The Trial Court Exercised Sound Discretion in Dealing with the Verdict in the Huhn Case and the Publicity That Followed

Anderson accuses the trial court of "not taking precautions to ensure the impartiality of Anderson's jury following the verdict in Huhn's case. . . ." (AOB 167 [sub-heading B]; see also AOB 168.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member is capable and willing to decide the case solely on the evidence before it [citations]." (*People v. Hensley* (2014) 59 Cal.4th 788, 824, internal quotation marks omitted.) Anderson further claims the trial

court erred because it did not ask the jurors if they had become aware of the Huhn verdict and, if so, whether they could nonetheless decide Anderson's case impartially. (AOB 168.) Anderson then assumes that one or more jurors was exposed to information about the Huhn verdict. Finally, Anderson asserts that a presumption of prejudice arose because of this juror misconduct, that the record fails to rebut that presumption, and that reversal is therefore required. (AOB 171-172.) These assertions lack merit. The trial court did take precautions to prevent the jury from becoming aware of the Huhn verdict, and Anderson cites no authority that would have required the court to seal the Huhn verdict or issue a gag order as Anderson suggests. Further, Anderson offered no evidence to show that any juror actually became aware of the Huhn verdict during the course of deliberation. Because there was no evidence of juror misconduct, no presumption of prejudice arose and reversal is unwarranted.

1. The trial court took appropriate steps to ensure the impartiality of the jury

Anderson asserts the trial court did not take any precautions to ensure the impartiality of the jury after the verdict in the Huhn case, and that such inaction constituted error. Anderson is wrong on both counts.

The verdict in the Huhn case was announced and recorded on Thursday, June 23. When the jury in Anderson's case stopped deliberating that afternoon, the court instructed them to avoid exposure to media accounts of the case, and also specifically told them to avoid accounts "regarding any type of criminal case." (32 RT 5388.) The jury did not reconvene until Monday morning, June 27, and reached a verdict later that day. Thus, contrary to Anderson's assertion, on the one occasion when the jury had the potential to be exposed to the Huhn verdict before their deliberation completed (between recessing on Thursday afternoon and

reconvening Monday morning), the court acted to prevent the jury from learning of the Huhn verdict and to preserve their impartiality.

The trial court was not required to do more. Anderson states in the heading to this argument that "the trial court erred in failing to seal the verdict in Huhn's case or issuing a gag order . . . ." (AOB 165.) This assertion is contrary to controlling authority. The First and Fourteenth Amendments to the federal Constitution grant to the public the right to attend trial proceedings in criminal prosecutions. (*Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 575-580 [100 S.Ct. 2814, 65 L.Ed.2d 973] (plurality opinion.) Thus, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." (*Id.* at p. 581; accord *Press Enterprise Co. v. Superior Court of California* (1984) 464 U.S. 501, 510 [104 S.Ct. 819, 78 L.Ed.2d 629] ["The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."].) In *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, at pages 1217-1218, this Court held:

> [*B*]*efore* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.

(Italics in original, footnotes omitted.)

This Court also noted that jurors are presumed to follow instructions "to avoid media coverage, and to disregard coverage that they happen to hear or see," and instructed that "cautionary admonitions and instructions must be considered a presumptively reasonable alternative" to closing a hearing—"a presumption that can be overcome only in exceptional

circumstances." (*Id.* at pp. 1223, 1224.) In light of these authorities, the trial court did not abuse its discretion by choosing not to seal the jury verdict in the Huhn case.

2. The trial court did not abuse its discretion by not asking the jurors if they had been exposed to media accounts of the verdict

Section 1089 provides in part: "If at any time . . . a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged . . . ." Under this statute, "once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty to make whatever inquiry is reasonably necessary to determine whether the juror should be discharged." (*People v. Martinez* (2010) 47 Cal.4th 911, 941, internal quotation marks omitted.) However, a hearing is required "only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." (*Id.* at p. 942, internal quotation marks omitted.) The decision to investigate possible juror misconduct rest with the sound discretion of the trial court. (*Ibid.*)

Based on *Martinez,* a trial court's duty to inquire into possible juror misconduct is triggered only when it possess information that, if true, would constitute good cause to doubt a juror's ability to perform his duties and would justify his removal from the case. No such information was presented to the trial court in this case. The only information presented to the court was that the verdict in the Huhn case was reported in the local newspaper and in an online article; there was no information that any juror read those articles or even became aware of them. Therefore, there was no information before the court that any juror had engaged in misconduct. (See

generally, *People v. Cummings*, *supra*, 4 Cal.4th at p. 1331 [stating it is misconduct for a juror to read, even inadvertently, a newspaper article relating to the trial].) In turn, the court had no duty to investigate the matter, nor did the court abuse its discretion in failing to do so.

