In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. MICHAEL LEON BELL, **Defendant and Appellant.**	CAPITAL CASE Case No. S080056

Stanislaus County Superior Court Case No. 133269
The Honorable David G. Vander Wall, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
KATHLEEN A. MCKENNA
Supervising Deputy Attorney General
SEAN M. MCCOY
Deputy Attorney General
WILLIAM K. KIM
Deputy Attorney General
State Bar No. 207818
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
Telephone: (559) 477-1675
Fax: (559) 445-5106
Email: william.kim@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF CASE

On February 2, 1998, the Stanislaus County District Attorney filed an information charging appellant, Michael Leon Bell, with: count 1, murder of Simon Francis (Pen. Code, § 187, subd. (a));[1] count 2, robbery of Simon Francis (§ 211); count 3, discharge of a firearm at an occupied motor vehicle (§ 246); and, count 4, unlawful possession of a firearm by a felon (former § 12021). The District Attorney alleged two special circumstances to the murder: that the murder was committed while appellant was engaged in the commission of robbery (§ 190.2, subd. (a)(17)(A)), and a burglary (§ 190.2, subd. (a)(17)(G)). The District Attorney further alleged that appellant had a prior conviction for a serious or violent felony (§§ 667, subd. (d); 1192.7, subd. (c)), and that appellant personally used a firearm in the commission of the offenses alleged in counts 1, 2, and 3 (§ 12022.5). (I CT 189-193.)[2]

On March 19, 1999, a jury was empaneled and the guilt phase of trial began. (III CT 876.) On April 1, 1999, the jury found appellant guilty as charged on counts 1, 2, 3, and 4. The jury found true the robbery and burglary special circumstances, as well as the firearm enhancements. (IV CT 997-1001; XIII RT 2668-2672.)

On April 5, 1999, appellant admitted the prior conviction allegation. (XIII RT 2729-2730; IV CT 1003.)

---

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

[2] "CT" and "RT" refer respectively to the Clerk's and Reporter's Transcripts On Appeal. "JCT" refers to the 18 volumes of Clerk's Transcripts On Appeal containing the prospective jurors' hardship requests and questionnaires. "AOB" refers to Appellant's Opening Brief.

On April 6, 1999, the penalty phase of trial began. (IV CT 1013.) On April 19, 1999, the jury returned a verdict of death. (V CT 1231; XIX RT 3837-3838.)

On June 18, 1999, the court imposed judgment and sentenced appellant to death for the murder of Simon Francis. The court also imposed a determinate prison term of 25 years and four months, for the remaining counts and enhancements. (XIX RT 3878-3896; V CT 1280-1283, 1289-1291.)

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

STATEMENT OF THE FACTS

A. Guilt Phase

Shortly before 4 a.m. on January 20, 1997, Daniel Perry, a truck driver for Lucky Supermarkets, was on route to make a delivery to the Turlock store. (IX RT 1859-1860.) As Perry drove by a Quick Stop convenience store, he saw a tall person, wearing a dark colored hooded jacket, run out of the store toward Perry's truck. (IX RT 1860-1864.) As Perry drove by, Perry heard two gunshots. (IX RT 1865.) Perry thought he was being shot at, and continued driving. (IX RT 1865.) He passed a dark colored sedan parked off to the side of the road. (IX RT 1865.) Perry kept an eye on the sedan, in his vehicle's side view mirror. (IX RT 1865.) Perry saw the sedan's headlights come on, and the sedan then drove off. (IX RT 1865-1867.) Perry continued driving to the Lucky store. (IX RT 1867.)

Around 4 a.m. on January 20, 1997, Richard Faugh was on his way to work when he stopped at the Quick Stop convenience store in Turlock. (X RT 1916-1917.) As he entered, Faugh heard a high pitched tone.[3] (X RT 1918.) He got dessert items off the shelf, walked to the counter, and put the items on the counter. (X RT 1918.) He then noticed the cash register drawer was open, and the store clerk, Simon Francis (Francis), was lying motionless behind the counter. (X RT 1918.) Faugh went behind the counter, lifted the clerk's jacket, and saw a blood stain and what appeared to be a bullet wound. (X RT 1919-1920, 1922.). A cash register money tray lay partially on the clerk's leg, and coins were scattered all over the floor. (X RT 1922.) Faugh went to the store office and called 911. (X RT 1919-1920.)

While the police were investigating at the Quik Stop, Perry made a 911 call from the Lucky store. (IX RT 1868.) Perry met a police officer at the Lucky store, told the officer what had happened earlier when he passed the Quik Stop, and showed the officer his truck, which had a dent just below the bottom step on the passenger side. (IX RT 1844-1845.) The officer relayed this information to the officers at Quik Stop, and then had Perry follow him to Quik Stop. (IX RT 1834, 1844-1845, 1868.) Perry showed investigating officers where his truck had been on the road when he heard the gun shots, and the area where the sedan had been parked. (IX RT 1833-1835, 1837, 1868-1869.) Officers found a bullet on a paved driveway next to the store. (IX RT 1844-1846, 1869.) In a dirt area off the road, officers saw car tire tracks and shoeprints. (IX RT 1836, 1839-1841, 1869; X RT 1960-1962.)

---

[3] The store owner testified that the high pitched tone was the alarm that automatically went off when the cash register was left open. (IX RT 1891.)

The police obtained and played the tape from Quik Stop's security surveillance system. (IX RT 1885; X RT 1951; XII RT 2396-2398; see People's Exh. 12.) The tape showed Francis dusting the store when the robber entered around 3:54 a.m. (IX RT 1887, 1890-1891; X RT 1933; see People's Exh. 12.) The robber was tall, and the detective then estimated the robber to have been between 6'2" to 6'5"[4] because he towered over the cigarette rack and Francis, who was six feet tall. (X RT 2026.) He was wearing a ski mask and a dark-colored hooded jacket. (X RT 1927; see XIII RT 2563.) His hands were gloved, and he held a revolver. (X RT 1952-1953.) The robber told Francis to open the safe. (X RT 1926, 1934.) Francis answered that he did not have the combination. (X RT 1926, 1934.) The robber then shoved Francis through the store, forcing Francis behind the counter to the cash register. (X RT 1926-1927, 1933-1934.) The robber told Francis to give him cash. (X RT 1927.) Francis opened the cash register. (X RT 1934-1935.) The robber then had Francis lie down on the floor. (See People's Exh. 12; see also XIII RT 2564.) The robber pulled the cash out of the cash register, and threw the money tray on the floor.[5] (X RT 1934-1935.) The robber pointed the revolver at, and fired shots into Francis. (X RT 1927; XIII RT 2564.) The robber then left the store within a minute of when he had entered. (X RT 1936; People's Exh. 12.) The tape also recorded the sound of two additional gunshots just after the robber left the store. (XII RT 2396.)

The medical examiner noted that Francis had been shot twice in the back. (IX RT 1820-1821; XI RT 2175.) One bullet went through the lung,

---

[4] At time of trial, appellant was about 6' 7" and about 270 pounds. (XVII RT 3473; see also XII RT 2405-2406.)

[5] An audit found $261 missing. (IX RT 1894.)

then the heart, and exited just beneath the chest area. (XI RT 2175-2176.) This deformed bullet was found underneath Francis's body. (IX RT 1820-1821.) The other bullet went into Francis's abdominal cavity, and was found lodged behind the colon. (X RT 1964-1965; XI RT 2176.)

During the course of the investigation, the police developed appellant as a suspect. (X RT 1967-1968.) The police contacted appellant, and arranged a time and place to meet with him. (X RT 1968, 2020-2021.) Appellant came to the meeting with Roseada ("Rose") Travis in her car, a 1988 blue Chevy Beretta. (X RT 1970-1971.) Appellant told the police officers that he and Rose were boyfriend and girlfriend. (X RT 1969, 1978.) Appellant claimed that during the weekend of the robbery/shooting at Quick Stop, he was sick and spent the entire weekend at Rose's apartment with Rose, her son Taureen ("Tory") Travis, and Tory's friend, Robert.[6] (X RT 1968-1969, 1971-1972.) Appellant provided the address of Rose's apartment. (X RT 1976, 1987.) Afterward, the police searched Rose's apartment and impounded her car. (X RT 1979-1980.)

Impressions of the four tires from Rose's car were made, and compared with photos of the tire impressions found in a dirt/mud area near Quik Stop. (X RT 1981-1988.) The two front tires were of the same brand, make, and size, the right and left rear tires were each of different brands and makes. (X RT 1986; XI RT 2152.) The tread patterns from the right rear tire and the front tires were consistent with the tire impressions found at the Quick Stop. (XI RT 2144-2154.)

---

[6] Because of the shared surname, respondent will refer to Rose and Tory by their first names.

The police arrested Rose. (X RT 1988.) Rose led the police to the location where a green cloth gun case was buried. (X RT 1988-1990, 1992-1995.) Inside the case was a Smith and Wesson .357 revolver and several Federal brand .38 Special Plus P bullets. (X RT 1990-1991, 1998-1999.)

A forensic criminalist tested the revolver and found it was operable. (XI RT 2154-2157, 2163.) The criminalist observed the bullets recovered from underneath Francis's body, inside Francis's abdominal cavity, and on the driveway next to Quik Stop, were nylon coated. (XI RT 2158, 2163-2165, 2167.) The criminalist compared the bullets recovered with bullets test fired from the recovered revolver. The criminalist opined that the two bullets recovered from underneath and inside Francis's body were consistent with having been fired from the recovered revolver. (XI RT 2159-2166.) The third bullet, found on the driveway next to the store, was too damaged to make a determination. (XI RT 2166-2167.) The criminalist also compared the gunshot residue pattern observed on the blue sweater worn by Francis (see IX RT 1854) with test-fire patterns, and opined that the revolver was fired from a distance of one to two feet away from the sweater. (XI RT 2167-2170.)

The police traced possession of the revolver. Phillip Campbell, who lived in the Los Angeles area, had purchased two revolvers from his brother-in-law, and then sold one to Nick James Feder (Feder). (XI RT 2137-2139; see XI 2127-2129.) Campbell identified the recovered revolver as the one he sold to Feder based on its serial number. (XI RT 2139-2140.) Feder bought a Smith and Wesson .357 revolver from Campbell, and then sold it to Debra Ochoa. (XI RT 2127-2129.) Feder said the recovered

revolver looked identical to the revolver he sold to Ochoa. (XI RT 2129-2130.) Debra Ochoa admitted only that she had known appellant for about 14 years.[7] (XI RT 2188-2189.)

The police received a black hooded jacket, size XXXL, from Nathan Neal ("Nathan")[8] and his foster mother Susie Mendoza (Mendoza). (X RT 2002-2004; XI RT 2232.) Mendoza had given Nathan the black hooded jacket. Mendoza recalled that when appellant came to her house for a Christmas dinner in 1996, he was wearing the jacket, and, several months later, appellant returned it to Nathan. (XI RT 2230-2232.)

Nathan testified under the grant of immunity. (XI RT 2219.) Nathan said he had a black hooded jacket, size XXXL. (XI RT 2220-2221.) He recalled that appellant had borrowed the jacket around Christmas of 1996, and that appellant returned the jacket some time after the shooting at Quik Stop. (XI RT 2221-2222.) Looking at still photos taken from Quik Stop's surveillance tape, Nathan said the jacket worn by the robber/shooter looked like his jacket. (XI RT 2225-2226.) Nathan testified that appellant admitted traveling to Los Angeles about two or three weeks before the Quick Stop robbery. (XI RT 2224.) Nathan admitted that, at school, Tory had told him about the Quick Stop robbery. (XI RT 2225.)

Nathan had seen appellant with a revolver. (XI RT 2222.) Felix Foster recalled that appellant brought a gun to his home. (X RT 2081-2083.) Felix's parents were home and saw the gun. (X RT 2083.)

---

[7] In a hearing under Evidence Code section 402, Ochoa refused to answer questions posed by the prosecution, asserting her Fifth Amendment privilege against self-incrimination. (See XI RT 2134, 2178-2186.)

[8] Respondent refers to the testifying minors by their first names because they referred to each other by their first names at trial, due in part to unfamiliarity with their last names.

Appellant left with the gun. (X RT 2083.) Some time after the Quick Stop shooting/robbery, Daniel Herrera received a gun in a case from appellant. (XI RT 2119, 2121.) Rose sent Felix and Nathan to get a gun from Daniel and bring it to her. (X RT 2083-2085, XI RT 2222-2224.) Felix and Nathan went to pick up the gun from Daniel, and Daniel gave it to them. (X RT 2084, XI RT 2120, 2224.) Felix and Nathan brought the gun to Rose, who then cleaned it. (X RT 2085, XI 2224.) Nathan and Tory then buried the case and revolver. (XI RT 2224.)

Tory testified as part of a plea agreement.[9] (X RT 2034.) Tory identified the robber/shooter in the store surveillance tape as appellant, and said the voice of the robber/shooter in the store surveillance tape was appellant's voice. (X RT 2058-2059.)

Tory recalled seeing appellant with a gun for the first time in December of 1996. (X RT 2035.) Appellant showed the gun to him. (X RT 2035-2036.) Tory described the gun as a .357 revolver. (X RT 2037.) Appellant told Tory that he got the gun from "L.A.," and that he got it "to get some money." (X RT 2036.) Tory said that while he was living with Tory and his mother, appellant had talked about "going to rob somebody." (X RT 2037.)

Tory said that on the night of January 19, 1997, he came home and walked into his mother's room. (X RT 2037-2038.) He saw his mother and appellant cleaning a gun and bullets, loading the bullets into the gun, and putting black electrical tape on appellant's shoes. (X RT 2038-2039, 2041-2042.) He also saw a red ski mask, and Nathan's black jacket. (X RT

[9] Tory pleaded guilty to the charge of accessory after the fact for the murder, and received a sentence of credit for time served in exchange for his truthful testimony in appellant's trial. (X RT 2034.)

2039-2041.) Tory understood that appellant and his mother were planning and preparing to commit a robbery. (X RT 2038, 2042.) Tory asked to come along. (X RT 2042.) Tory's mother did not want him to go, but appellant persuaded her to let Tory come along. (X RT 2042.)

During the early morning hours of January 20, 1997, appellant, Rose, and Tory got into Rose's blue Beretta and began driving around looking for a convenience store to "jack," that is, to rob. (X RT 2042-2044, 2060.) Rose and Tory scouted and identified several stores, but appellant said no. (X RT 2044-2046.) Just before 4 a.m., they selected the Quik Stop in Turlock. (X RT 2046-2048.)

Rose pulled her car into a driveway on the side of the store. (X RT 2048.) Appellant climbed out of the back seat. (X RT 2049.) He asked Tory whether or not he should kill the clerk. (X RT 2049.) Tory said no. (X RT 2049.) Rose then moved the car and parked nearby. (X RT 2049-2050.) Appellant went into the store. He was wearing Fila shoes with black electrical tape wrapped around the shoes, black pants, a black hooded jacket, and a red ski mask. (X RT 2049-2050.)

Appellant then ran out of the store toward Rose's car. (X RT 2050.) A truck passed, and appellant fired two shots at the truck. (X RT 2050, 2060.) He then got into the Berreta, holding a wad of cash. (X RT 2050, 2056.) Rose turned the car engine and headlights on, and drove off. (X RT 2050-2051.)

Appellant told Rose and Tory that there was a struggle between him and the clerk, so he shot him. (X RT 2059, 2073.) Tory also asked appellant why he shot at the passing truck, and appellant answered that he did not want any witnesses. (X RT 2059, 2073.)

After driving around for about an hour, they returned back to Rose's apartment. (X RT 2051-2052.) There, they changed clothes, and appellant

and Rose cleaned the gun and bullets again. (X RT 2052.) Tory burned the Fila shoes with black electrical tape, as appellant directed. (X RT 2052-2054, 2071-2072.) Sometime later, the black hooded jacket was returned to Nathan. (X RT 2055-2056.) Tory, Rose, and Nathan buried the revolver in its carrying case. (X RT 2054-2055, 2071-2072.)

B. Defense

The defense presented the testimony of two individuals who were housed with Tory in juvenile hall, Kenneth Alsip and Brandon Thornsberry, to challenge the identification of appellant as the robber/shooter. (See XIII RT 2586-2602.).

Alsip testified that, while in juvenile hall, Tory bragged, "I did commit that murder [at Quik Stop], and the person that I'm going to let fall for me did not commit it." (XII RT 2273-2276; see also XII RT 2285-2308.)

Thornsberry testified that, while in juvenile hall, he and Tory had talked about the killing at Quik Stop. Tory said he was in the car with his mother and her boyfriend. (XII RT 2454.) Tory identified the boyfriend as a "black guy" from Las Vegas. (XII RT 2455-2456.) Tory said that they got a couple hundred dollars from the robbery, and that they buried the gun and burned the ski mask. (XII RT 2455-2456.)