The cases relied on by Anderson to support a contrary conclusion are inapposite. In *People v. Cummings*, *supra*, 4 Cal.4th 1233, this Court stated that *if a juror inadvertently reads a newspaper account relating to the trial*, the trial court should conduct a hearing "'into whether and to what extent the jury as a whole may have been affected and whether there was good cause to discharge any of the jurors.'" (*Id.* at p. 1332, quoting *People v. Hernandez* (1988) 47 Cal.3d 315, 338.) Here, unlike in *Cummings*, there was no information presented to the trial court that any juror had read an article about the trial. Accordingly, the duty identified in *Cummings* to conduct a hearing to ascertain the potential impact of such misconduct did not arise.

The two federal cases relied on by Anderson are also inapposite because they involved the application of federal criminal procedure—not a constitutional rule—to find that the district court should have inquired of the jurors about media publicity. (See *United States v. Bermea* (5th Cir. 1994) 30 F.3d 1539, 1557-1560; *United States v. Aragon* (5th Cir. 1992) 962 F.2d 439, 441, fn. 3.)

D. Any Error Was Harmless

As noted above, there is no evidence in the record to suggest that any juror read or otherwise became aware of the news accounts of Huhn's verdict. Accordingly, the record does not show that any juror was unable to perform his or her duty as a juror due to the news accounts of Huhn's verdict. (Cf. *People v. Martinez*, *supra*, 47 Cal.4th at p. 943 [finding no prejudice in the trial court's decision not to ask a juror about conversations she had with a district attorney investigator after the trial had begun

because the record failed to show that, during those conversations, the juror was exposed to information about the case that she did not already know, and, therefore, that she was unable to fulfill her functions as a juror].) Therefore, assuming, arguendo, the trial court should have investigated whether any juror had been exposed to the verdict in Huhn's case, its failure to do so does not warrant reversal under any standard. (See *Id.* at p. 943, fn. 6 ["Since we find no violation of section 1089, a statute that we have previously held is consistent with state and federal constitutional proscriptions, our conclusion also necessarily disposes of defendant's state and federal constitutional claims."].)

XVIII. THE RECORD DOES NOT SUPPORT ANDERSON'S CLAIM OF JUROR MISCONDUCT

Anderson contends the jury committed misconduct when a document that was not admitted into evidence was mistakenly placed in the jury room during deliberation. (AOB 172-178.) Respondent disagrees. The trial court's mistake did not amount to juror misconduct. In any event, sending the document into the jury room did not result in a miscarriage of justice.

A. Trial Court Proceedings

The prosecution called John Pasquale as a witness. Pasquale testified that he spent time as Anderson's cell mate in the Harney County jail in Oregon. (24 RT 4150.) During their time together, Anderson showed Pasquale a handcuff key and talked about escaping from the jail. (24 RT 4151.) Among the ideas Anderson shared was to escape during the nightshift when there was only one guard on duty; Anderson said he would "pound[] the guard's head into the wall." (24 RT 4151-4152.) Anderson also told Pasquale that he (Anderson) should have grabbed a guard's gun, shot him, and taken off when he had the chance on one occasion when both Pasquale and Anderson were being escorted to a courtroom in Harney County. (24 RT 4152.)

On cross-examination, the defense attempted to impeach Pasquale, in part, by showing he had a motive to fabricate evidence that was prejudicial to Anderson. To this end, the defense asked Pasquale to relate to the jury portions of three letters he wrote to the prosecutor after being subpoenaed to testify in this case. The letters were marked as defense exhibits, and all were admitted into evidence. (24 RT 4157; 28 RT 4977; 8 CT 1638.) In two of the letters, Pasquale, in essence, sought assistance from the prosecutor in getting him released from prison in Colorado in exchange for testifying in this case; in the third letter, Pasquale informed the prosecutor that he had refused to talk with a defense investigator about the case. (24 RT 4158-4160.)

Relevant to the issue Anderson raises on appeal, one of the letters begins with the following language:

> Dear Mr. McAlister
>
> I have been subpoenaed to be a witness in the above case by your office. Unfortunately I am presently incarserated in Colorado Springs, CO. There is no doubt in my of Brandon Handshoe's guilt in your case against him because of information he disclosed to me in Burns County Jail in Oregon where we shared a cell. I would like to help you convict him of murder an see to the fact that he never kills again.

(43 CT 8948 [Def. Exh. Q-1], misspellings in original.) Pasquale explained during his testimony that he referred to Brandon Handshoe because he believes Anderson originally identified himself to Pasquale as Brandon Handshoe. (24 RT 4158-4159.)

On redirect examination, the prosecutor identified a letter dated June 15, 2004, written on letterhead of the district attorney, and asked Pasquale if he received that letter in response to one of the letters he had written to the prosecutor. The letter was marked as Plaintiff's Exhibit 79. (24 RT

4164-4165.) The letter, addressed to Pasquale and signed by the prosecutor, states in full:

> I received your letter postmarked June 1, 2004, just yesterday. I appreciate your situation but I am afraid that there is nothing I can do for you regarding any cases you have pending.
>
> I also appreciate how difficult it is to find yourself in the position of being compelled to testify in such a serious case while incarcerated as an inmate. But, as you pointed out, the greater good here is to see that Anderson is not in a position to harm others in the future.
>
> I can tell you that we will make every effort to have you here for testimony and then returned as quickly as possible to minimize any inconvenience to you.

(8 CT 1683.) Pasquale testified that he never received that letter. Accordingly, he was asked no further questions about the letter, and the prosecutor did not seek to have the letter admitted into evidence. (24 RT 4165, 4250, 4333.) Instead, in response to the prosecutor's questions, Pasquale testified that he did not receive any benefits for appearing in court and testifying. (24 RT 4165.)

After the guilty verdicts in this case, Anderson filed a motion for a new trial on the ground, among others, that the prosecutor's letter to Pasquale was given to the jury along with the other trial exhibits, even though the letter had not been admitted into evidence. (8 CT 1663-1672, 1683.) In the motion, Anderson focused on the sentence in the letter that reads: "But, as you pointed out, the greater good here is to see that Anderson is not in a position to harm others in the future." Anderson argued that this "inflammatory" language was "clearly very prejudicial to Mr. Anderson and substantially likely to have resulted in juror bias against him." (8 CT 1671-1672.)

At the hearing on the motion, the trial court said it appeared the letter had indeed been placed in the jury room inadvertently during deliberation.

(38 RT 5734; 9 CT 1937.) However, the trial court denied the motion for new trial. The trial stated there was no evidence that any juror actually read the letter, but assumed for purposes of the motion that they did. (38 RT 5734.) The court found that the letter was not inherently prejudicial, and that, under the totality of the circumstances in the case, the letter was not substantially likely to cause a juror to be actually biased against Anderson. (38 RT 5733-5735.) In support of these conclusions, the trial court relied in part on the fact that the idea that Pasquale should testify against Anderson to prevent him from harming others in the future was first raised in one of Pasquale's letters to the prosecutor, and that letter was admitted into evidence and properly given to the jury during deliberation. (38 RT 5733-5734.) The court further cited the fact that the prosecutor's letter, which was a response to Pasquale's letter, did not read as an effort "to blast Mr. Anderson as a dangerous man," but rather "was simply an effort, kind of a subtle effort to [encourage] Mr. Pasquale to come out and cooperate, even though he wasn't going to strike a bargain." (38 RT 5734.)

B. Standard of Review

When a reviewing the denial of a new trial motion based on alleged juror misconduct, an appellate court must accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (lead opn. of George, C.J.).) However, whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court's independent determination. (*Ibid.*)

C. The Inadvertent Placement in the Jury Room of a Document Not Admitted in Evidence Did Not Amount to Juror Misconduct

Anderson treats this issue as one of juror misconduct, and argues that the trial court wrongly concluded that the prosecution failed to rebut the

presumption of prejudice that normally arises therefrom. (AOB 174-178; see *People v. Nesler*, *supra*, 16 Cal.4th at p. 578 ["Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias."].) Respondent disagrees that the inadvertent placement of the letter in the jury room falls within the rubric of juror misconduct; instead, the error is akin to evidentiary error.

Anderson cites *People v. Andrews* (1983) 149 Cal.App.3d 358, for the proposition that it constitutes jury misconduct when exhibits not admitted in evidence are mistakenly sent to the jury room. (AOB 175.) In Andrews, exhibits not admitted in evidence were sent mistakenly to the jury room, including a newspaper article that indicated the defendant was facing felony charges in another county. The mistake came to the court's attention when the jury asked the court to identify the pending charges in the other county. Because the pending charges had not been mentioned during the trial, the question indicated that at least one juror had read the article. The trial court admonished the jurors to disregard the article and not to consider its contents in their deliberation. (*Andrews*, at pp. 362-363.) Citing *People v. Kitt* (1978) 83 Cal.App.3d 834, the *Andrews* court stated that, "[a]though the jury's obtaining of knowledge of the newspaper articles was not purposeful, that the article in fact were read or discussed by jurors falls within the category of juror misconduct, albeit unintentional. (*Andrews*, at p. 363.)