C. Penalty Phase

1. The People's Case In Chief

a. Victim Impact Testimony

The District Attorney provided victim impact testimony from Francis's father (XIV RT 2756-2758), Francis's sister (XIV RT 2759-2760), and a cousin of Francis's wife (XIV RT 2761-2763).

Isaac Francis Dawod, Francis's father, testified that Francis was the youngest of his seven children. (XIV RT 2756.) Dawod said Francis had been married less than two months when he was shot and killed. (XIV RT 2756.) Dawod said a neighbor informed him of his son's death. (XIV RT 2756-2757.) The neighbor brought Dawod to the hospital, and then back home. (XIV RT 2757.) Dawod said he felt very hollow and void; he shook, fell, and passed out. (XIV RT 2757.) He could not go to church, and was unable to visit his son's grave. (XIV RT 2757-2758.)

Margaret Francis testified that she was Francis's older sister. (XIV RT 2759.) She described herself as a second mother to Francis. (XIV RT 2759.) She was 51 years old at the time of trial, and Francis had been about 27 years old when he was murdered. (XIV RT 2759.) Margaret said that Francis was very precious to her because she had raised him. (XIV RT 2760.) When she lived in Venezuela and was not doing well physically, Francis had helped her financially. (XIV RT 2760.) When she learned of Francis's death, she passed out and had a stroke. (XIV RT 2759-2760.)

Laura Belham testified that she and Francis's wife, Esther, are cousins. (XIV RT 2761.) Belham was a bridesmaid at their wedding. (XIV RT 2761.) Belham said she missed Francis. (XIV RT 2763.) After Francis's murder, Belham became fearful and would not go out at night. (XIV RT 2763.) A video of Francis's and Esther's wedding was completed after his death. (XIV RT 2762-2763.) The District Attorney showed the jury an approximate four-minute portion of the wedding video. (XIV RT 2764-2765.)

b. Other Criminal Conduct And Convictions

(1) May 1991 Sexual Assault Of Leatha O'Halloran

Leatha O'Halloran testified that she lived with appellant in May of 1991. (XIV RT 2766.) She was about 19 years old at the time. (XIV RT 2769.) She and appellant then had two children. (XIV RT 2765-2766, 2769.) And though she was not aware then, she was about three months pregnant with their third child. (XIV RT 2767-2768.) On May 19, 1991, appellant came home intoxicated and angry. (XIV RT 2767-2768.) He dragged her into a bedroom, threw her onto a bed, removed some of her clothing without her consent, and attempted to have sex with her. (XIV RT 2766-2767.) She cried for help and struggled with appellant. (XIV RT 2767-2768.) She was able to get away and ran next door to the neighbors. (XIV RT 2768.) She suffered a swollen lip. (XIV RT 2767; V CT 1322-1324.)

(2) September 1993 Assault Of Patrick Carver

Lawrence Smith testified that on September 5, 1993, he, appellant, and several others assaulted Patrick Carver. Smith had learned from Carver's then girlfriend that Carver was a child molester. (XV RT 2969.) Smith spoke with his friends, including appellant, and they decided to beat up Carver. (XV RT 2970.) When Carver returned home, Smith and appellant confronted Carver. (XV RT 2971.) Appellant told Carver to pull out a 12-inch knife that Carver had. (XV RT 2971-2972.) Carver said no. (XV RT 2972.) Appellant repeated to Carver, three or four more times, to pull out his knife. (XV RT 2972.) Carver eventually did so. (XV RT 2972.) Appellant told Carver to "act like you're going to come at me with

it." (XV RT 2973.) Carver's grip on the knife was shaky and loose. (XV RT 2973.) Appellant took the knife away from him. (XV RT 2973.) With his free hand, appellant lifted Carver by the neck off the ground. (XV RT 2974.) He slammed Carver into the wood framing on the house. (XV RT 2974.) Appellant then jabbed Carver's forehead with the knife, 20 to 30 times, just with enough force to penetrate the skin. (XV RT 2974-2975.)

Smith recounted that appellant dropped Carver and began to jump up and down on Carver's rib cage. (XV RT 2975.) After a couple of jumps, appellant stopped. (XV RT 2975.) Appellant offered Carver a drink of water. (XV RT 2975-2976.) Carver said yes. (XV RT 2976.) Appellant grabbed a hose and turned the water on. (XV RT 2976.) He brought Carver's head up from the ground and put the hose on the side of Carver's mouth. (XV RT 2976.) While Carver drank, appellant suddenly shoved the hose into his mouth. (XV RT 2976.) Carver began choking, shaking and kicking. (XV RT 2976.) Appellant then pulled the hose out of Carver's mouth.[10] (XV RT 2977.) He then lifted Carver, walked across the backyard, and threw him over the fence onto the street. (XV RT 2977-2978.)

Smith testified that appellant hopped the fence and picked up Carver. (XV RT 2978.) He told Carver that he wanted money. (XV RT 2978.) Carver said he did not have any money. (XV RT 2978.) Appellant looked at Carver's car and told Carver to sign the car over to him. (XV RT 2978.)

---

[10] Smith testified that appellant pulled the hose out of Carver's mouth because he pulled out a gun, pointed it at appellant, and told appellant, "that was enough." (XV RT 2976-2977.)

Appellant then said, "No. Fuck that. I want money." (XV RT 2978.) Carver said that he could get money, that he just had to call his relatives. (XV RT 2979.) Appellant then told everyone there to get into the car. (XV RT 2979.) Appellant drove them around the corner to a pay phone. (XV RT 2979.) Carver got out and used the phone. (XV RT 2979-2980.) While Carver was on the phone, the police arrived. (XV RT 2981.) Appellant fled. (XV RT 2981-2982.)

Patrick Carver testified that he had owed rent money to Chris and Carla Wallace. (XVIII 3580-3581.) One day, Carla, with a group of people, including Lawrence Smith and appellant, went to the residence where Carver was staying. (XVIII RT 3582.) Carla and her group of people circled Carver. (XVIII RT 3583.) Carla repeatedly tried to hit Carver. (XVIII RT 3583.) Carver pushed her to the ground, but refused to hit her. (XVIII RT 3583.) Ten or fifteen minutes later, the altercation stopped. (XVIII RT 3584.) Later that night, appellant dragged him out of his car and slammed him to the ground. (XVIII RT 3584-3585.) Carver recalled being kicked repeatedly by appellant and others. (XVIII RT 3585-3586.) Carver remembered gasping for air, passing out, and then waking up. (XVIII RT 3586.) Carver said that when he woke, he tried to escape went to a pay phone, and tried to call his aunt for help. (XVIII RT 3587-3588.) Before he was able to use the pay phone, Smith, appellant, and others pulled up in a car. (XVIII RT 3588.) Appellant grabbed Carver and threw him into the car. (XVIII RT 3588-3589.) They drove Carver back to the house where he was staying. (XVIII RT 3589.) Carver was dragged out of the car, and the group continued to beat him. (XVIII RT 3589.) Carver remembered that appellant threw him over a fence. (XVIII RT 3586-3587, 3589.) Carver was then dragged to a chair and tied up with a hose. (XVIII RT 3587, 3589-3590, 3592.) Appellant and the others

resumed beating him. (XVIII RT 3590-3591.) Appellant took a long knife and held it across Carver's throat and lips. (XVIII RT 3593.) Appellant then repeatedly tapped Carver on the head with the tip of the knife. (XVIII RT 3594.)

Carver recalled that, at some point, appellant kicked Carver in the face, and the chair tipped over. (XVIII RT 3591.) At that point, Carver was able to break free. (XVIII RT 3592.) Appellant then turned on the water hose full blast, and shoved the hose into Carver's mouth. (XVIII RT 3592.) Carver was able to get the hose out of his mouth. (XVIII RT 3594.) As Carver struggled to breathe, appellant jumped on Carver with both feet. (XVIII RT 3594-3595.) Carver recalled passing out. (XVIII RT 3595.) When he awoke, appellant was dragging him to the car. (XVIII RT 3596.) Appellant repeatedly asked Carver, "How are you going to come up with the money?" (XVIII RT 3596.) Carver told appellant that he did not have any money, but he would call his aunt and have her wire the money. (XVIII RT 3596.) Appellant said okay. (XVIII RT 3596.) Carver was driven to a pay phone. (XVIII RT 3597.) Carver called his aunt from a pay phone, told her that he needed $20,000 because there was a man with a gun to his head threatening to kill him, and gave her the address. (XVIII RT 3598-3599.) Carver's intention was for her aunt to notify the police, not for her to wire money. (XVIII RT 3600.) After hanging up, Carver and appellant walked back to the car, police vehicles pulled up from every direction, and appellant took off running. (XVIII RT 3600.)

(3) February 1996 Assault Of And Threats Against Gary Wolford

Gary Wolford testified that in February of 1996, he lived in a converted garage that he rented from Moe Drinnon. (XV RT 3028-3029.) On February 12, 1996, Drinnon called Wolford, asking Wolford to come up

to the house. (XV RT 3029.) Wolford went into the house, and was confronted by Drinnon and appellant. (XV RT 3029.) They directed Wolford to a bedroom. (XV RT 3029.) Appellant was angry. (XV RT 3030.) He told Wolford to bring over his friend, Renee. (XV RT 3030, 3033-3034.) Appellant said he was going to "F her up" because she had given Drinnon "some bad crank." (XV RT 3030.) Appellant and Drinnon were doing lines of crank. (XV RT 3030.) They accused Wolford of being "a snitch and a rat," and told Wolford to do a line. (XV RT 3030.) Appellant then told Wolford to give him a hundred dollars. (XV RT 3030.) Appellant told Wolford that Wolford was going to start buying all of his crank from appellant. (XV RT 3031.) Wolford tried to leave, but they would not let him. (XV RT 3031.) Appellant shoved Wolford to the ground once, And, several times, appellant grabbed Wolford by his neck and banged his head against the wall. (XV RT 3031-3032.) Wolford was in the house for three or four hours. (XV RT 3032.) Eventually, appellant and Drinnon allowed Wolford to leave. (XV RT 3032.) Appellant warned Wolford to have a hundred dollars the next day, or otherwise he was going to hurt him. (XV RT 3032.)

(4) March 1996 Assault And Theft From Larry Wooldridge

Larry Wooldridge testified that on March 14, 1996, he went to a house of a friend, Danielle. (XIV RT 2784-2785.) Appellant and Michael Hill were there. (XIV RT 2784-2785.) Appellant and Wooldridge were friends at that time. (XIV RT 2784.) Wooldridge gave appellant $25 and asked appellant to buy him some marijuana. (XIV RT 2785, 2792.) Appellant took the money. (XIV RT 2787.) Appellant and Hill then left. (XIV RT 2785.) About five minutes later, they returned and accused

Wooldridge of "being a cop." (XIV RT 2785.) They pulled Wooldridge outside. (XIV RT 2785-2786.) They then drew machetes and swung them in front of Wooldridge, as if they were going to chop him in half. (XIV RT 2786.) Hill was saying, "Can I? Can I? Can I chop him in half?" (XIV RT 2786.) Appellant and Hill both struck Wooldridge's face. (XIV RT 2787.) Appellant demanded Wooldridge's money. (XIV RT 2786.) Wooldridge gave appellant what money he still had. (XIV RT 2786-2787; see V CT 1336.)

(5) February 1997 Evasive Driving

Turlock Police Officer Robert Lugo testified that during the early morning hours of February 25, 1997, he saw an Oldsmobile traveling about 90 miles per hour in a 45 mile per hour zone. (XIV RT 2795-2798.) After passing Officer Lugo's patrol vehicle, the driver of the car applied the brakes and slowed the car. (XIV RT 2799.) Officer Lugo made a U-turn and began following the Oldsmobile. (XIV RT 2798-2799.) The driver of the Oldsmobile made no attempt to stop at an intersection for a four-way stop sign. (XIV RT 2800.) The driver made a turn. (XIV RT 2799-2800.) The driver then accelerated the car and shut the car lights off. (XIV RT 2800.) Officer Lugo activated his patrol vehicle's emergency lights and siren, and initiated pursuit. (XIV RT 2800-2801.) Officer Lugo lost sight of the car momentarily after the Oldsmobile made a turn. (XIV RT 2801.) Officer Lugo followed and found the Oldsmobile parked alongside the road curb. (XIV RT 2801.) The Oldsmobile appeared unoccupied. (XIV RT 2801-2802.)

Officer Lugo got out of his patrol vehicle and stood by its door. (XIV RT 2802.) He looked around trying to determine in which direction the driver may have fled, and called for backup. (XIV RT 2802.) Suddenly, the engine started on the Oldsmobile. (XIV RT 2802.) The

driver sat up and the car sped off. (XIV RT 2802.) Officer Lugo got back into his vehicle and began pursuit again. (XIV RT 2803.) Officer Lugo observed the driver run another stop sign, throw a bottle out the car window, travel at 60 to 65 miles per hour in very narrow residential streets where the limit was 25 miles per hour, and cross over to the opposing lane of traffic. (XIV RT 2803-2810.)

The driver turned onto a barricaded road where the car finally stopped. (XIV RT 2810.) The driver, identified as appellant, struck the steering wheel and windshield with his hands. (XIV RT 2811-2812.) Appellant did not comply with officers' verbal commands to step out of the car with his hands up. (XIV RT 2812.) Appellant eventually got out of the Oldsmobile. (XIV RT 2812.) He looked and yelled at the officers. (XIV RT 2812.) Appellant resisted efforts to handcuff him, and it took three officers to put appellant in a prone position and place him in handcuffs and leg irons. (XIV RT 2813-2814.) While Officer Lugo searched appellant, appellant banged his head on the trunk of the vehicle three or four times, causing small dents in the trunk. (XIV RT 2814.) Officer Lugo smelled the odor of alcohol from appellant's breath. (XIV RT 2814-2815.) Appellant blew into a breathalyzer, which then showed a blood alcohol level of .10 and .11 percent. (XIV RT 2815, 2818.)

Sheriff's Deputy Timothy Kirk testified that on September 15, 1998, he searched appellant's clothing before bringing him to the jail yard. (XIV RT 2821-2822.) Deputy Kirk found a shank, a metal object with a sharp point, hidden under the insole of one of appellant's shoes. (XIV RT 2823-2826.) Deputy Kirk also found a small mirror wrapped in tape. (XIV RT 2826-2827.)

The District Attorney introduced evidence that appellant had suffered felony conviction for possession of a firearm by a prohibited person in September of 1995. (XVIII RT 3747; see IX RT 1773-1774, V CT 1326-1330.)

D. Defense Evidence in Mitigation

1. Prison Expert

The defense presented the testimony of James Park, an expert on California prisons. (XIV RT 2830-2836.) Park explained that prisoners are assigned to one of four custodial levels: I, II, III, or IV. (XIV RT 2837.) Inmates sentenced to life in prison without the possibility of parole are automatically assigned to a Level IV maximum security prison. (XIV RT 2837.) Park described photos of a sample cell for a Level IV inmate. (XIV RT 2837-2843.) Park noted the Level IV cell has a steel door controlled by an armed correctional officer in a guard post, and a window five inches wide. (XIV RT 2838-2839.) Inside the cell are a stainless steel toilet, a stainless steel wash basin, and two bunks anchored into the concrete. (XIV RT 2839.) The beds are thick sheet steel. (XIV RT 2839-2840.) Officers control the individual cell doors and the shower cell door through an electric console panel in an impregnable station. (XIV RT 2840-2841.) Surrounding a maximum security prison are two 12-foot fences topped with razor ribbon wire, and in between these two fences is a 13-foot high, 4500-volt electric fence. (XIV RT 2842.) Park further noted that in a Level IV prison, should an inmate get into trouble, the inmate would be placed in a 23-hour a day lockup. (XIV RT 2843.) The inmate would be allowed out of the cell to a very small exercise yard only an hour a day, or at most, three hours every two days. (XIV RT 2843.) Inmates not

confined in a 23-hour per day lockup are able to use the prison shops, factories, library, school, exercise yards and recreational areas where they could socialize with other inmates. (XIV RT 2847-2849.)

2. Testimony Of Joseph Black

The defense presented the testimony Joseph Black, who challenged Smith's recollection of the circumstances of appellant's assault on Carver. Black testified that he was present during the fight between appellant and Carver. (XVI RT 3371.) Black said that the fight was about rent money, and that the fight was mutual. (XVI RT 3371-3372.) Black said appellant got the better of Carver. (XVI RT 3372.) Black did not see a knife during the fight. (XVI RT 3372.) He did not see appellant jump up and down on Carver, nor did he see appellant force a hose into Carver's mouth, or pick up Carver and throw him over the fence. (XVI RT 3372-3373.) Black said Smith was present during the fight. (XVI RT 3371-3372.)