In *Kitt*, four photographs that were not admitted in evidence were inadvertently sent into the jury room, but were removed from the room after about five minutes once the error was noticed. The trial court stated for the record that the jury had observed all or some of the four photographs. (*People v. Kitt, supra*, 83 Cal.App.3d at p. 849.) Without explanation or citation to authority, the court of appeal stated that, "[e]ven

though the jury's observation of these photographs was not intentional, the fact that the photographs were actually observed by jurors falls under the category of juror misconduct." (*Id.* at p. 850.)

Andrews and *Kitt* are no longer good authority on this issue. In *People v. Cooper* (1991) 53 Cal.3d 771, this Court was faced with a similar circumstance. In that capital case, a reporter's transcript of a hearing from a prior prosecution of the defendant was "'inadvertently' admitted into evidence at the defense's request" and was sent to the jury room. (*Id.* at p. 834.) The jurors discussed the transcript and asked the court a question about it. The court told the jury that the transcript was "received into evidence inadvertently and through mistake," and instructed the jury not to consider it. (*Ibid.*) On automatic appeal, this Court rejected the defendant's assertion that the circumstances implicated jury misconduct, which would give rise to a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted. (*Id.* at p. 835.) The Court explained that the cases establishing the presumption of prejudice involve actual misconduct, or "true jury misconduct," which properly give rise to such a presumption:

> A juror is not allowed to say: 'I acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room.' The law, in its wisdom, does not allow a juror to purge himself in that way." [Citation.] When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties. [Citation.] The presumption of prejudice is appropriate in those situations.

(*Id.* at pp. 835-836.)

The Court distinguished true jury misconduct cases from those in which the jurors did not act in violation of their oath. "When, as in this case, a jury innocently considers evidence it was inadvertently given, there is no misconduct." (*Id.* at p. 836.) Instead, the circumstances are akin to error regarding the admission of evidence, which is reversible only if it

resulted in a miscarriage of justice under *People v. Watson, supra*, 46 Cal.2d at p. 836. (*Cooper*, at p. 836.) This Court expressly disapproved of contrary language in *Kitt*. (*Ibid.*)

Here, like in Cooper, an exhibit was mistakenly sent by the court to the jury room. Unlike in Cooper, there was no evidence in this case that any juror actually read the letter. (38 RT 5734.) But even if they had, it would have been innocent behavior on their part and would not have constituted misconduct that gives rise to a presumption of prejudice. (*People v. Cooper, supra*, 53 Cal.3d at pp. 835-836.) The issue becomes, then, whether the jury's possession of the letter in the jury room resulted in a miscarriage of justice.

D. The Inadvertent Placement in the Jury Room of a Document Not Admitted in Evidence Did Not Result in a Miscarriage of Justice

A miscarriage of justice will be found only if, after an examination of the whole record, the court determines it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) The record militates against such a finding in this case.

As the trial court pointed out, the opinion of Pasquale that he should come out to testify because Anderson should not be allowed to harm anyone else was already properly before the jury in the form of Pasquale's letter, which was offered into evidence by the defense. (38 RT 5734.) And the clear import of the letter was to encourage Pasquale to cooperate in testifying at the trial, not, in the words of the trial court, "to blast Mr. Anderson as a dangerous man." (*Ibid.*)

In addition, as discussed at various points in previous arguments, the case against Anderson was strong. To summarize, Peretti and Handshoe identified Anderson as a principal in the attempted robbery and murder,

witnesses saw a Bronco similar to Anderson's leaving the scene of the crime, Anderson made inculpatory statements to Northcutt, and he fled the state ten days after the crime.

E. Any Presumption of Prejudice Was Rebutted

Even if this issue is treated as one of juror misconduct, the presumption of prejudice was rebutted because, for the same reasons discussed above, there is no substantial likelihood that any juror was impermissibly influenced against Anderson based on the prosecutor's letter to Pasquale. (See *People v. Nesler*, *supra*, 16 Cal.4th at p. 578 ["When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias."].)