3. Testimony Of Bertha Bell-Udeze

Bertha Bell-Udeze is appellant's mother. (XV RT 3043-3044.) She testified that she became pregnant at the age of 15, and gave birth to appellant at the age of 16. (XV RT 3045.) Appellant was a premature baby, born at six months and two weeks, and he weighed three pounds and four ounces. (XV RT 3046-3047.) He stayed in an incubator at the hospital for eight weeks. (XV RT 3047-3048.) Until he was about two years old, appellant was often sick, in and out of the hospital. (XV RT 3048-3049.)

Bell-Udeze said that when she was about 18 years old, she married appellant's father, who was then about 20 years old. (XV RT 3049.) Appellant's father was enlisted in the Air Force. (XV RT 3050.) The

family moved to Blytheville, Arkansas, just outside the Air Force base. (XV RT 3050.) They stayed there for about two years, after which appellant's father was transferred to Guam and then to Portugal. (XV RT 3050-3051.) Bell-Udeze and appellant did not accompany appellant's father to Guam, but they eventually joined him in Portugal. (XV RT 3051-3052.)

In Portugal, Bell-Udeze and appellant's father had marital problems. (XV RT 3052.) He was out all times of the night, and they argued. (XV RT 3052.) She said appellant's father had no patience with appellant, and it seemed that appellant "could never do anything right for him." (XV RT 3052-3053.) When appellant was about four years old, he could not sit still. (XV RT 3053.) While in Portugal, Bell-Udeze took appellant to the doctor, who prescribed Ritalin. (XV RT 3053.) Bell-Udeze said the Ritalin made appellant act withdrawn, that he would just sit in a corner and not do anything. (XV RT 3053.) Not liking the effect Ritalin had on appellant, she stopped giving the medication to him. (XV RT 3053-3054.)

The family stayed in Portugal for about two years, and then appellant's father was transferred to Las Vegas. (XV RT 3054-3055.) Appellant was six years old and about to begin first grade. (XV RT 3055.) Appellant continued having behavioral problems; he would get in confrontations, or play too rough with other children, he could not sit still and was disruptive in class. (XV RT 3055.) Bell-Udeze said appellant would become frustrated and agitated because he had trouble understanding instructions that she would give him. (XV RT 3056.)

Appellant's brother, Scheron Bell, was born in Las Vegas. (XV RT 3058.) Sometime after Scheron was born, Bell-Udeze separated from appellant's father and left Las Vegas. (XV RT 3056-3057.) She and the

children moved to California, eventually settling in Merced. (XV RT 3057.) Appellant's sister, Nekesha Bell, was born in Merced. (XV RT 3058.) Appellant's father, when he was around, seemed more patient with Scheron and Nekesha. (XV RT 3058-3059.) In Merced, Bell-Udeze went back to school. She received welfare and financial aid, which gave her an allowance for babysitting. (XV RT 3061-3062.)

Appellant continued to have problems at school. (XV RT 3059.) Teachers would call Bell-Udeze and tell her that appellant was not doing his assignments, and that he would be busy doing something else other than what was instructed. (XV RT 3059.) Bell-Udeze believed that if appellant applied himself, he could do his school work. (XV RT 3059.) When appellant was about 10 years old, because of his problems, the school referred appellant to the county mental health department in Merced. (XV RT 3059-3060.) Bell-Udeze went with appellant to see a counselor a couple of times. (XV RT 3060.) Bell-Udeze and the children moved to Turlock, in Stanislaus County, in August of 1985. (XV RT 3060-3061.) Appellant was about 15 years old at the time. (XV RT 3061.) Bell-Udeze said they moved because appellant got in trouble several times for shoplifting in Merced. (XV RT 3060-3061.)

Bell-Udeze said she and the children regularly attended a church in Turlock. (XV RT 3061-3062.) At some point, after moving to Turlock, Bell-Udeze married Aloysius Udeze. (XV RT 3062-3063.) Appellant did not care much for Aloysius, and resented him. (XV RT 3063.) According to Bell-Udeze, appellant did not want to see her with anyone else. (XV RT 3063.) Appellant talked much about his father, and about Bell-Udeze getting back together with appellant's father. (XV RT 3063-3064.)

Appellant continued to have problems at school. (XV RT 3064.) Appellant was placed in special education classes for reading and math. (XV RT 3064-3065.) He did not like being placed in the special education classes. (XV RT 3064-3065.)

When appellant was about 16 years old, he moved out of the house. (XV RT 3066.) According to Bell-Udeze, appellant felt he could not follow the rules. (XV RT 3066.) After moving out, appellant appeared "distant" and "a little more frustrated." (XV RT 3069.) Bell-Udeze noted that on one occasion, appellant took her car and hit another car. (XV RT 3066.) He came home drunk and threw up everywhere. (XV RT 3066.) He moved in with his then girlfriend, Leatha O'Halloran, and her stepfather. (XV RT 3067.) Bell-Udeze later learned that appellant got O'Halloran pregnant. (XV RT 3067.) Bell-Udeze told appellant that he needed to "try to work things out with her," "try to find a job," and "try to go to school part time if he could." (XV RT 3067.)

4. Testimony Of Neuropsychologist Nell Riley And Psychologist Gretchen White

The defense presented the testimony of neuropsychologist Nell Riley and psychologist Gretchen White.

Riley reviewed appellant's records, interviewed people who knew appellant as a child, and performed a neuropsychological evaluation of appellant. (XVI RT 3137-3139.) Riley administered a battery of tests. (XVI RT 3139-3140, 3143.) On a standard IQ test, appellant scored a 77. (XVI RT 3141.) Though not considered mentally retarded, the score of 77 is very low, in the sixth percentile. (XVI RT 3141, 3144.) Riley found appellant to have subnormal overall intellectual ability. (XVI RT 3141.) Appellant had "a very serious reading disability," "severe attention deficit disorder," and "a group of other problems [] generally referred to as

impairments in executive function." (XVI RT 3144.) Riley stated that executive functions[11] included reasoning, the individual's ability to control themselves (their mental functions, emotions and behavior), ability to perform multiple mental actions ("to switch back and forth between one thing and another"), and cognitive flexibility. (XVI RT 3144-3145, 3161-3163.) Riley found appellant to have very poor working memory, that is, the ability to hold information in one's mind for a few seconds. (XVI RT 3160.) Riley found that appellant's rate of processing information tended to be slow, especially where he had to do analysis. (XVI RT 3161.)

Riley's findings from the test results were consistent with appellant's school records and history. (XVI RT 3145.) Specifically, Riley noted the Air Force pediatrician's diagnosis of hyperkinetic syndrome of childhood, the old term for Attention Deficit Hyperactivity Disorder ("ADHD"), the Merced County Mental Health Department's ADHD diagnosis, and appellant's recorded behavioral and academic problems in school. (XVI RT 3145-3146, 3158-3160.)

Riley opined appellant's "extreme prematurity" was an important factor in causing such mental defects. (XVI RT 3146.) Riley noted that appellant, weighing only three pounds and four ounces at birth, was in a "very high risk group for having [] developmental disabilities." (XVI RT 3146-3147.) At the time of appellant's birth, premature low birth weight babies were put in incubators placed in the hospital's intensive care unit, an environment with bright lights and noise. (XVI RT 3147, 3150-3152.) These premature low birth weight babies had tubes going in their noses and

[11] Riley also referred to executive functions as frontal lobe functions. (XVI RT 3162-3163.)

throats. (XVI RT 3147-3148, 3152.) They suffered high levels of stress. (XVI RT 3152, 3157.) These babies were separated from their mothers, and lacked touch stimulation and human interaction which would reduce the stress. (XVI RT 3150-3151.) Under stress, the babies' blood pressure rises and often causes micro hemorrhages, or micro strokes, which impair the development of the babies' brains. (XVI RT 3152-3153, 3158.) Riley noted that research literature indicates that these very low birth weight babies tend to experience more trouble regulating their behavior, adapting to change, adapting to stress, and getting along with peers. (XVI RT 3148-3150.) These babies also tend to have difficulties in acquiring language; and as they get older, they have difficulties in more complex language skills like reading and spelling. (XVI RT 3148.) Riley added that appellant "was a very sickly baby." (XVI RT 3164.) Riley observed that appellant's medical records documented feeding difficulties and nutritional deficits, and a diagnosis of profound anemia and congestive heart failure which required hospitalization for 11 days when appellant was eight months old. (XVI RT 3164.) Riley opined that these health problems, occurring at a time when appellant's brain was still developing, contributed to his "sub-optimal development." (XVI RT 3164-3165.)

Riley explained that young children with severe attention deficit disorder are often very difficult to care for, especially for a very young mother with limited emotional resources such as Bell-Udeze. (XVI RT 3165-3166.) Riley provided a grim outlook for children with severe attention deficit disorder, noting that such children are often disruptive and difficult in school. (XVI RT 3166.) They have reading difficulties, which severely hamper their academic development and their occupational and economic opportunities for the rest of their lives. (XVI RT 3166-3167.)

Riley disagreed with the "sit down and do the work" approach used by appellant's mother. (XVI RT 3167.) Riley said such an approach would not benefit children with severe attention deficit disorder, because such children lack the "neuro capacity" to "just sit down and do it, [to] just pay attention." (XVI RT 3167.) Riley emphasized: "It's not that they're bad kids, it's just that they're not able to do it. It's an impossible task for them, a very, very challenging task." (XVI RT 3168.) Riley said that for some children, medication that alters the brain's biochemistry, like Ritalin, would allow the children to "stick with an activity," to "control their motor restlessness more effectively. (XVI RT 3168.) But, Riley stressed, appellant did not have the benefit of such medications. (XVI RT 3168.) "[F]or [appellant][,] those were impossible tasks that probably really added to his general frustration." (XVI RT 3168.)

Riley used appellant's violent outburst after his mother's testimony to highlight her findings and opinions. (XVI RT 3168.) Riley recognized Bell-Udeze's testimony and her subsequent loud wailing was an extremely emotional event for appellant, and Riley acknowledged that anyone seeing his mother in that kind or amount of distress would be flooded with emotion. (XVI RT 3168-3169.) But, Riley opined, "most people would have been able to control themselves or contain those emotions, especially in this setting." (XVI RT 3169.) She explained, at a very time jurors were deciding whether or not to give him the death penalty, appellant acted out in an uncontrollable physical way, he behaved in a self-destructive manner, and he just could not control himself. (XVI RT 3169.) Riley reiterated for the jury that the outburst in the courtroom was "consistent with the kind of deficits [appellant] has," and the "difficulty he has acting in his own best

interest in holding in his emotions and controlling himself." (XVI RT 3169.) Riley reemphasized, "[T]hings just burst through in ways that are very harmful to himself and are, to a large extent, out of his control." (XVI RT 3169.)

Gretchen White testified that she was asked "to look at the factors that shaped [appellant's] development from the point of view of a psychologist." (XVI RT 3300.) White constructed a psychosocial history of appellant. (XVI RT 3301.) She obtained and reviewed various records relating to appellant, including the robbery/murder at Quik Stop. (XVI RT 3301-3303.) She spoke with appellant on several occasions. (XVI RT 3302.) She or her investigators interviewed family members and others who knew appellant. (XVI RT 3301-3303.) White arrived at the following opinion:

> [A]t every developmental level – [] from birth through infancy, early childhood, school-age years, pre-adolescence and into adolescence [–] that [appellant] experienced a variety of risk factors that affected his adjustment. [¶] Some of those risk factors were an innate part of his own makeup, such as hyperactivity or a learning disability. And some of them were external, due to things like family conflict or financial stress. . . . [¶] [F]ailures at each stage, each of these developmental stages, led to ongoing deficits that then interfered with the ability to master the next developmental level.

(XVI RT 3303-3304.) White emphasized that risk factors "are both cumulative and multiplicative," which, she explained, means that "as one begins to accumulate risk factors, they don't just add up; they multiply." (XVI RT 3304.)

White began with appellant's premature birth and very low birth weight. (XVI RT 3308.) White noted that appellant had weighed 1480 grams, and research showed that infants that weigh less than 1,500 grams tended to be much more prone to having negative temperament

characteristics, attention deficit disorder and lower levels of social competence than either full-term infants or infants who are premature but have higher birth weights. (XVI RT 3308-3309.) White added that in his first two years, appellant had numerous physical problems, including feeding and digestive problems. (XVI RT 3309.) Appellant became profoundly anemic when he was seven months old, and was hospitalized for 11 days. (XVI RT 3309-3310.) In the hospital, he had congestive heart failure and required a transfusion. (XVI RT 3309-3310.)

White found external familial risk factors, or stressors, during the period from appellant's birth to about four years of age. Appellant's mother was exceptionally young when she gave birth to him, 16 years of age. (XVI RT 3308, 3318.) During the pregnancy, there was a lot of conflict between appellant's mother and father. (XVI RT 3318.) Appellant's father saw appellant only occasionally during his first two years and did not live with appellant until he and appellant's mother married, when appellant was about two years old. (XVI RT 3319.) When appellant was three years old, the family moved overseas. (XVI RT 3319.) Appellant's mother was still very young, had never been away from home, and felt isolated. (XVI RT 3319.) She and appellant's father began to develop marital problems because appellant's father began to see other women and stay out late at night. (XVI RT 3319.)

White highlighted appellant's hyperactivity and attention deficit disorder. (XVI RT 3308.) White noted a genetic disposition or family history of hyperactivity; several cousins of appellant's father, as well as one of appellant's children, were considered hyperactive. (XVI RT 3315.) Medical records indicate that symptoms of hyperactivity were observed when appellant was five years old and living overseas. (XVI RT 3311-3312.) Appellant was placed on Ritalin. (XVI RT 3314-3315.) When he

was reevaluated about a month later, there were indications that the medication appeared to have been working, but there was also documentation noting appellant's mother was concerned about the change in his personality. (XVI RT 3314.) When appellant was deemed to be much improved, appellant's mother took him off the medication. (XVI RT 3315.)

White described three stressor consequences for children with ADHD. First, such children wear their parents out. (XVI RT 3315-3316.) Such children are often disruptive and destructive, bringing the parents into conflict with other parents and caretakers at school. (XVI RT 3316.) The parents consequently may reject, avoid, or over-punish such children. (XVI RT 3316-3317.) But more often, the parents are inconsistent emotionally. (XVI RT 3316.) Second, such children cannot regulate their own behavior. (XVI RT 3316.) They cannot follow rules and directions, they have difficulty pursuing long term goals, mastering tasks that require repeated learning, and delaying gratification. (XVI RT 3316.) They often overreact. (XVI RT 3316.) They are very stress intolerant. (XVI RT 3316-3317.) Third, these children are often not liked by their peers because they cannot engage in cooperative, sustained back and forth play. (XVI RT 3317.) Basically, White summarized, hyperactive and attention deficit children have trouble getting things done and having trouble getting along. (XVI RT 3318.) White noted that hyperactivity and attention deficit is a significant risk factor on future school adjustment. (XVI RT 3317-3318.)

White observed that appellant experienced difficulty and failure as soon as he entered the school system. (XVI RT 3320.) In addition to the hyperactivity and attention deficit, appellant had a learning disability and low intelligence. (XVI RT 3320.) Appellant was placed in intellectually handicapped classes in elementary school, and continued to be in learning

disabled or special education classes through the tenth grade. (XVI RT 3320.) White noted that numerous studies correlate low academic achievement and behavior problems in school. (XVI RT 3320-3321.) White commented: "[B]y the time [appellant's] in school and going through elementary school, we can begin to see an accumulation of these deficits or one building on the other as he going through [] the school career." (XVI RT 3321.)

White emphasized three significant external stressors during appellant's school age period. First, appellant's sister and brother were born when appellant was eight and nine years of age. (XVI RT 3321-3322.) Second, when appellant was nine years old, he underwent two surgeries on his genitalia: one for an undescended testicle, and the other to correct a botched circumcision. (XVI RT 3321.) White said that appellant did not appear normal even after the surgeries. (XVI RT 3321-3322.) And to explain the deformity, as an adult, appellant told people that he had been injured in a motorcycle accident. (XVI RT 3322.) Third, still when he was nine years old, his parents decided to separate. (XVI RT 3322.) White stressed that "basically within the space of this one year [appellant's] whole world changed:" "[h]e had newborn brother and a sister still in diapers;" "[h]is father was gone;" and "his mother went on welfare and started going to college." (XVI RT 3322.)

White noted that when appellant was nine years old, due to temper outbursts and day dreaming, the school referred him for counseling. (XVI RT 3322-3323.) He was diagnosed with attention deficit hyperactivity disorder. (XVI RT 3323.) He underwent individual and group therapy. (XVI RT 3323.) The records show that his parents occasionally participated in his counseling sessions. (XVI RT 3323.) The

counselor described appellant's father as "very guarded," "hostile," "defensive," and "ultimately refusing to continue in the therapy." (XVI RT 3323.) The counselor felt that a lot of appellant's behaviors were related to the lack of attention he was receiving from his father, and also from the upcoming separation between the parents. (XVI RT 3323.) The counselor noted that appellant appeared to suppress feelings of anger and frustration, that appellant wanted a close relationship with his father but his father seemed to be rejecting him, demanding that appellant be perfect. (XVI RT 3323.)

White noted that after appellant's parents separated, his father moved to Sacramento for about a year, and then returned to Merced for a short period of time during which appellant occasionally saw him around town. (XVI RT 3323-3324.) When appellant was about 12 or 13 years old, his father left Merced. (XVI RT 3324.) Appellant did not know where his father went, and did not see him again. (XVI RT 3324.) White's investigators found appellant's father incarcerated in Oklahoma for a series of bank robberies. (XVI RT 3324.)

White opined that appellant felt rejected by his father. (XVI RT 3324.) White noted research discussing the restructuring of roles and relationships in the family that occur after the divorce of parents. (XVI RT 3324-3325.) White noted the most commonly reported problems with boys adjusting to divorce are aggressive noncompliance acting out behavior, disruptions in relationships with their peers, and problems in academic achievement and school adjustment. (XVI RT 3325.)

White noted that appellant, upon entering the ninth grade, was functioning at the fourth grade level in reading, at the fifth grade level in math, and at the third grade level in expressive language skills. (XVI RT 3325.) Two external stressors during appellant's adolescence and high

school years included appellant's mother marrying Al Udeze, and , the family moving to Turlock when appellant was in the tenth grade. (XVI RT 3326-3327.) White noted that at that time, Udeze was studying to get a chiropractic degree, while appellant's mother was still going to school and working part-time. (XVI RT 3326.) White described Udeze as "a very authoritarian rigid individual." (XVI RT 3326.) The children were "somewhat afraid of him." (XVI RT 3326.) White said Udeze was "fairly intolerant of childishness." (XVI RT 3326.) As an example, White noted that Udeze required that the house be very, very quiet when he was studying. (XVI RT 3326.) During the summers, Udeze would take the two younger children to the library, where he would have them write long reports from encyclopedia, and memorize places on the map. (XVI RT 3326.) Appellant had a "great deal of conflict" with Udeze. (XVI RT 3326.) According to White, appellant had seen himself as the oldest male figure in the household for about five years since his father left. (XVI RT 3326.) Appellant continued to cling to the memory of his father, and hoped that his father would come back and his parents would get back together. (XVI RT 3326.)

In the tenth grade, the family moved to Turlock. (XVI RT 3327.) He entered a new high school, and was placed in special education classes, which he felt made him look retarded. (XVI RT 3327.) White observed that most children have difficulty changing school in high school, but for someone with appellant's deficits, the change was more difficult to cope with. (XVI RT 3327-3328.)

White opined that the accumulation of risk factors, stressors, led to a lifestyle more and more risky. (XVI RT 3328.)

5. Impact Statements From Appellant's Family Members

Bell-Udeze said she loved her son. (XV RT 3069.) She said appellant was "warm," and "show[ed] [her] respect." (XV RT 3070.) She felt overwhelmed and stressed by her son's murder conviction and the possible imposition of the death penalty. (XV RT 3070.) Bell-Udeze apologized to and sympathized with Francis's family. (XV RT 3070.)

Appellant's brother, Scheron Bell, testified that he was a student athlete at Merced Junior College. (XVI RT 3208-3209.) Scheron planned to transfer to a four-year university after completing his studies at the junior college. (XVI RT 3209.) Scheron hoped to obtain a master's degree in child development, and work with children. (XVI RT 3210.) Scheron said he loved his brother very much. (XVI RT 3213.) Scheron said appellant "had problems . . . from the get-go." (XVI RT 3212.) Scheron recalled appellant always telling him, "don't be like [appellant] . . . stay in school . . . stick with the books." (XVI RT 3212-3213.)

Leatha O'Halloran testified that appellant was drunk when he sexually assaulted and battered her in May of 1991. (XVI RT 3218-3219.) She allowed appellant to see their three children: Vanessa, Marcus, and Stephanie. (XVI RT 3219.) Since appellant's arrest for the robbery murder, O'Halloran told the children that their father was "out of town." (XVI RT 3219.) She understood that the children would eventually learn that their father was not out of town. (XVI RT 3219.) When asked how the children would be affected if appellant was to be executed, O'Halloran said they would be devastated. (XVI RT 3219-3220.)

E. People's Rebuttal

Sheriff's Deputy Candy Cook testified that around 10:15 p.m. on April 12, 1999, she heard what sounded like metal hitting the floor, and she

alerted the control deputy. (XVII RT 3496-3500.) Deputy Cook and other deputies searched the jail cells in the area where she had heard the metal sound. (XVII RT 3496-3500.) Sheriff's Deputy Ray Framstad performed the search of appellant's cell. (XVII RT 3503-3504.) Deputy Framstad advised appellant that he needed to handcuff and move him to the showers so he could search the cell. (XVII RT 3504.) Deputy Framstad handcuffed appellant without a problem. (XVII RT 3504.) Before Deputy Framstad was able to remove appellant from the cell, appellant reached back under his mattress and pulled out a shank and handed it to Framstad. (XVII RT 3504-3506.)

Sheriff's Deputies Beverly Bentley and Jim Ridenour testified that, after appellant's mother testified and just after the jurors had been led out of the courtroom, appellant pounded his fists on the table several times. (XVII RT 3450-3453, 3469-3470.) It appeared that appellant was going to tip over the table. (XVII RT 3453-3454.) Four deputies attempted to restrain appellant, but were unable to do so. (XVII RT 3453-3455, 3470-3471.) Appellant stood, and continued to move, kick, and swing his arms. (XVII RT 3471.) He threw Deputy Bentley over the railing into the gallery. (XVII RT 3455-3457.) Deputy Bentley called for assistance. (XVII RT 3461.) Appellant tried to grab her microphone. (XVII RT 3462.) He grabbed and pulled on Deputy Bentley's hair, and put her into a headlock. (XVII RT 3462-3463, 3472.) Appellant also had another deputy in a headlock, in his other arm. (XVII RT 3472.) Deputy Ridenour struck appellant in the thigh area of both legs with an "asp," but no effect. (XVII RT 3458, 3460, 3471-3473.) Sheriff's deputies were eventually able to restrain appellant, handcuff him and shackle his legs with leg irons. (XVII RT 3464-3465, 3473-3474.) Appellant continued to struggle. (XVII RT 3465.) According to Deputy Ridenour, seven to nine deputies were needed to subdue appellant. (XVII RT 3473.)

ARGUMENTS

I. APPELLANT FORFEITED HIS CLAIM THAT THE JURY WAS NOT IMPARTIAL OR THAT VOIR DIRE WAS IMPERMISSIBLY RESTRICTED; APPELLANT FAILS TO SHOW THAT HE WAS DENIED A FAIR AND IMPARTIAL JURY

Appellant argues that the court violated his right to an impartial jury. (AOB 76-114.) Specifically, appellant suggests that the jury was unduly prone to impose the death penalty, or that there is sufficient doubt as to whether an empaneled juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 425 (*Witt*).) Appellant's claim is forfeited. In any event, it is without merit.

Appellant's claims, that the court misapplied the *Witt* standard and used threats to curtail voir dire, are forfeited. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1239-1240 [claim of error based on denial of challenge for cause forfeited]; *People v. Taylor* (2010) 48 Cal.4th 574, 608 [failure to object or suggest follow-up questions forfeited claim]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1149.) Further, appellant did not object below to the adequacy of the voir dire of the prospective jurors. (*People v. Foster* (2010) 50 Cal.4th 1301, 1324; *People v. Taylor, supra,* 48 Cal.4th at p. 608.) Appellant acknowledges that he did not exhaust his peremptory challenges, and he did not express dissatisfaction with the jury as constituted, thus, under such circumstances, appellate review would "[o]rdinarily" be unavailable. (AOB 111; see *People v. Mills* (2010) 48 Cal.4th 158, 186-187.) Appellant fails to present any compelling reason why he should be excused for his failure to properly preserve his claims

despite his failure both to exhaust his peremptory challenges and to object to the jury as finally constituted. (*People v. Virgil, supra*, 51 Cal.4th at pp. 1239-1240; *People v. Mills, supra*, 48 Cal.4th at pp. 186-187; *People v. Foster, supra*, 50 Cal.4th at p. 1324.)

Appellant does not allege any of the empaneled jurors were unduly prone to impose the death penalty. Appellant did not challenge any of the empaneled jurors for cause. (See IV RT 651-657 [Juror 6]; V RT 820-830 [juror 12]; V RT 931-941 [Juror 5]; V RT 981-994 [Juror 10]; V RT 1012-1021 [Juror 1]; VI RT 1251-1257 [Juror 4]; VII RT 1401-1406 [Juror 3]; VII RT 1448-1551 [Juror 2]; VIII RT 1518-1524 [Juror 8]; VIII RT 1550-1556 [Juror 7]; VIII RT 1622-1626 [Juror 9]; VIII RT 1677-1680 [Juror 11].) Appellant does not argue that the court erred in granting any of the prosecution's challenges for cause based on the prospective juror's views for or against the death penalty. (See *People v. Clark* (2011) 52 Cal.4th 856, 895 ["The erroneous excusal of even a single prospective juror under the principles of *Witt* and its progeny requires reversal of the penalty judgment."], citing *Gray v. Mississippi* (1987) 481 U.S. 648, 663-666, and *People v. Stewart* (2004) 33 Cal.4th 425, 454-455.)

Appellant says the trial court erred in denying his challenges for cause to alternate juror number three, Ernest Armendariz, Tam Diep, Glenn Appiano, George Galvez, Brenda Ranes, Charles Ewing, and Charles King.[12] (AOB 80-102.) None of these eight prospective jurors sat on the jury that decided his guilt or penalty, and thus could not have compromised

[12] Appellant's challenge for cause of Brenda Ranes was not related to her views on the death penalty. The stated basis of the challenge was that "her brother-in-law [was] working for the prosecution." (VI RT 1228.)

the impartiality of the jury. (VIII RT 1714-1726; *People v. Horton* (1995) 11 Cal.4th 1068, 1093; see *Ross v. Oklahoma* (1988) 487 U.S. 81, 86.)

Because appellant failed to object below, failed to exhaust his peremptory challenges, and failed to express dissatisfaction with the jury as finally constituted, his claims here are forfeited.

Even if review is available here for appellant's claims of misapplication of standard and curtailment of voir dire, appellant has not shown prejudice.

The standard for determining when a prospective juror may be excluded for cause due to his/her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Stewart, supra,* 33 Cal.4th at pp. 440-441.) The federal Constitution "'does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.'" (*People v. Avila* (2006) 38 Cal.4th 491, 536, quoting *Morgan v. Illinois* (1992) 504 U.S. 719, 729.) Rather,

> [v]oir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is so because the determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.

(*Ristaino v. Ross* (1976) 424 U.S. 589, 594-595.)

"Individual sequestered voir dire is not constitutionally required, even in a capital case." (*People v. Harris* (2013) 57 Cal.4th 804, 832.) Rather,

> [t]he right to voir dire, like the right to peremptorily challenge, is not a constitutional right but a means to achieve the end of an impartial jury. . . . [I]t is the duty of the trial judge to restrict the examination of the prospective jurors within reasonable bounds so as to expedite the trial.

(*People v. Wright* (1990) 52 Cal.3d 367, 419, overruled on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 458-459.)

The record does not support appellant's contention that the trial court misapplied the law in evaluating the qualifications of the prospective jurors. The prospective jurors filled out an extensive 39-page questionnaire. Appellant was afforded the opportunity to voir dire the prospective jurors. Where a prospective juror provided an ambiguous response, the court and appellant's trial counsel were able to ask questions. (See, e.g., IV RT 602-612; VI RT 1216-1224.) As to the prospective jurors identified by appellant, the trial court was satisfied that each of the prospective jurors indicated that they would not automatically impose the death penalty, that they were able and willing to put aside their personal feelings, keep an open mind, follow the court's instructions and consider and weigh the mitigating and aggravating circumstances in deciding the appropriate penalty. (See IV RT 577-591 [Armendariz]; IV RT 596-613 [Alt. juror 3]; IV RT 662-675 [Diep]; V RT 888-908 [Appiano]; VI RT 1042-1058 [Galvez]; VI RT 1214-1230 [Ranes]; VI RT 1203-1213 and VIII RT 1704-1709 [King]; VII RT 1424-1442 [Ewing].) Further, the judge expressly stated that he believed them or impliedly found them to be credible.

Appellant has failed to show that the voir dire of these jurors was inadequate, or that, despite his failure to exhaust his peremptory challenges,

his jury was not fairly composed. (*People v. Yeoman* (2003) 31 Cal.4th 93, 114 [properly preserved claim rejected because no prejudice]; see *Ross v. Oklahoma, supra,* 487 U.S. at pp. 86-91 [loss of a peremptory challenge provides grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him].)

Appellant's contention that the trial court restricted voir dire is also forfeited. A claim that the trial court improperly restricted death qualification voir dire of some prospective jurors is not reviewable when none of those prospective jurors ultimately sat on the jury. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1157.) None of the seven prospective jurors identified by appellant, Appiano, Armendariz, Diep, Ewing, Galvez, King, Ranes, or alternate juror 3, actually sat on the jury that decided appellant's guilt and penalty. Further, appellant did not challenge for cause any of the jurors ultimately seated. (See IV RT 651-657 [Juror 6]; V RT 820-830 [juror 12]; V RT 931-941 [Juror 5]; V RT 981-994 [Juror 10]; V RT 1012-1021 [Juror 1]; VI RT 1251-1257 [Juror 4]; VII RT 1401-1406 [Juror 3]; VII RT 1448-1551 [Juror 2]; VIII RT 1518-1524 [Juror 8]; VIII RT 1550-1556 [Juror 7]; VIII RT 1622-1626 [Juror 9]; VIII RT 1677-1680 [Juror 11].)

Even if not forfeited, the record does not support his claim.

Trial courts have considerable discretion to contain voir dire. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Butler* (2009) 46 Cal.4th 847, 859.)

> The *Witherspoon-Witt* . . . voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract. . . . The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination.

(*People v. Clark* (1990) 50 Cal.3d 583, 597.)

The voir dire transcripts show the jurors said they would not automatically impose the death penalty, and they were able and willing to put aside their personal feelings, keep and open mind, follow the court's instructions and consider and weigh the mitigating and aggravating circumstances in deciding the appropriate penalty. (See, e.g., V RT 1012-1021 [Juror 1]; VII RT 1401-1406 [Juror 3]; VII RT 1448-1551 [Juror 2]; VIII RT 1518-1524 [Juror 8].)

Despite his failure to challenge either juror for cause, appellant suggests that his ability to voir dire both Jurors 1 and 3 was restricted. (See AOB 108.) To support this contention, however, appellant misconstrues the remarks of both jurors. Juror 1 never said that anyone who has been in prison before and kills someone should get the death penalty. Rather, in response to the statement "anyone who has been in prison in the past and kills someone should get the death penalty," Juror 1 wrote, "I would have to hear the case."[13] (XVI JCT 4648.) Similarly, Juror 3 did not say the death penalty should be imposed on defendants found guilty of murder with special circumstances. Juror 3 said, "[i]f found guilty," presumably of murder, "with no special circumstances," "the punishment should match the crime." (VII RT 1401-1406.) Thus, while Juror 3 expressed support for the death penalty, Juror 3 noted the possibility that the death penalty may not be warranted. In any event, as to either Juror 1 or 3, at no time did

[13] The court clerk confused prospective juror Carol Vierra with Juror 1. Carol Vierra's name was blackened on the questionnaire, and replaced with "Juror #1". (V JCT 1436.) Carol Vierra was excused for cause. (VII RT 1290-1294.) The questionnaire for Juror 1 can be found in volume XVI of the Clerk's Transcripts On Appeal containing the prospective jurors' hardship requests and questionnaires, pages 4631 to 4669.

appellant identify or suggest below any additional question or examination that he wanted but not allowed to conduct.

Assuming arguendo that the trial court erroneously restricted appellant's voir dire, in order to demonstrate prejudice, appellant must explain what additional inquiry was necessary for an intelligent exercise of peremptory challenges in light of the responses to questions the court did permit. (*People v. Ramos, supra,* 15 Cal.4th at p. 1158.) Appellant does not identify any question he sought to ask of the prospective jurors that was refused by the court. (See *People v. Vieira* (2005) 35 Cal.4th 264, 286-287; *Morgan v. Illinois, supra,* 504 U.S. at p. 723.) Further, appellant did not object below to the adequacy of the voir dire of the prospective jurors. (See *People v. Foster, supra,* 50 Cal.4th at p. 1324; *People v. Taylor, supra,* 48 Cal.4th at p. 608.) Thus, this claim must fail.

Appellant relies on the examination of prospective jurors and his assertion that the trial court threatened to terminate individual sequestered voir dire to support his claim that his ability to voir dire was impermissibly restricted. The argument remains without merit. Even if the court's comment to terminate individual voir dire was a threat, the court had the power to control voir dire and so could have done what it was "threatening" to do. (See *People v. Harris, supra,* 57 Cal.4th at p. 832; *People v. Wright, supra,* 52 Cal.3d at p. 419.)