XIX. RESPONDENT DOES NOT OBJECT TO ANDERSON'S REQUEST FOR THIS COURT TO REVIEW THE SEALED RECORD RELATING TO THE DENIAL OF HIS MOTION FOR DISCOVERY OF PEACE OFFICER PERSONNEL RECORDS

Anderson joined in a motion by codefendant Huhn seeking discovery of certain personnel records for District Attorney Investigator Steven Baker. (5 CT 1073-1074; 5 RT 786-796; see generally *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Pen. Code, § 832.7; Evid. Code, § 1043 et seq.) In particular, the motion sought discovery of past complaints against investigator Baker relating to dishonesty, excessive force, unnecessary violence, under pressure of witnesses, and other misconduct. (5 RT 788.) Based on the motion and supporting declarations, the trial court found good cause to conduct an in camera review of investigator Baker's personnel records to determine if there were past citizen complaints regarding dishonesty, undue pressure of witnesses, or fabrication of reports. (5 RT 788-789.) The court conducted an in camera review of the records, and denied the request for discovery. (5 RT 790, 596.)

Anderson asks this Court to independently review the sealed record relating to the *Pitchess* motion to determine whether the trial court erred when it decided not to order discovery of any of the personnel records. (AOB 178-179.) Respondent has no objection to Anderson's request. A trial court's decision not to order the release of personnel records is reviewed for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) And even if a trial court is found to have abused its discretion by refusing to order discovery, a defendant is not entitled to relief on appeal unless he can demonstrate a reasonable probability of a different outcome had the evidence been disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 181-182.)

XX. The Validity of the Penalty Verdict Is Not Undermined by Anderson's Testimony in Favor of the Death Penalty

Anderson contends the penalty verdict should be reversed because the trial court allowed him to testify in favor of receiving the death penalty, thereby resulting in an unreliable verdict. (AOB 180-194.) Anderson acknowledges that decisions of this Court foreclose relief on this claim, but he requests that those decisions be reconsidered. (AOB 183.) This Court should decline that request.

A defendant has a fundamental right to testify on his own behalf, even against the advice of counsel. (*People v. Guzman* 45 Cal.3d 915, 962; see *Rock v. Arkansas* (1987) 483 U.S. 44, 49-53 [97 L.Ed.2d 37, 107 S.Ct. 2704].) This right extends to the penalty phase of a capital case, and includes the right to indicate a preference for the death penalty. (*People v. Nakahara* (2003) 30 Cal.4th 705, 716-717, 719; see *People v. Webb* (1993) 6 Cal.4th 494, 534-535.) Moreover, this court has consistently rejected claims that a defendant's testimony in favor of receiving the death penalty rendered the jury's death verdict unreliable. (See *People v. Mai* (2013) 57

Cal.4th 986, 1056; *People v. Nakahara*, 30 Cal.4th at p. 719; *People v. Webb*, 6 Cal.4th at pp. 534-535; *People v. Guzman*, 45 Cal.3d at pp. 961-963.)

Anderson's request to reconsider these authorities should be rejected. Anderson contends a defendant's testimony that he prefers the death penalty is irrelevant to the jury's penalty decision. (AOB 184-185.) It may or may not be. In *People v. Danielson* (1992) 3 Cal.4th 691, at page 715, this Court stated: "A defendant's opinion regarding the appropriate penalty the jury should impose usually would be irrelevant to the jury's penalty decision." However, this Court found under the circumstances of that case that the defendant's testimony, "[i]f I were one of the 12 jurors, I would vote for death," elicited by the prosecutor on cross-examination, was relevant to matters raised by the defendant in his direct examination. (*Ibid.*; see also *People v. Whitt* (1990) 51 Cal.3d 620, 646-648 [defendant's response to defense questions asking if he wanted to live or deserved to live were deemed potentially relevant mitigating evidence].) But relevancy does not control the issue, because a defendant's fundamental right to testify demands some flexibility in the application of evidentiary rules: "a defendant's absolute right to testify cannot be foreclosed or censored based on content." (*People v. Webb*, 6 Cal.4th at p. 535; see also *People v. Danielson*, 3 Cal.4th at p. 715 [suggesting that a defendant's voluntary testimony that he prefers the death penalty would foreclose a relevancy challenge on a "right to testify" basis].) Therefore, Anderson's request to reconsider prior decisions based on the alleged irrelevancy of his testimony is unpersuasive.

Anderson further claims that even if the trial court did not err in failing to preclude or strike his testimony, the trial court needed to at least instruct the jury that his testimony "was not an aggravating factor and therefore could not be used in the weighing process." (AOB 190.)

Respondent disagrees. Anderson's testimony was not in jeopardy of being construed as an aggravating factor, and the jury was otherwise properly instructed.