In any event, the trial court's remark to counsel that it would terminate individual sequestered voir dire "if [counsel was] going to do that on every witness," should not be read as an effort to curtail counsel's ability to voir dire, that is, as a restriction of his ability to seek clarification of ambiguous responses, and to reliably expose disqualifying biases. Read in context, the trial court was simply expressing frustration and displeasure at defense counsel for "putting words in [the prospective juror's] mouth." (IV RT 591-592.)

For example, prospective juror Armendariz expressed a general, abstract support for the death penalty. (IV RT 583-585.) But in response to the court's inquiry, Armendariz said he could put aside his personal feelings, keep an open mind, follow the court's instructions, and listen to both sides before making the penalty determination. (IV RT 579-582, 585-587, 589.) But then appellant's trial counsel repeatedly asked follow-up questions that interpreted and portrayed Armendariz's general, abstract support for the death penalty to be an unyielding and perhaps fanatical support:

> Q. Mr. Armendariz, I noticed in question 52 that you indicated your opinions about the death penalty. You said that if you do the crime, you pay for the crime.
>
> A. Yes, sir.
>
> Q. Now, does that mean that in your opinion is the only way to pay for a murder, with your life?
>
> A. That is my opinion.
>
> Q. Okay. You've thought about this in the past?
>
> A. Yes, sir.
>
> Q. And it's not something you just . . . It's not something that you just first thought of when you came to the courtroom or first filled out this questionnaire, right?
>
> A. No, sir.
>
> Q. So your opinion is that first degree murder gets the death penalty?
>
> A. Yes, sir.
>
> Q. [Y]ou indicated that you feel that you believe in the old adage an eye for an eye; is that right?
>
> A. Yes, sir.

Q. If somebody takes a life, they should give their life?

A. That is correct.

Q. No questions?

A. No, sir.

Q. No doubt in your mind?

A. No, sir.

[¶] . . . [¶]

Q. There is a question with which you – the question is, "Please state whether you believe any of the following statements and explain why or why not." And the particular statement was, "Anyone who plans and commits a murder should get the death penalty." And you indicated that they should.

A. Yes, sir.

Q. Without question?

A. Yes, sir.

[¶] . . . [¶]

Q. Sir, you have an uncle who works for the Department of Corrections, []. Have you had any discussions with him about death penalty or that kind of thing that would influence your decision?

A. No, sir.

Q. Okay. So as I understand it, then, the opinions you have, you've had for a long time; is that right?

A. Yes, sir.

Q. They're strong opinions?

A. I believe so.

Q. And they're not subject to change; is that right?

A. Not in this type of case, I don't think so.

Q. Not in a death penalty case?

A. No, sir.

(IV RT 583-584, 586.)

After questioning prospective juror Ernest Armendariz, appellant challenged Armendariz for cause. (IV RT 588.) The court rejected appellant's characterization, noting that counsel counsel was "putting words in [the prospective juror's] mouth to get him to change his mind." (IV RT 592.) The court said that it would terminate individual sequestered voir dire "if [counsel was] going to do that on every witness." (IV RT 591.)

A trial court "possesse[s] discretion to conduct oral voir dire as necessary and to allow attorney participation and questioning as appropriate." (*People v. Robinson* (2006) 37 Cal.4th 592, 614.) Thus, the manner in which the trial court conducts voir dire does not provide a basis for reversal unless it renders appellant's trial fundamentally unfair. (*People v. Carter* (2005) 36 Cal.4th 1215, 1250.) Assuming that appellant's claim is not forfeited, it is without merit or he fails to establish any prejudice. Accordingly, it must be rejected.

II. DENIAL OF SECTION 987.9 FUNDS FOR A JURY SELECTION EXPERT DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS OR EQUAL PROTECTION

Appellant argues that the court's denial of his request for section 987.9 funds to hire a jury selection expert violated his rights to due process and equal protection. (AOB 115-151.) Not so.

A. Background

Defense counsel filed numerous requests under section 987.9 for funds for services for appellant's defense. (See Supplemental Declaration/Request For Funds and Order 987.9 Transcript (hereinafter "987.9 ST"), Vols. I & II.) Specifically, counsel sought funds for a jury selection expert.

Appellant's first request for funds to fire a jury selection expert was dated May 5, 1998. (I 987.9 ST 121.) In the request, counsel declared, in part:

> I believe that in order to effectively represent the defendant in this case I will need the services of a jury consultant. The State in this case has a significant advantage over the defendant with respect to resources and manpower available to it at its discretion. The District Attorney's Office has access to all criminal history information concerning prospective jurors, has access to other sources of information unavailable to the accused, has the ability and funds to deploy more manpower in investigation and preparation than the accused, and has absolute discretion to hire any expert it wishes, in addition to those automatically available to it, without any court supervision over selection and payment whatsoever. . . . Additionally, in this county, in the case of *People v. Moore*, a capital case tried in 1998, a jury selection consultant was funded by Stanislaus County through the office of the Public Defender. The *Moore* case is very similar to this case, involving a Black defendant accused of shooting an Assyrian convenience store clerk. [¶] I have discussed the *Moore* case with Greg Spiering, the attorney for the defendant. He informed me that he used Eda Gordon as a jury selection consultant and that she was extremely helpful and instrumental in the LWOP verdict. A copy of Ms. Gordon's resume is attached hereto . . .. I have discussed this case with Ms. Gordon and she has agreed to work with me.

(See I 987.9 ST 119-120.)

The court denied the request for funding, providing the following reason: "Defense counsel is quite competent to select his own jury, especially in this day and age of voir dire being conducted judicially." (I 987.9 ST 124.)

Counsel then filed a "Supplemental Declaration In Support Of Request For Jury Consultant," dated May 18, 1998. In the supplemental declaration, counsel wrote, in part:

> As of the date of this declaration, it is unknown by anyone what methods of jury selection will be used by the trial judge in this case. It is very possible that trial counsel will be involved in direct and/or follow-up questions of prospective jurors regarding attitudes toward the death penalty, publicity, and race. I am informed by the Deputy District Attorney who will try this case that she will join a defense request for sequestered voir dire conducted and/or assisted by trial counsel. It has been my experience in other cases before the trial judge that he has permitted trial counsel to be involved in voir dire.
>
> I believe that each juror will be given a lengthy questionnaire to complete and that each of these questionnaires will have to be evaluated and graded by trial counsel prior to any voir dire and challenges taking place. I am informed and believe that the District Attorney has significant resources to assist trial counsel in this task, paid for by the County of Stanislaus. I have no such resources and will have none unless the Court allows the services of the requested expert.
>
> Whether or not the trial court conducts all, some, or none of the voir dire is not relevant to the need for assistance. In fact, if the trial court conducts all of the voir dire, as suggested by this court, the need for assistance is even greater, because the increased speed of the process and the smaller amount of information which is available for counsel to make his decisions.

> Counsel in this case is paid $100.00 per hour. If counsel is required to review and grade all of the completed questionnaires, this will cost the County $7500.00 assuming 150 questionnaires at 30 minutes each. Using the proposed expert for the same task will cost $4500.00, based on a rate of $60.00 per hour. The real savings, however, will be in court time, since it is unrealistic to expect trial counsel, *unassisted by second counsel,* to be able to review all of the questionnaires in a timely fashion and perform all other duties required in a capital case. An alternative would be to request second counsel for this and other functions.

(Supplemental Declaration in Support of Request for Jury Consultant, dated May 18, 1998, pp. 2-4 [italics in original].) Counsel opined that "[p]icking the right jury . . . is the single most important and complex task in capital defense litigation," and argued that denial of funds for a jury consultant would deny appellant due process, a fair trial before an impartial jury, effective assistance of counsel, and equal protection of the law. (*Id.* at pp. 3-4.) As to his equal protection assertion, counsel explained:

> I am aware of four capital cases in which this county has provided funding for a jury consultant. In three of these, *People v. Brooks* (Case No. 235572), *People v. Hoskins* (Case No. 250173), and *People v. Stephens* (Case no. 259693), funding for a jury consultant was approved by this court. All three of those cases were tried by the same defense attorney and two of the three resulted in a verdict of LWOP. In another case earlier this year in this county, Rhett Moore was tried in a capital case and a verdict of LWOP was returned (Case No. 30966). Mr. Moore was represented by the Stanislaus County Public Defender. The county paid for the services of Eda Gordon, the jury consultant who is requested by this declaration. Mr. Moore's case and the defendant's case are remarkably similar: Both defendants are young black men with CYA or state prison records, both victims were Assyrian male convenience store clerks in Quik Stop Markets, both killings were by gunshot in the course of a robbery, and both killings were captured on videotape. It is

> anticipated that similar mitigation evidence will be presented on behalf of the defendant as was presented by Mr. Moore. Thus, the defendant and Mr. Moore are "persons under like circumstances." For the county to deny the defendant the identical ancillary services provided to Mr. Moore is a denial of equal protection and due process of law.

(*Id.* at p. 4.)

At the hearing, held on May 27, 1998, counsel called deputy public defender Greg Spiering as a witness. Spiering testified that, in his capital case of *People v. Rhett Lamar Moore*, his office retained the services of the jury consultant Eda Gordon, who assisted him in securing a life without the possibility of parole sentence.[14] (I 987.9 ST 142-152.)

In a written decision, dated May 27, 1998, the court again denied the funding request for a jury consultant:

> Defendant's request for funds for a jury consultant expert is DENIED. As pointed out by Defense Counsel, it is within the sound discretion of the court to grant such funds (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 313). Based upon the declarations and testimony presented in support of this request, there appears to be nothing so unusual or complex about this case (convenience store robbery/firearm murder of Assyrian clerk allegedly committed by a black male with low intelligence) that requires expertise in jury selection over and above that which should be possessed by competent defense counsel. Defense counsel is highly competent, having had considerable experience in trying capital cases, including *People v. Beck* in front of this Court.

---

[14] Respondent notes that, according to appellant, his trial counsel also submitted a declaration of attorney Robert Wildman, who declared that he was appointed to represent the defendants in *People v. Brooks, People v. Hoskins,* and *People v. Stephens,* and in each of these cases, he requested and received funding for a jury consultant pursuant to section 987.9. (AOB 117; see I 987.9 ST 157.)

While cost should not be a consideration in determining whether reasonably necessary investigation and expert fee requests should be granted or denied, it is very questionable whether there would be a cost savings (difference in hourly rate of the requested expert and counsel) as suggested by Counsel because it is expected that Counsel would also devote chargeable time in consultation with the expert in preparation of the questionnaires and would personally review the questionnaires.

In the Stanislaus County courts on the date of trial the District Attorney and Defense Counsel are provided with a list of jurors identified by name only. At counsels' request, and if ordered by the Court, they will be provided with the order in which the prospective jurors will be called. The District Attorney has no advantage over Defense Counsel in information it has about prospective jurors at the time the names on the panel are disclosed.

It may be argued that in all cases (aside possible from the very, very few "O.J. Simpson" type cases) the district Attorney has more resources available than does the defendant. What the defendant is entitled to is what is reasonably necessary, not resources equal to those available to the District Attorney.

The slight time savings at trial in this case suggested by Defense Counsel does not mandate the appointment of such an expert.

Defense Counsel has listed four other murder cases tried in Stanislaus County where funds for a jury consultant were allowed. Except for the *Moore* case, Counsel does not specify whether the murder case was a capital one or not, or if there were unusual facts suggesting a jury consultant was required, or when the cases were tried. From the case numbers included, this court will assume they were tried in the 1990's. However, counsel did not include the many, many murder cases tried in this Court during the same time frame where funds for such an expert were either not requested or denied. The fact alone that one defendant is allowed funds for a particular expert is not a violation of the constitutional rights of another defendant when the defendant's request for similar funds is denied.

(I 987.9 ST 138-139 [minute order, dated 5-27-98].)

Counsel filed a "Request For New Hearing On Defendant's Application For Funding For A Jury Consultant," dated June 2, 1998. The basis for the new hearing request was that appellant was not present at the original hearing, that his presence was statutorily mandated, and that he did not waive his right to be present at the hearing. (Request For New Hearing On Defendant's Application For Funding For A Jury Consultant, dated June 2, 1998, pp. 1-2; see also II 987.9 ST 203.)

On July 23, 1998, the court held another hearing on the funding request for a jury consultant, this time with appellant personally present. (7/23/98 ART 3, 29.) Spiering again testified. He repeated his earlier testimony regarding the services of the jury consultant Eda Gordon, and that Gordon was helpful and accurate in identifying the individuals that would be leaders in the jury room and be sympathetic toward life for the defendant. He also said Gordon's services reduced the amount of time he spent on preparing for jury selection. (7/23/98 ART 7-19.) Following Spiering's testimony, the court and defense counsel discussed, among other things, about what in Gordon's background qualified her to be a jury selection expert, and would make her better in identifying and selecting favorable jurors than counsel or an investigator. The court wondered "whether anybody can become themselves a professional selector with any degree of reliability." (7/23/98 ART 24.) The court asked if there was any evidence that the District Attorney would be hiring a jury consultant in this case. Counsel replied no. (7/23/98 ART 24.)

In a written decision, dated July 27, 1998, the court again denied the funding request for a jury consultant:

Defendant Bell applies, under PC 987.9, for appointment of a jury expert and for approval of the sum of $6510.00 to do so, primarily for the penalty phase of the trial.

The Defendant has not demonstrated that denial of his motion will deny Defendant's constitutional right to effective assistance of counsel because:

1. No evidence is offered the District Attorney has or is going to retain a "jury expert."

2. No satisfactory connection is shown between the jury consultant's claim of expertise and the objective of acquiring a fair and impartial jury, or between her claim of expertise and the verdicts in trials in which she has participated. The jury expert sought is, in fact, a private investigator.

3. The evidence is insufficient to conclude the peculiar facts of Defendant bell's case are such that he will not receive a fair trial an/or that the District Attorney will acquire a favorable jury, as opposed to a fair jury, unless the jury expert is retained.

The Defendant <u>has</u> demonstrated that his counsel will need private investigator assistance in study and review of the jury questionnaires. (No doubt, the District Attorney also will require such investigator assistance.) This assistance should be predicated on a study and review of 75 questionnaires for 75 "hardship qualified" jurors. Also, some allowance for review of the questionnaires on jurors who claim hardship should be included.

The PC 987.9 application is DENIED, without prejudice to reapply as set forth above, in the event none of the prior applications for private investigator services have included this subject matter.

(II 987.9 ST 202, underline in original.)

Counsel then filed a declaration and request, dated July 31, 1998, for funding for the assistance of Eda Gordon, in her capacity as a private investigator, in the jury selection process. (II 987.9 ST 215-216.) Counsel declared:

> I have not made a request for assistance in jury selection in any of the prior applications for investigative services in this case. I am bringing this request to this Court because I believe it is appropriate in view of the fact that this Court heard the defense request for a jury consultant and issued a ruling which included language defining the extent to which the defense was entitled to assistance in jury selection.

(II 987.9 ST 215-216.)

On August 12, 1998, the court granted the request for the services of an investigator in the jury selection process, for "one of the previously authorized private investigators, Joe Maxwell or Richard Wood," but not Eda Gordon. (II 987.9 ST 218.)

Counsel filed another declaration and request, dated August 24, 1998, for funding for assistance with jury selection. (II 987.9 ST 219-221, 224-225.) Counsel declared that both Maxwell and Wood said they were unqualified to assist with jury selection. Counsel added:

> In spite of the fact that I have tried previous capital cases, I believe I do not have the qualifications and experience necessary to pick a jury which will understand and accept the issues necessary to be accepted and understood by the jury in order to give the defendant's case in mitigation adequate consideration. If I am denied assistance in jury selection the defendant will not receive adequate assistance of counsel and therefore will not receive a fair trial . . ..

(II 987.9 ST 220.) Counsel said he met with a trial consultant, Karen Fleming, Ph.D., who had "extensive experience in assisting in selecting capital case juries." Counsel asked for funding to hire Dr. Fleming. (See II 987.9 ST 220-221, 225.) Counsel filed a supplemental declaration, dated August 28, 1998, in which he attached a letter from the National Jury Project providing a work plan and budget for jury consultation services. (II 987.9 ST 226-238.)

On September 1, 1998, the court denied the funding request for the services of Dr. Fleming, referring to the court's prior orders of August 12, 1998 (II 987.9 ST 218, 259) and July 27, 1998 (II 987.9 ST 202, 257). (II 987.9 ST 222-223.)

Counsel filed another declaration and request, dated October 20, 1998, seeking to increase the amount of the funds approved for an investigator's assistance in the jury selection process. Counsel also requested authorization to hire an investigator other than Maxwell or Wood. (II 987.9 ST 254-255.) The court authorized counsel to hire "a person" to "review juror questionnaires and confer with defense counsel." The court denied the request to increase the funding amount. (II 987.9 ST 256, 258.)