Before Anderson testified, his attorneys presented evidence that he did not participate in the Brucker murder. (35 RT 5505-5508.) Anderson testified consistently with this defense, telling the jury that he was innocent, there was no evidence to prove his involvement, and that the guilty verdict was wrong. (35 RT 5622-5623.) Even his statement, "I don't give a shit. Give me the death penalty. If you believe I'm guilty, kill me," implies Anderson's belief that he is innocent. Thus, the overall content of his testimony was relevant mitigating evidence, which the jury could properly consider. (See *People v. Johnson*, *supra*, 3 Cal.4th at p. 1252 [stating a "defendant may urge his possible innocence to the jury as a factor in mitigation," and that a jury may properly consider any residual doubt about his guilt].)

Nonetheless, Anderson protests that his testimony telling the jury he did not care and to give him the death penalty "surely encouraged the jury to short circuit the process and decide on a penalty of death." (AOB 190.) This is speculation. As explained above, the thrust of Anderson's testimony was that he was innocent. His statement that he did not care about getting the death penalty was more a manifestation of frustration or defiance than a genuine plea for that outcome. In any event, this Court has stated that a court has no obligation to instruct the jury on how to view the evidence. (See *People v. Brown* (2004) 33 Cal.4th 382, 402 ["Since there is no requirement that the court identify which factors are aggravating and which are mitigating [citation], neither must it restrict the jurors' consideration of the evidence in this regard."].)

XXI. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH A REVISED VERSION OF CALJIC NO. 8.85

During the penalty phase, using the standardized language of CALJIC No. 8.85, the trial court instructed the jury as follows: "In determining which penalty it is to be imposed, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account, and be guided by the following factors, if applicable." (35 RT 5515-5516; 8 CT 1642-1643; see also 36 RT 5718-5719.) The court then listed the potential aggravating and mitigating circumstances set forth in section 190.3, subdivisions (a) through (k). The trial court had rejected Anderson's request to give an alternative instruction to CALJIC No. 8.85. (35 RT 5495.) Anderson contends this was error. (AOB 195-198.) This contention should be rejected because this Court has repeatedly held that the standard language of CALJIC No. 8.85 is both correct and adequate.

Anderson has not cited anywhere in the record that documents the language of his proposed instruction, and respondent's review of the record failed to find it. Trial counsel described the proposed instruction as "one of two options currently being considered by the judicial council as a replacement for 8.85," but there has been no change to the language of CALJIC No. 8.85 between the time of Anderson's trial and the writing of this brief. (Compare 8 CT 1642-1643 [language of instruction given at trial] with CALJIC (Fall 2014 Edition) No. 8.85.) The contents of the proposed modifications are therefore unknowable based on the appellate record.

The record does reveal, however, that the trial court firmly believed that recent statements of this Court provided solid ground to deny Anderson's requested modifications. The court stated:

> I have reviewed the revised CALJIC 8.85 – I'll call it a revised version of that, that is apparently being circulated for comment. In reviewing that and the current 8.85, and relying

> primarily on some fairly recent California Supreme Court analysis, I'm declining to give the revised version.
>
> In *People versus Turner*, 34 Cal.4th at 406, and *People versus Brown*, 33 Cal.4th 382, the Supreme Court stated in a matter-of-fact fashion that they have consistently rejected the argument that what's mitigating and aggravating be identified, and as recently as November of last year indicated, "we find no persuasive reason to reexamine 8.85 and the listing of factors that can be considered in setting penalty."
>
> So the request to give that revision is denied.

(35 RT 5495-5496.)

Anderson did not protest that *Turner* and *Brown* were not on point, or otherwise indicate that the court's reasoning was not fully responsive to the issues raised by the proposed instruction. Therefore, on this record, Anderson cannot establish that the court erred by refusing to modify CALJIC No. 8.85.

Indeed, this Court has repeatedly rejected claims that CALJIC No. 8.85 requires modification, and has declared that "CALJIC No. 8.85 is both correct and adequate." (*People v. Valencia* (2008) 43 Cal.4th 268, 309; see, e.g., *People v. Sattiewhite* (2014) 59 Cal.4th 446, 490 ["The trial court is not required to identify which factors are aggravating and which are mitigating or to 'restrict the jurors' consideration of the evidence in this regard.'"]; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1362 [trial court properly rejected defense instruction which would have identified certain factors enumerated in CALJIC No. 8.85 as either aggravating or mitigating because the "nature of the various factors is readily apparent without such labels"]; *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [finding "unmeritorious" the claim that penalty phase instructions unconstitutionally failed to identity which circumstances were aggravating and which were mitigating]; *People v. Lucero* (2000) 23 Cal.4th 692, 728 [rejecting claim

that CALJIC No. 8.85 is unconstitutional because it fails to "limit the jury to consideration of only the listed factors in aggravation"]; *People v. Musselwhite* (1998) 17 Cal.4th 1218, 1266-1268 [rejecting claim that unmodified version of CALJIC No. 8.85 resulted in an unconstitutional penalty verdict].) Therefore, the trial court did not err in refusing Anderson's request to modify that instruction.

XXII. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY THAT THERE NEED NOT BE ANY MITIGATING CIRCUMSTANCES TO JUSTIFY A DECISION THAT THE PENALTY BE LIFE WITHOUT PAROLE

Anderson requested an instruction to inform the jury "that there need not be any mitigating circumstance in order to justify a decision that the penalty be life without possibility of parole." (35 RT 5628.) Defense counsel argued such an instruction was important because Anderson had prevented the defense from presenting mitigating evidence. (*Ibid.*) The trial court denied the request. Anderson claims this was error. (AOB 198-202.) Respondent disagrees.

This Court has repeatedly denied claims that a trial court erred by failing to give an instruction like the one at issue here, explaining that under the language of CALJIC No. 8.88, "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no mitigating circumstances were found to exist." (*People v. Johnson* (1993) 6 Cal.4th 1, 52; see *People v. McKinzie, supra*, 54 Cal.4th 1302, 1363-1364; *People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Seaton* (2001) 26 Cal.4th 598, 688; *People v. Ray, supra*, 13 Cal.4th at pp. 355-356; see also *People v. Duncan* (1991) 53 Cal.4th 955, 979 [finding the language of the instruction does not create a presumption in favor or death, and reasonably conveys to a jury that it "may decide, even in the absence of mitigating evidence, that the aggravating evidence is

not comparatively substantial enough to warrant death."].) Anderson presents no persuasive argument to reconsider these decisions.

XXIII. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT ON LINGERING DOUBT

Anderson contends the trial court erred when it refused his request to give an instruction telling the jury that it could consider "lingering doubt" regarding his guilt in determining the appropriate penalty. (AOB 202-205.) Relief on this claim is foreclosed by prior decisions of this Court, which have held that trial courts are under no obligation to instruct a jury on lingering doubt, even on request. (See *People v. Jones* (2012) 54 Cal.4th 1, 84; *People v. Gray* (2005) 37 Cal.4th 168, 231; *People v. Staten* (2000) 24 Cal.4th 434, 464; *People v. Hines* (1997) 15 Cal.4th 997, 1068.)

XXIV. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSISTENT WITH CONSTITUTIONAL PRINCIPLES

Anderson raises several generic claims challenging the constitutionality of California's death penalty statute. (AOB 205-225.) He acknowledges this Court has rejected the same or similar claims in the past, and therefore presents only "abbreviated" arguments and asks this Court to reconsider its prior decisions. (AOB 205; see *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [advising that an extended argument in support of such claims is unnecessary to secure a ruling on the merits].) Anderson offers no persuasive argument to revisit any of the issues, and they should all be rejected consistent with this Court's previous rulings.

Anderson claims that California's death penalty scheme is invalid for the following reasons: it is impermissibly broad because it does not meaningfully narrow the pool of murderers eligible for the death penalty (AOB 206-207); it allows arbitrary and capricious imposition of the death penalty (AOB 208-210); it fails to require written findings or unanimity as to aggravating factors, proof of all aggravating factors beyond a reasonable

doubt, findings that aggravation outweighs mitigation beyond a reasonable doubt, or findings that death is the appropriate penalty beyond a reasonable doubt (AOB 210-216); it does not require inter-case proportionality review (AOB 221-222); and it permits a jury to consider unadjudicated criminal activity in determining the appropriate penalty (AOB 222-223). Claims that are identical or similar to each of these claims have been repeatedly rejected by this Court. (*People v. Carrasco* (2014) 59 Cal.4th 924, 970-971.)

Anderson also claims here that the failure to instruct the jury that statutory mitigating factors are relevant solely as potential mitigating factors precluded a fair, reliable, and evenhanded administration of the death penalty. (AOB 223-224.) This claim, too, has been repeatedly rejected. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 692; *People v. Page* (2008) 44 Cal.4th 1, 61; *People v. Farnum* (2002) 28 Cal.4th 107, 191.)