Counsel filed a declaration and request, dated December 7, 1998, for reconsideration of the prior request for a jury consultant. (II 987.9 ST 260-293.) Counsel informed the court that the District Attorney would have two deputy district attorneys in the courtroom on this case. (*Ibid.*) Counsel requested an in camera hearing if the court again denied the funding request for a jury consultant. (*Ibid.*)

An in camera hearing was held on December 29, 1998. Then deputy district attorney Birgit Fladager (now the District Attorney) testified that she was assigned to prosecute appellant, and another deputy district attorney, Doug Raynaud, had been assigned to assist. Deputy Fladager testified that Raynaud would be assisting her during the entire trial, including jury selection. (12/29/98 ART 94-95.) Fladager then described what she expected to be her and Raynaud's roles and responsibilities during the jury selection process. (12/29/98 ART 95-98.) Following Fladager's testimony, appellant's trial counsel argued that, due to "unique

mitigation themes for the defense, . . . it's extremely important to be able to select a jury that will listen to and consider the themes that we're developing." (12/29/98 ART 98.) Counsel described some of the evidence in mitigation that he anticipated would be presented in the penalty phase. (12/29/98 ART 99.) Counsel remarked that the jury must "at least [be] receptive" to the "science" involved, and that he was "just not up on [this science]." (12/29/98 ART 99.) Counsel said: "I think a different kind of case, straight murder case, I could pick a jury pretty well. But I don't feel comfortable. This is a case, I believe, I need assistance in." (12/29/98 ART 99.)

The court asked counsel, "What are you not up on?" (12/29/98 RT 100.) Counsel explained there were two reasons. First, counsel said he lacked the expertise to select jurors who would be receptive to the mitigation evidence and themes that he would present in the penalty phase. (12/29/98 ART 99-100.) Second, counsel explained the jury selection process in capital case required "more than one set of eyes, more than one set of ears." (12/29/98 ART 101.) Counsel said he would be "immersed with a deluge of information, not only from the questionnaires, but looking at the jury, making eye contact . . .." (12/29/98 ART 101.) Counsel said that he was not seeking a second counsel, that he wanted a jury consultant. (12/29/98 ART 102-103, 105, 111.)

The court reminded counsel that, at an earlier hearing, it found no connection between a claim of jury voir dire expertise and the selection of a more favorable jury. (12/29/98 ART 101.) The court considered the circumstance that there would be two deputy district attorneys for the jury selection process, but found this circumstance insufficient to alter the

previous ruling denying the funding request for a jury consultant. (12/29/98 ART 106-108.) The court explained that there was no connection between the use of "so-called jury selection expert" and "any trial result." (12/29/98 ART 108-109, 119; II 987.9 ST 295.)

In a declaration/request, dated December 31, 1998, counsel asked for funding to expand the duties of second counsel, Karen Kelly, to include assisting lead counsel with jury selection.[15] (II 987.9 ST 296-307.) The court granted the request, authorizing funds for the services of attorney Kelly "as needed during jury selection . . . to assist in selecting jury." (II 987.9 ST 300.)

B. Discussion

Section 987.9, subdivision (a), provides:

> In the trial of a capital case or a case under subdivision (a) of section 190.05, the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be

---

[15] On June 10, 1998, counsel had requested funding to hire Karen Kelly to serve as second counsel. (I 987.9 ST 168-173; see *Keenan v. Superior Court* (1982) 31 Cal.3d 424.) The court granted the request, appointing Kelly to assist lead counsel in the following areas: "1) research and prepare writs and other appellate filings following a ruling or order offensive to the defendant; 2) research and prepare motions following the commencement of trial; and 3) review discovery and consult with lead counsel." (I 987.9 ST 175.) The court stated that "[t]his authorization include[d] proceedings *in limine* and during jury selection, post-guilt phase proceedings and proceeding during and following penalty phase . . .." (I 987.9 ST 175.)

> confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

"'Section 987.9 commits to the sound discretion of the trial court the determination of the reasonableness of an application for funds for ancillary services' such as a jury selection expert." (*People v. Box* (2000) 23 Cal.4th 1153, 1184, disapproved of on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10, quoting *People v. Mattson* (1990) 50 Cal.3d 826, 847.) The trial court's consideration of requests for ancillary defense services, such as investigators, experts, and others for preparation of defense, shall be guided by the need to provide a complete and full defense. (*People v. Williams* (2006) 40 Cal.4th 287, 303-304.) The trial court should view the motion for assistance with "considerable liberality," but it is the defendant's burden to demonstrate the need for the requested services, and the court should grant the request only upon a showing the services are reasonably necessary. (*People v. Gonzalez* (2011) 52 Cal.4th 254, 287, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1085.)

The United States Supreme Court has stated:

> [M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, [], it has often reaffirmed that fundamental fairness entitles indigent defendants to "an

> adequate opportunity to present their claims fairly within the adversary system," []. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," [], and we have required that such tools be provided to those defendants who cannot afford to pay for them.

(*Ake v. Oklahoma* (1985) 470 U.S. 68, 77.) *Ake* involved the defendant's right to present a defense with assistance of a psychiatrist where the question of his sanity at the time of the offense was an issue at trial. (*Id.* at pp. 82-85.) This Court has held that a jury selection expert is not reasonably necessary for the preparation or presentation of the defense. (AOB 149; see *People v. Box, supra,* 23 Cal.4th at pp. 1184-1185; *People v. Mattson, supra,* 50 Cal.3d at pp. 847-848.)

Here, the trial court properly denied appellant's request for funds for a jury selection expert. The trial court repeatedly observed that noting about this case appeared complex or unusual. Appellant's trial counsel was an experienced trial lawyer, who had previously tried five death penalty cases (see I 987.9 ST 20). The trial court specifically allowed counsel to have for jury selection the assistance of a private investigator and second counsel (II 987.9 ST 296-307). The district attorney did not have the assistance of a jury selection expert. (See *Miller-El v. Dretke* (2005) 545 U.S. 231, 266-273 (conc. opn. of Bryer, J.) [observing that analyzing juror demographics in order to exercise peremptory challenges at cross purposes with the law's antidiscrimination command].) The trial court was not persuaded that Eda Gordon, Dr. Karen Fleming, or any jury consultant, would have brought any more "expertise" to the selection of a jury than an experienced trial lawyer. (See 7/23/98 ART 24.)

Appellant fails to show that the trial court abused its discretion when it denied his request for funds to retain a jury selection expert.

Appellant asserts that the court's ruling deprived him of equal protection. Specifically, he contends that, had he been represented by the public defender, that agency could have hired a jury selection expert out of its own funds and then sought reimbursement from the state. (AOB 145-146.) However, because he was represented by a court-appointed private attorney, his counsel had to apply to the court for funding under section 987.9. Appellant's assertion is without merit.

> To demonstrate a denial of equal protection, it must first be shown that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. . . . [¶] If it is determined that the law treats similarly situated groups differently, a second level of analysis is required. If the law in question impinges on the exercise of a fundamental right, it is subject to strict scrutiny and will be upheld only if it is necessary to further a compelling state interest. All other legislation satisfies the requirements of equal protection if it bears a rational relationship to a legitimate state purpose.

(*People v. Goslar* (1999) 70 Cal.App.4th 270, 276.) Wealth, or rather, indigency, is not a suspect classification. (*Harris v. McRae* (1980) 448 U.S. 297, 323 [poverty, standing alone, is not a suspect classification].) The assistance of a jury selection expert is not a fundamental right, nor is it necessary to the meaningful exercise of any fundamental right. (*People v. Box, supra,* 23 Cal.4th at pp. 1184-1185; *People v. Mattson, supra,* 50 Cal.3d at pp. 847-848.) The equal protection clause "does not require absolute equality or precisely equal advantages." (*Ross v. Moffitt* (1974) 417 U.S. 600, 612.) While

> [T]he Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendants in order to insure effective preparation of their defense by their attorneys, . . . such assistance is not automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case.

(*Mason v. Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351-1352.)

The fact that a county public defender may have the funds to retain the assistance of a jury selection expert without court approval does not mean that court-appointed private attorneys must be granted funds to retain a jury selection expert. A county public defender may choose to retain a jury selection expert out of existing funds, but it is purely speculative to assert a public defender has a greater chance of obtaining reimbursement than appointed counsel does of securing funds in the first instance when the same standard is used to evaluate the necessity of the expense. (Gov. Code, § 15200 et seq; Cal. Code Regs., tit. 2, §§ 1022.1, 1022.2, 1025.1, 1025.2; see 67 Ops. Cal. Atty. Gen. 310 [application of section 987.9 to public defender's request for reimbursement].)

In any event, as noted above, appellant had no right to a jury selection expert, and failed to establish that such an expert was reasonably necessary for the preparation or presentation of his defense. (*People v. Box, supra,* 23 Cal.4th at pp. 1184-1185.) Appellant fails to establish that the trial court's order was arbitrary, capricious, wholly outside the bounds of reason, or violated appellant's right to equal protection. Appellant's claim should be rejected.

III. THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR DISCOVERY OF TORY'S CONFIDENTIAL COMMUNICATIONS WITH HIS COUNSEL

Appellant argues that the court erred when it denied his motion to discover confidential communications between Tory and his counsel, Alan Cassidy. (AOB 155-169.) Not so.

A. The Record

Prior to trial, on August 6, 1998, appellant's trial counsel filed a motion seeking the recusal of the entire district attorney's office (§ 1424), and for the disclosure of all communications between Taureen Travis ("Tory") and his counsel, Alan Cassidy, or, in the alternative, preclusion of Tory's testimony against appellant. (II CT 461-495.) Appellant alleged that the law office of Perry and Wildman (later changed to Perry and Associates) was appointed to represent Tory. (II CT 461.) Cassidy, then an associate of the firm, was assigned by the firm to represent Tory. (II CT 461-462.) While representing Tory, Cassidy accepted an offer of employment with the district attorney's office, and Cassidy continued to represent Tory until he began working for the district attorney on February 2, 1998. (II CT 462.)

Attached to the motion was a transcript of a July 15, 1998, interview of Cassidy by appellant's trial counsel. (II CT 488.) Cassidy said that he applied for and accepted an offer of employment with the district attorney's office about six to eight weeks prior to February 2, 1998. (II CT 491-493.) Between the day he accepted the employment offer and the day he started his employment with the district attorney, Cassidy continued to represent Tory. (II CT 462.) On January 20, 1998, Tory and the district attorney

entered into a written plea agreement in which Tory would testify against appellant and plead to the reduced charge of accessory after the fact (§ 32). (II CT 462, 485-487.) The next day, January 21, 1998, with Cassidy present, Tory testified against appellant at appellant's preliminary hearing. (II CT 462.) Cassidy invoked attorney-client privilege and refused to disclose any of his discussions with Tory. (II CT 494.)

The district attorney and the Attorney General both filed responses in opposition. (II CT 501-522)

On October 16, 1998, the court held a hearing on the motion. Both Bruce Perry and Cassidy testified. (II RT 33-62.)

Perry testified that he was a self-employed attorney, and had a contract with the county to handle indigent defense cases. (II RT 36.) Perry said that Cassidy was an associate of his firm from around February or March of 1994 through January of 1998. (II RT 36-37.) Perry said his firm represented Tory on a murder case, and Cassidy was assigned this task and responsibility. (II RT 37.) Cassidy maintained the case file, but when Cassidy terminated employment with the firm, the file remained with the firm. (II RT 37-38.) Perry, invoking attorney-client privilege, refused to disclose any of the contents of the case file. (II RT 38-39.) Appellant's trial counsel asked the court to order Perry to turn over the case file, but the court denied the request, explaining "[t]hose are attorney-client privileged documents." (II RT 39.)

Cassidy testified that he was currently a deputy district attorney with the county. (II RT 40.) Cassidy acknowledged that appellant's trial counsel interviewed him on July 15, 1998, about his representation of Tory. (II RT 40.) Cassidy further acknowledged that he invoked the attorney-client privilege during the interview regarding his communications with

Tory. (II RT 41.) Cassidy continued to assert attorney-client privilege. (II RT 41.) Cassidy said Tory's plea agreement had been in place for "a number of months" before appellant's preliminary hearing and before he was aware of a job opening in the district attorney's office. (II RT 45-49.) Cassidy added that the possibility of employment with the district attorney's office did not change the negotiated terms for Tory, and that at all times, he acted in Tory's best interest. (II RT 49.)

Cassidy said he had no contact with appellant's case file after he left Perry and Widman and joined the district attorney's Office, and had no contact with any of district attorney file for the cases he handled while an associate at Perry and Wildman. (II RT 41.) He recalled that management at the district attorney's office discussed conflict case policy with him. (II RT 41-42.) He would not handle any pending conflict case, would not take part in discussions regarding any given conflict case, and if he was aware of a conversation regarding such a case, he would leave the area. (II RT 42.) He noted that he discussed appellant's case with the trial prosecutors only to arrange for his appearance in court and for the July of 1998 interview. (II RT 42.) No details of the case were discussed, just scheduling. (II RT 42.) Cassidy added that he had no supervisorial power in the district attorney's office. (II RT 42-43.)

The trial court denied the motions to recuse the district attorney, to compel discovery of Tory's statements to Cassidy or, in the alternative, to preclude Tory's testimony. (II RT 62.) The court reasoned:

> [A]ppears to me that the district attorney's office and Mr. Cassidy have taken every precaution to prevent the sort of things that would happen – would cause someone to grant such a motion. He's been kept from this case and they have done what

> they are supposed to do with regard to keeping him away from certain files and keeping his involvement out of those cases. It doesn't appear to me that the defendant won't get a fair trial based on what's occurred to this point. And it appears to me that he would get a fair trial.
>
> [¶] . . . [¶]
>
> I see no reason to recuse the district attorney's office based on what's been presented to me or to violate the attorney/client privilege involved in this case, or, in fact, if he – to keep the co-defendant from testifying. There has been nothing presented to cause the Court to grant those motions. I have read the authorities, the points and authorities that were submitted and listened to the testimony today. And the motion is denied in its entirety.

(II RT 62; see also II CT 532.)

B. Discussion

Appellant argued below that the district attorney, by employing Cassidy, came into possession of exculpatory or impeachment information. (See II CT 464-472, 524-529.) Thus, under *Brady v. Maryland* (1963) 373 U.S. 83, the district attorney had an affirmative duty to determine which of the communications between Tory and Cassidy contained exculpatory or impeachment evidence, and to disclose the communications containing such evidence to the defense. (See II CT 464-472, 524-529.) On appeal, appellant argues that an in camera hearing should be held to determine which communications between Tory and Cassidy are protected by the attorney-client privilege and contain exculpatory or impeachment evidence, and to thereafter weigh and determine whether the interest in confidentiality should yield to his constitutional rights to confrontation and a fair trial. (AOB 162-169.)

Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 (*SpeeDee Oil*).) The fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 740-741 (*Costco*), citing *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) The primary harm in discovery of material protected by the attorney-client privilege is the disruption of that relationship, not the risk that the parties seeking discovery may obtain information to which they are not entitled. (*Costco Wholesale Corp. v. Superior Court, supra,* 47 Cal.4th at p. 741, citing *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336.) A criminal defendant's right to due process does not entitle him to invade the attorney-client privilege of another. (*People v. Gurule* (2002) 28 Cal.4th 557, 594; *People v. Johnson* (1989) 47 Cal.3d 1194, 1228.)

There is no dispute in the record that Tory's trial counsel negotiated a plea agreement on Tory's behalf and thereafter accepted employment with the district attorney's office. Yet neither the termination of Tory's attorney-client relationship with Cassidy, nor Cassidy's subsequent employment with by district attorney, vitiated Cassidy's duty of confidentiality or Tory's right to maintain it. (See *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [duty survives termination of attorney-client relationship]; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra,* 20 Cal.4th at p. 1146.) The attorney-client privilege is essential to our system of justice, it can and does result in the withholding of relevant information from the fact finder. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1208.)

Appellant cites to a dissenting opinion by Justice O'Connor for the proposition that the attorney-client privilege should be balanced against a criminal defendant's constitutional rights. (*Swidler & Berlin v. United States* (1998) 524 U.S. 399, 416 (dis. opn. of O'Connor, J.) (*Swidler*).) The *Swidler* case arose out of a criminal investigation involving personnel in the White House in 1993. (*Id.* at pp. 401-402.) The Court was called upon to decide whether an attorney could be required to turn over notes from an interview with a client who had subsequently passed away. (*Id.* at p. 401.) The circuit court had held that curtailing the privilege of the decedent in a criminal context would not have a chilling effect on attorney-client relationships. (*Id.* at p. 402.) The Supreme Court reversed, concluding that the common law attorney-client privilege survived death. (*Id.* at pp. 408-411; cf. *Fisher v. United States* (1976) 425 U.S. 391, 403 ["confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged"].)

Because appellant had no right to compel disclosure of Tory's confidential communications with Cassidy, appellant fails to show that the trial court's ruling was arbitrary, capricious, or wholly outside the bounds of reason.[16]

---

[16] Appellant suggests that this case should be remanded for an in camera hearing so that the superior court can test whether Tory's communications with Cassidy were covered under attorney-client privilege. (AOB at 167-168.) Attorney-client communications are not within the scope of exceptions set forth in section 915, subdivision (b), to the prohibition on compelling disclosure of privileged material. (See *Costco Wholesale Corp. v. Superior Court, supra,* 47 Cal.4th at pp. 736-739.) Assuming arguendo that such a remedy were permissible, it would be to no purpose since the record establishes, and appellant does not dispute, that Cassidy was Tory's attorney at all stages up through Tory's acceptance of his plea bargain. (II RT 33-62.)

Assuming arguendo that an in camera hearing was authorized and that the court erred in failing to conduct one, any such error was harmless.[17] (*People v. Watson* (1956) 46 Cal.2d 818.) Tory testified at appellant's trial and was subject to cross-examination. (X RT 2034.) Appellant did not object or claim that he had not received discovery regarding Tory's testimony. Except for the confidential communications between Tory and Cassidy made during the course of Cassidy's representation , appellant identifies no material information about Tory or his involvement in the crime that appellant was denied. There is no reasonable probability that appellant would have obtained a more favorable result but for the trial court's ruling denying discovery of Tory's confidential communications with Cassidy.

Appellant's claim must be denied.

IV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO RECUSE THE STANISLAUS COUNTY DISTRICT ATTORNEY'S OFFICE; APPELLANT FORFEITED ANY EQUAL PROTECTION CHALLENGE; APPELLANT FAILS TO SHOW HE WAS DENIED A FAIR TRIAL

Appellant argues that the trial court abused its discretion when it denied his motion to recuse the Stanislaus County District Attorney's

---

[17] Appellant suggests that the trial court violated his right of confrontation, implicating the federal harmless error standard under *Chapman v. California* (1967) 386 U.S. 18, 24. (AOB 159.) This is incorrect. "The Confrontation clause guarantees only the opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.) The right of confrontation is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1138–1139.)

Office, and that he was denied due process and his right to equal protection. (AOB 170-197.) Appellant forfeited his equal protection claim. In any event, he fails to show that the court abused its discretion or that he was denied a fair trial.

Section 1424 provides that a motion to disqualify a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." A "conflict," under section 1424, "'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.'" (*People v. Eubanks* (1996) 14 Cal.4th 580, 592, quoting *People v. Conner* (1983) 34 Cal.3d 141, 148.) Thus, a conflict warrants recusal only if it is "'so grave as to render it unlikely that defendant will receive fair treatment.'" (*People v. Eubanks, supra,* 14 Cal.4th at p. 594, quoting *People v. Conner, supra,* 34 Cal.3d at p. 148.)

Section 1424 articulates a two-prong test: "'(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?'" (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833, quoting *People v. Eubanks, supra,* 14 Cal.4th at p. 594.) The defendant bears the burden of proof. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 709.)

> [This Court] "review[s] the superior court's factual findings for substantial evidence and, based on those findings, determine[s] whether the trial court abused its discretion in denying the recusal motion."

(*Hambarian v. Superior Court, supra,* 27 Cal.4th at p. 834.) On appeal, the defendant must show actual prejudice from the denial of the recusal motion. (*People v. Vasquez* (2006) 39 Cal.4th 47, 68-70.)

Here, appellant fails to establish that the court abused its discretion in denying appellant's motion to recuse the district attorney. Cassidy did not prosecute appellant; and Cassidy did not participate or assist in any way in the prosecution of appellant. Deputy District Attorneys Fladager and Raynaud prosecuted the case against appellant. There was no evidence that Cassidy violated his ethical duty to Tory and divulged any confidential privileged information to the prosecuting deputies. To the contrary, Cassidy testified that he had discussed conflicts with the district attorney's office, and that he would not handle or discuss any pending case in which he had a conflict. Cassidy was not in a supervisory position. Given the protective measures the district attorney and Cassidy took to respect and protect Tory's privilege arising from Cassidy's prior representation, and to avert any prosecutorial conflict, appellant fails to establish that the trial court's decision not to recuse the district attorney was arbitrary, capricious, or wholly outside the bounds of reason. (See *People v. Vasquez, supra,* 39 Cal.4th at pp. 57-58.)

Assuming arguendo that the trial court erred by denying the motion to disqualify the district attorney, any error was harmless. (See *People v. Vasquez, supra,* 39 Cal.4th at pp. 68-70.) Cassidy was not involved with the prosecution of the case against appellant. There is no evidence that would support even an inference that Cassidy violated his duty to Tory and revealed any privileged communications to the prosecution team. Finally, there is no evidence that because of Cassidy's employment with the district attorney, the prosecution team treated appellant's case in an unfair manner. (*Id.*, at pp. 68-69; see *People v. Eubanks, supra*, 14 Cal.4th at pp. 591-592.) There is no reasonable probability that appellant would have obtained a more favorable result but for the trial court's denial of the motion to disqualify the district attorney. (*People v. Vasquez, supra*, 39 Cal.4th at p. 70.)

Appellant argues that section 1424 violates equal protection because an attorney's conflict is imputed to a private law firm, but not to prosecutorial offices. (AOB 184-196.) Appellant forfeited this claim because it was not raised below. (*People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.)

In any event, section 1424 on its face does not violate the equal protection clause. A criminal defendant and a civil litigant are not similarly situated. (See *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 53 ["Under the equal protection clause, we do not inquire whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the challenged law."].) Section 1424 serves to prevent due process violations. (*People v. Gamache* (2010) 48 Cal.4th 347, 366.) Section 1424 does not involve a suspect classification or interfere with a fundamental constitutional right. (Cf. *People v. Ramos* (2004) 34 Cal.4th 494, 511-512 [rejecting equal protection challenge to Code Civ. Proc., § 223 where defendant claimed civil litigants afforded greater protection] ; *People v. Boulerice* (1992) 5 Cal.App.4th 463, 472-480.) If civil litigation attorneys resolve ethical conflicts in a manner different from what is permitted for an elected public prosecutor and his or her deputies, that fact does not establish that appellant is situated differently, or treated differently, from any other defendant in a criminal case. Recusal motions are not disciplinary proceedings against the prosecutor but inquiries into whether there is a fact that jeopardizes the defendant's right to a fair trial. (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 735.)

Appellant contends that section 1424 violates his right to due process because the statute "impos[es] a nearly impossible burden of proving an actual 'probability that the defendant will be treated unfairly.'" (AOB 196-197.) Appellant's assertion is without merit.

Where a motion to disqualify the district attorney is properly denied, there is no due process violation. (*People v. Gamache, supra,* 48 Cal.4th at p. 366.) This Court has noted: "Neither this court nor the United States Supreme Court has delineated the limitations due process places on prosecutorial conflicts of interest." (*People v. Vasquez, supra,* 39 Cal.4th at p. 60.) Section 1424 is "prophylactic in nature and 'serve[s] to prevent potential constitutional violations from occurring.'" (*People v. Gamache, supra,* 48 Cal.4th at p. 366.) As noted above, section 1424's recusal standard – actual or real likelihood of unfair treatment – is broader than the showing necessary to prove a due process violation. (See *People v. Vasquez, supra,* 39 Cal.4th at pp. 59-60.) Though section 1424 eliminated appearance of impropriety as a basis for recusal (see *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255), section 1424 continues to advance, not impede, the due process rights of criminal defendants.

As noted above, appellant failed to establish that the trial court erred when it denied his motion to disqualify the district attorney, and he failed to show that he suffered prejudice. Thus, appellant fails to show a violation of due process.

Appellant's claim should be rejected.

V. APPELLANT FORFEITED ANY CLAIM OF ERROR REGARDING OLSON'S TESTIMONY ABOUT ROSE TRAVIS'S STATEMENT; OLSON'S TESTIMONY CONCERNING ROSE TRAVIS'S STATEMENT ABOUT WASHING THE CAR DID NOT VIOLATE APPELLANT'S RIGHT TO CONFRONTATION

Appellant argues that allowing Detective Olson to testify about a statement made by Rose Travis[18] violated his right to confrontation. (AOB 198-214.) Not so.

A. The Record

Appellant called Detective Lance Olson back to the stand. (XII RT 2394.) On direct examination, appellant elicited admissions from Olson about a "possible bloodstain sample" found on the Chevy Beretta's door frame was sent to the Department of Justice for DNA testing, but was never tested. (XII RT 2410-2414; see XI RT 2199-2202 [criminalist Sarah Yoshida testifying that she received a blood sample labeled "blood sample? (suspect vehicle passenger door)," but was not asked to test or analyze the sample to see if it was blood].) On cross examination and without any objection from appellant, the following colloquy took place between the prosecutor and Detective Olson:

> Q. Was there any reason to believe that there would be blood on that door on the passenger side of the car at some point later on?
>
> A. No reason to believe.
>
> Q. Did you also receive information from [Rose] that things were done to that car subsequent or after the killing?

---

[18] Roseada (Rose) Travis was charged as a codefendant in this case. (See I CT 57-58.) She died before trial, on December 27, 1998. (XII RT 2253, 2266.)

A. That's correct.

Q. Did she tell you that the car was washed?

A. She said it was washed, yes.

Q. At a professional car wash?

A. I don't recall if she said professional. What I recall – at least the portion that I recall is that she went out the next morning and washed down the interior of the car herself. That's what I recall.

Q. Did she also talk about washing the exterior of the car, if you remember?

A. I recall something about the exterior, but I don't know if she did it or a professional did it.

(XII RT 2415-2416.)

Later, during a recess, appellant's trial counsel moved for a mistrial, alleging an *Aranda-Bruton*[19] violation:

> [D]uring [the prosecutor's] cross-examination of Detective Olson he asked questions regarding what statements were made by the co-defendant in violation of *Aranda* and *Bruton.*
>
> I did not jump up and object and ask for a mistrial because I didn't think that was the appropriate thing to do in terms of trial strategy. However, what he did was he elicited several statements from Detective Olson that Rose Travis had told Detective Olson that they had washed the car inside and out. And this is, I think, material issue. It goes to whether or not there was blood in the car, that was the gist of the testimony.
>
> I think it's an *Aranda-Bruton* violation and at this time I'm moving for a mistrial.

(XII RT 2432-2433.) The following colloquy then ensued:

---

[19] *People v. Aranda* (1965) 63 Cal.2d 518, 530; *Bruton v. United States* (1968) 391 U.S. 123, 124-137.

THE COURT: Well, there is no basis for a mistrial here. Besides you're the one that asked him, as I recall, about the blood, didn't you? I mean –

[DEFENSE COUNSEL]: I asked him about the – I asked him about the blood sample that was sent up to – from the door.

THE COURT: Yeah. I mean, aren't we talking about the car –

[DEFENSE COUNSEL]: Yes.

THE COURT: - and the blood?

[DEFENSE COUNSEL]: But that doesn't open the door for statements from a co-defendant, especially regarding a material fact.

THE COURT: First of all, you had an opportunity to make an objection at the time but you didn't. So we could have cured the problem at that point in time. Now you're asking me after lunch two hours later to declare a mistrial based on that when you never made an objection in the first place.

. . . Because you never made an objection at that time, and it seems to me that you would have to in order to preserve the objection.

In any case, assuming that you didn't have to, it doesn't seem to me to be that kind of an issue that she first of all, she's dead. And –

[DEFENSE COUNSEL]: That's right.

THE COURT: And it wasn't a statement that was made – well, I guess it links him to the crime. But there is no basis for a mistrial.

[THE PROSECUTOR]: Your Honor, I would agree with that and also state that this was following up on questioning that was elicited by the defense. And it did not – the washing of the car didn't even mention [appellant]. And the act of washing a car in and of itself is not a culpatory act.

THE COURT: Well –

[DEFENSE COUNSEL]: Let me just respond to that.

THE COURT: Trying to wash a car after a crime certainly isn't culpatory. You can't preclude the People from asking questions about it. You opened it up and then invite a mistrial based on that.

[DEFENSE COUNSEL]: I'm not inviting a mistrial.

THE COURT: Yeah, you are, because you're getting the whole area yourself. They have a right to follow up on that.

[DEFENSE COUNSEL]: I don't think they have a right to ask the detective what a co-defendant said, especially one who is now deceased.

THE COURT: You opened the door with regard to these questions about the car and the blood. I mean, it's clear to me. And you didn't make an objection at the time. You asked him questions and [the prosecutor] has the right to follow up on these questions.

[N]ow that [defense counsel] has made an objection, maybe you should stay away from any statements made by somebody else that might have been a co-defendant at one time.

But those objections weren't made at the time. And I don't think it's grounds for a mistrial. And the time has passed for me to give them any kind of instruction on that, a limiting instruction, unless you want me to do that later at the time of the instructions to the jury. But I wouldn't think you would want to call attention to that.

(XII RT 2433-2435.)

B. Discussion

Appellant contends that eliciting Rose's statement to Olson that she, herself, had washed and cleaned the exterior and interior of the car violated

his right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). (AOB 202-203.) Appellant's *Crawford* claim should be deemed forfeited under the circumstances here. Even if not forfeited, it is without merit.

Appellant did not make any timely, contemporaneous evidentiary objection to the Olson's testimony that Rose told him she had washed the car. (Evid. Code, § 353; *People v. Livingston* (2012) 53 Cal.4th 1145, 1160.) Appellant waited two hours until a recess to raise an objection to the statements on the ground that admission of the statement violated *Aranda-Bruton.* Appellant did not object on the basis of hearsay or raise any other objection involving his right to confrontation.

Although *Crawford* applies here, forfeiture is appropriate in this case where appellant could have made some form of contemporaneous objection. (*People v. Livingston, supra*, 53 Cal.4th at pp. 1160-1161; see *People v. Cage* (2007) 40 Cal.4th 965, 970.) In *Livingston*, an officer testified that he transported three witnesses who identified a car that was used in the crime. (*People v. Livingston, supra,* 53 Cal.4th at p. 1160.) On appeal, the defendant asserted that the admission of the statement violated his right to confront the witnesses. (*Ibid.*) This Court deemed the confrontation claim forfeited. (*Id.* at pp. 1160-1161; see *In re Seaton* (2004) 34 Cal.4th 193, 198 [failure to object relieves appellate court of obligation to consider statutory or constitutional errors].) Appellant's *Aranda-Bruton* objection, the legal basis of which is the right to confrontation, did not apply because Rose and appellant were not jointly tried (see *People v. Combs* (2004) 34 Cal.4th 821, 841), and her statement that she washed the car did not incriminate appellant (see *United States v. Rashid* (8th Cir. 2004) 383 F.3d 769, 776). Because appellant failed to make a timely, contemporaneous objection of any kind, this Court should deem appellant's *Crawford* claim forfeited.

Regardless, the admission of Rose's statement that she washed the car did not violate appellant's right to confrontation. In *Crawford*, the Supreme Court stressed that the confrontation "[c]lause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford v. Washington, supra,* 541 U.S. at p. 59, fn. 9.) Rose's statement was offered for the purpose of showing why Olson never pursued or followed up on testing the possible bloodstain sample from the car door frame for DNA. (See XII RT 2415-2416; see also XII RT 2437-2438.) Because Rose's statement was offered as evidence of Olson's state of mind in response to, or as a consequence of, that statement, no assertive or testimonial use was made and it was not inadmissible under the Hearsay Rule. (See Evid. Code, § 1200; *People v. Thornton* (2007) 41 Cal.4th 391, 447.)

Even if admission of Rose's statement to Olson was error, it was harmless under either *Chapman v. California, supra,* 386 U.S. at page 24, or *People v. Watson, supra,* 46 Cal.2d at page 836. Rose's statement that she washed the car did not implicate appellant. (XII RT 2415-2416.) Given the strength of the evidence against appellant, including the video tape and the witnesses linking him directly to the crime, any error in admitting Rose's statement to Olson that she washed the interior and exterior of the car to explain why Olson did not seek to have a sample tested, was harmless beyond a reasonable doubt.

Accordingly, appellant's claim should be rejected.

VI. APPELLANT FORFEITED ANY CLAIM OF ERROR BASED ON THE CONFRONTATION CLAUSE; THE TRIAL COURT PROPERLY ALLOWED DETECTIVE OLSON'S TESTIMONY REGARDING HIS MEETING WITH A CITIZEN INFORMANT AND SUBSEQUENT ACTION

Appellant argues that the admission of Detective Olson's testimony that he met with a citizen informant who personally knew appellant the day after the robbery/shooting, that he showed the citizen informant the store surveillance video, and that after that meeting, he set up a meeting with appellant, violated his right to confrontation. (AOB 215-230.) Appellant forfeited any confrontation clause objection; even if not forfeited, appellant fails to establish error, or, if there was error, that he suffered prejudice.