XXV. CALIFORNIA'S SENTENCING SCHEME DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES

Anderson contends that California's sentencing scheme violates his right to equal protection because it denies capital defendants procedural safeguards that are afforded to non-capital defendants. (AOB 225-227.) This claim has been repeatedly denied, and Anderson offers no persuasive reason to reconsider the issue. (See *People v. Carrasco*, *supra*, 59 Cal.4th at p. 971.)

XXVI. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE INTERNATIONAL NORMS OF HUMANITY AND DECENCY

Anderson contends that California's death penalty laws violate international norms of humanity and decency. (AOB 227-229.) This argument, too, has been repeatedly rejected and Anderson fails to present a

persuasive reason to reconsider the issue. (*People v. Carrasco*, *supra*, 59 Cal.4th at p. 971.)

XXVII. The One-Year Enhancement for the Prison Prior Allegation Should Be Stricken Because It Is Based on the Same Prior Offenses That Serve As the Bases for the Serious Felony Prior Allegations, for Which Five-Year Enhancements Were Imposed

Anderson contends the trial court erroneously imposed a one-year sentence enhancement for the true finding on the prison prior allegation under section 667.5, subdivision (b), because that allegation was based on the same two prior convictions that underlie the serious felony prior allegations under section 667, subdivision (a), for which the court imposed five-year sentence enhancements. (AOB 229-230.) Respondent agrees. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1153 [holding that "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667(a) enhancement, the greatest enhancement, but only that one, will apply."].)

XXVIII. The Cumulative Effect of the Alleged Guilt and Penalty Phase Errors Do Not Require Reversal of the Convictions or Death Judgment

Anderson contends that the cumulative effect of the alleged errors requires reversal of his convictions and death judgment. (AOB 230-234.) However, no error occurred. Alternatively, to the extent error did occur, Anderson has failed to demonstrate prejudice. Therefore, reversal of Anderson's convictions and death sentence is not warranted.

Where no single error warrants reversal, the cumulative effect of all the errors may, in a particular case, require reversal in accordance with the due process guarantee. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 [93 S.Ct. 1038, 35 L.Ed.2d 297] [finding that the combined effect of all the individual errors denied the defendant his right to due process and a fair

trial]; *People v. Hill*, *supra*, 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) However, even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Where, as in the present case, few or no errors have occurred, and where any errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (E.g., *People v. Price*, *supra*, 1 Cal.4th at p. 465.)

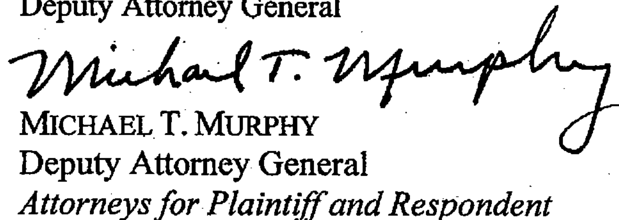
CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment be affirmed.

Dated: March 19, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
THEODORE M. CROPLEY
Deputy Attorney General



MICHAEL T. MURPHY
Deputy Attorney General
Attorneys for Plaintiff and Respondent

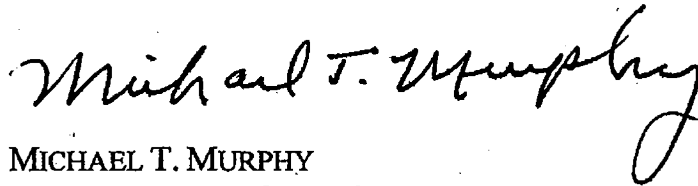
SD2005800233
71043442.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 53,385 words.

Dated: March 19, 2015

KAMALA D. HARRIS
Attorney General of California



MICHAEL T. MURPHY
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Eric Steve Anderson***
No.: **S138474**

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 24, 2015, 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Joanna McKim
Post Office Box 19493
San Diego, CA 92159

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

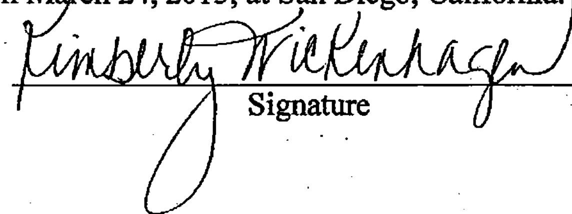
Court Executive Officer
Honorable Lantz Lewis, Judge
San Diego County Superior Court
220 West Broadway
San Diego, CA 92101

Governor's Office, Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Bonnie Dumanis
District Attorney
330 West Broadway Suite 1300
San Diego, CA 92101

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 24, 2015, at San Diego, California.

Kimberly Wickenhagen
Declarant


Signature

SD2005800233
71052763.doc