A. The Record

Michael Moore testified at the preliminary hearing. (I CT 92-104.) Moore was a Stanislaus County probation officer who supervised appellant on probation. (I CT 93-95.) On or around January 21, 1997, Moore read an article in the Modesto Bee about a robber shooting a clerk at the Quik Stop in Turlock. (I CT 95.) The article contained a photograph of the suspect. (I CT 95-96.) After reviewing the article, Moore called the Turlock Police Department. (I CT 96-97.) A police detective showed Moore the surveillance audio/video tape, and still photographs, of the robbery/shooting. Moore said the suspect's gait and posture reminded him of appellant. (I CT 97-98.)

Prior to trial, appellant filed a motion seeking to exclude Moore's testimony identifying the robber/shooter in the surveillance tape as appellant. (III CT 727-728, 750-757.) The court denied the motion without prejudice, noting that a hearing could be held under Evidence Code section 402 prior to Moore's testimony at trial. (II RT 194-202.)

On the tenth day of trial, a hearing under Evidence Code section 402 was held regarding Moore's anticipated testimony. Moore explained his familiarity with appellant, and recounted the circumstances attendant to his identification of appellant from the store surveillance tape. (IX RT 1898-1909.) Appellant objected to allowing Moore to testify on the grounds that his testimony would be irrelevant and unduly prejudicial. (IX RT 1909-1912.) The court overruled both objections, and ruled that Moore could recount the circumstances attendant to his identification of the robber/shooter in the surveillance tape as appellant so long as there was no mention or suggestion that appellant was on probation. (IX RT 1912, 1914.)

The next day, the prosecutor informed appellant and the court that he would not be calling Moore to testify at the moment because Moore had recognized one of the jurors, Juror 6, as a personal acquaintance who might be familiar with his occupation. (X RT 1947.) The prosecutor unsuccessfully sought from defense counsel a stipulation in lieu of live testimony by Moore. (XII RT 2239A-2242A.) The prosecutor ultimately decided not to call Moore as a witness. (XII RT 2428.)

Appellant called Detective Olson during the defense portion of the guilt phase. (XII RT 2394.)

During cross-examination, the prosecutor requested a side bar wherein the following colloquy occurred:

[PROSECUTOR]: I want to get very limited into the issue of the citizen informant, Mike Moore, without using his name, because he showed that very picture of [appellant] leaving the store to Mike Moore.

THE COURT: I think the door is opened.

[PROSECUTOR]: Not proceeding to use his name or his occupation but what happened the next day. And he received information from him about how he looked, and that's the first time he got [appellant's] name.

[DEFENSE COUNSEL]: But that was – okay. That was before he published the photo on the wanted poster.

[PROSECUTOR]: We'll find out. It was that same picture of him leaving, the stride of him leaving.

THE COURT: This is rebuttal. [¶] And I think, [defense counsel], you opened the door. I almost think that you opened the door letting that evidence in as to who he is, what he does. [¶] But if you want to keep it limited, it solves all the problems. It's appropriate. But you opened the door by asking him about it, and he said that he brought it to someone the next day.

[DEFENSE COUNSEL]: I didn't solicit that answer.

THE COURT: Yeah, you did. Go back and look. I was waiting for it. You asked him about meeting with someone the next day.

[DEFENSE COUNSEL]: I never asked him.

THE COURT: Yeah, you asked him. Yes, you did.

[DEFENSE COUNSEL]: I didn't ask him if he met with somebody.

THE COURT: The way the question was phrased, it invited that. I am almost sure.

[PROSECUTOR]: He asked him when he reviewed the photograph, what were the conditions. He said he reviewed some the next day and they looked at the photographs, they looked at the videotape.

[DEFENSE COUNSEL]: As long as you're going to limit it to that.

THE COURT: He is looking at it the next day with someone that knows [appellant].

[PROSECUTOR]: Right. Right.

THE COURT: You have a right to get into that.

[PROSECUTOR]: Are you going –

THE COURT: He is going to keep it limited.

[PROSECUTOR]: I am going to keep it limited. I won't get his name or occupation.

(XII RT 2418-2419.)

The prosecutor elicited the following testimony from Detective Olson:

Q. Detective, the following day, the day after this crime, you had that videotape in your possession, right?

A. That's correct.

Q. And you met with somebody the following day, a citizen informant, didn't you?

A. I did.

Q. This is a person who is not – was not up for any charges, right?

A. That's correct.

Q. The person was not receiving any money, right?

A. That's correct.

Q. A person who knew the defendant, an acquaintance of the defendant, right?

A. That's correct.

Q. A person who had met with the defendant on several occasions, at least five occasions, had talked to him, had seen him move and walk and so forth, right?

A. That's correct.

Q. And this was January 21st, 1997, the day after the murder, you met with that person, right?

A. I did.

Q. That person came to your police station, and you showed that person the videotape and you played the audio tape, right?

A. I did.

Q. You showed him specifically photographs including this one, a photograph of the killer leaving the store, this photograph right here, did you not?

A. I did.

Q. You also played the audio tape, the tape of the crime for that person?

A. I did.

Q. And that person knew the defendant on a personal basis, right?

A. Yes, he did.

Q. What did that person tell you the day after the crime about this photograph as far as a description of how this person looked in relation to the defendant, if you recall?

A. Would you repeat the question, please?

Q. Let me rephrase it.

(XII RT 2419-2421.)

At this point, the court gave the jury a short recess. During the recess, appellant objected "to this line of questioning." Counsel stated that he did not recall asking Olson "any questions that would elicit a reference to his meeting with Michael Moore." (XII RT 2421-2422.) Counsel stressed, "[Olson] is the one that volunteered it. I didn't elicit it." (XII RT 2422.)

The court and the parties reviewed the reporter's transcript:

> [DEFENSE COUNSEL]: . . . It's clear from reading the transcript that I was intending to elicit from him only what he did. My questions were specific that I used the word "you," not meaning anyone else. He is the one – when I say "he" I mean Detective Olson – is the one that brought this up originally.
>
> And I would direct the court to page 35 line 14, "What was the purpose of watching it the next morning?" The answer, "The purpose the next morning is because I had a person that wanted to look at it." The context here is how many times did he look at it and was he looking at it to form an identity of the perpetrator.
>
> THE COURT: If you ask a question, the listener of your question isn't going to know exactly what your question is about. And you asked the question. And you asked a broad question that opens the door to – I mean, if he had responded the purpose of watching the video the next morning was so the probation officer [¶] could see it, I wouldn't even sustain an objection at that point because you asked the question and opened the door in your case. If the People had asked that question, I would have a problem. I would maybe have a mistrial.
>
> But I don't think I would have sustained an objection if the officer had been less – what's the word I want to use – circumspect with regard to his answer. Because I'm sure he understood that he didn't want to get into the fact that Michael Moore was the person that he was talking about.

[¶] . . . [¶]

[DEFENSE COUNSEL]: [A]ssuming for argument sake that his answer was proper within the context, that still doesn't open the door for all this hearsay that's – that they want to put in. Because I didn't follow that up. I didn't say, "Oh, and what did that person tell you?" I didn't ask any questions about that.

If you continue to read the transcript, I went right back and I said, "This is because you wanted to see the identity of the perpetrator." I kept on that tact. I did not encourage him in any way to elicit any further information regarding that person.

THE COURT: I think it would be incumbent upon [the prosecutor], though, to cover that area of questioning so the jurors aren't left up in the air about what that was all about. I would think it was his responsibility to go through that. I don't expect that he's going to ask him about the specific person involved, but you created some questioning -- question marks here about the height of the person involved and identity. [District Attorney] wouldn't be doing his duty if he didn't get into that himself now and [] what that was all about that next day.

[DEFENSE COUNSEL]: Well, if that's the case –

THE COURT: What you're doing is setting up argument basically, if I get from where you're going, is creating argument that the police officer couldn't even tell you how tall he was from looking at this stuff and didn't know and how are the jurors supposed to know looking at this that the person is five-eight or six foot or six foot five and identity is that kind of an issue that you can't be sure about and they can't prove it beyond a reasonable doubt.

He has a right to respond to that and to show [] where the police officer was going and the steps he was talking in trying to piece the thing together. I mean, you're trying to create doubt; he has a right to respond to that.

[DEFENSE COUNSEL]: I understand that, your Honor. But I think he's – what we have here is he's vouching for a witness – he's vouching for a person that is not a witness. The question he knew him well, he knew his voice, this is – this is total hearsay and vouching for somebody who is not even a witness.

[¶] . . . [¶]

THE COURT: I have already ruled previously before we started this case that Mr. Moore could testify. The People have chosen to not call him as a witness.

[¶] . . . [¶]

[DEFENSE COUNSEL]: Well, if that's the case, Your Honor, then there is a foundation and hearsay problem.

THE COURT: Okay. You want to bring Mr. Moore in?

[DEFENSE COUNSEL]: He's in the building. I mean –

THE COURT: I have already heard Mr. Moore. He can testify. If you want to bring Mr. Moore and testify in front of the jurors, that's fine. And we'll deal with that juror and take him off the panel if need be. But I'm not going to preclude the People from presenting – that's valid evidence in the case. I have already ruled that Mr. Moore is going to be called to testify.

[DEFENSE COUNSEL]: I'm going to make the objection on foundation and hearsay. And I don't think that this should come out with [] Detective Olson.

THE COURT: Foundation and hearsay as to -

[DEFENSE COUNSEL]: As to –

THE COURT: – what Mr. Moore said?

[DEFENSE COUNSEL]: Exactly.

THE COURT: [Do the People] want to call Mr. Moore?

[¶] . . . [¶]

[PROSECUTOR]: Your Honor, we do not want to risk a mistrial. We put a lot of time in this case. If there is a possibility we will lose a juror, we want to avoid it. We feel because the defense has attacked the basis of Detective Olson's knowledge for the height and size of this victim, because he has opened the door to the issue regarding somebody coming in and viewing the videotape the next day, and he has – particularly on page 36 of the transcript, line 16, the question was asked, "Did you have some discussions with anyone about the height and weight of the perpetrator?" Answer, "Yes, I did." 19, question – line 19, question, "And that was after watching the videotape?" Line 20, Answer, "That's – well, it was during watching the videotape." It goes on from there. I think clearly the door has been opened.

All we ask to do is ask limited questions of Detective Olson, not identifying this person or what he does for a living, but the fact it was somebody who knew the Defendant, knew his size and his height, and viewed the videotape and in Detective Olson's presence.

THE COURT: But you can't get in Michael Moore's statements to the officer. That's hearsay. That's hearsay.

[PROSECUTOR]: Your Honor, it's hearsay but it's not offered for the truth; it's offered for the limited purpose of establishing why he did what he did.

THE COURT: Come on. It's irrelevant.

[¶] . . . [¶]

THE COURT: [Defense counsel] can keep it out by objecting under hearsay, but you can get it in by calling the witness. Why don't you want to call the witness? Because you don't want to lose a juror I guess.

[PROSECUTOR]: We're concerned about that.

THE COURT: So why don't we just leave it alone at this point.

[DEFENSE COUNSEL]: I would ask that – if that's the Court's ruling and they're not going to call Mr. Moore, I would ask that the testimony regarding Mr. Moore or this person who evidently is Mr. Moore be stricken and the jury be instructed to disregard it.

THE COURT: Well, there may be information that they can get in without getting hearsay in. The fact that he was looking at the videotape with a citizen informant, that's not hearsay. Right? And what he did after he talked to that citizen informant.

[PROSECUTOR]: Right.

THE COURT: It's just what the citizen informant told him was hearsay. I don't remember exactly now what the –

[DEFENSE COUNSEL]: Well, as I remember, Your Honor –

THE COURT: Or even whether – I don't think you made a hearsay objection at the time.

[PROSECUTOR]: Your Honor, what if we –

THE COURT: I stopped the testimony myself, didn't I?

[PROSECUTOR]: Yes.

THE COURT: It wasn't that you made an objection.

[DEFENSE COUNSEL]: I think I made an objection at side bar. But the Court ruled –

THE COURT: That was when I stopped the questioning. Because I was afraid that Detective Olson might say something based on a response to your questions on something we had already decided to keep out. But at the side bar, then we got into the discussion about you opening the door. But there was never any hearsay objection made. So that's – right?

[PROSECUTOR]: I don't recall a hearsay objection being made.

THE COURT: So that's waived. But the fact is standing where we are now, you can just kind of conclude the testimony with regard to what he did as a result of this without getting into the hearsay. [¶] You have to agree, [prosecutor], it's hearsay what Michael Moore told us.

[PROSECUTOR]: I agree it's hearsay. [¶] What I would ask, then, is to be able to wrap up this portion by just asking if based on his meeting with this acquaintance of the defendant, based on that that he set up an appointment to meet with the defendant.

THE COURT: Just ask him what he did after viewing the video with this person.

(XII RT 2425-2432.)

After the recess, the prosecutor resumed his questioning of Detective Olson:

Q. [R]ight before lunch we were discussing a meeting that you had with somebody at Turlock Police Department the day after the shooting and the killing at the Quik Stop?

A. That's correct.

Q. You showed a videotape of the incident to that person.

A. I did.

Q. And based on that what did you do?

A. I set up an appointment to meet with [appellant].

Q. And that's the appointment that you discussed earlier on February 6th of 1997?

A. It was.

(XII RT 2436-2437.)

B. Discussion

Though appellant's trial took place prior to *Crawford*, appellant's *Crawford* claim should be deemed forfeited under the circumstances here. (*People v. Livingston, supra*, 53 Cal.4th at pp. 1160-1161; see *People v. Cage, supra,* 40 Cal.4th at p. 970.) Appellant's counsel questioned Olson about the surveillance video. On cross-examination, the prosecutor elicited testimony from Olson that the day after the robbery/shooting, he met with a citizen who personally knew appellant, and they watched the store surveillance video. Olson never offered any testimony regarding statements or assertions from the citizen informant. Rather, Olson testified only that subsequent to watching the video with the citizen, Olson arranged to meet with appellant. During the side bar conference in the middle of the prosecutor's cross-examination, the trial court observed that Moore's statements to Olson would be inadmissible hearsay. (See XII RT 2425-2432.) To the extent appellant contends he was denied an opportunity to confront and cross-examine Moore on the basis of Olson's testimony on cross-examination, that claim should be deemed forfeited.

Olson's testimony that he met with a citizen informant who personally knew appellant the day after the robbery/shooting, showed that citizen informant the store surveillance video, and later the detective set up a meeting with appellant did not involve testimonial hearsay, and thus did not violate appellant's right to confrontation. The confrontation "[c]lause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*People v. Riccardi* (2012) 54 Cal.4th 758, 801, fn. 21, quoting *Crawford v. Washington, supra,* 541 U.S. at p. 59, fn. 9.) The challenged testimony was not were not offered for the truth of the matter asserted, that appellant was the person in the surveillance

video. Rather, Olson's testimony was admissible to show Olson's actions, that is, mental input. (See Evid. Code, § 1200.) Assuming arguendo that the jury could and did draw an inference from Olson's testimony that the citizen informant identified appellant as the person in the surveillance video, there was no objectionable hearsay. Olson did not testify that Moore said appellant was the person in the video, an out of court statement. He said only that after meeting with Moore, Olson arranged to meet with appellant. Thus, no out of court statement from Moore was offered for the purpose of establishing that appellant was in fact the person in the video. (See *People v. Ervine* (2009) 47 Cal.4th 745, 775 [out of court statement admissible for non-hearsay purpose of showing officer's reactions].)

Appellant concedes that Olson never offered any hearsay statement from Olson. (AOB 225.) Even so, he suggests that this Court extend Crawford to include not just testimonial hearsay, but also the testimony offered by witnesses subject to cross-examination when that witness testifies how he acted in response to some act or statement. *Crawford* held that the confrontation clause protects an accused against hearsay uttered by one who spoke as a witness bearing testimony. (*People v. Cage, supra*, 40 Cal.4th at p. 969, citing *Crawford v. Washington, supra*, 541 U.S. at p. 51.) Olson did not testify to any hearsay statement from Moore. *Crawford* is not implicated by inferences about what Olson and Moore discussed, or by out-of-court statements used for non-hearsay purposes, such as Olson's actions that followed viewing the video with Moore. (*People v. Riccardi, supra,* 54 Cal.4th at p. 801, fn. 21

Even if admission of Olson's testimony was error, it was harmless under either *Chapman v. California, supra,* 386 U.S. at page 24, or *People v. Watson, supra,* 46 Cal.2d at page 836. The challenged testimony simply

explained Olson's actions leading him to suspect appellant was the robber/shooter in the surveillance video. Given the strength of the evidence against appellant and the jury's focus on the surveillance video (XIII RT 2649-2667), the challenged testimony had no effect on the jury's verdict.

Accordingly, appellant's claim should be rejected.

VII. APPELLANT FORFEITED ANY CLAIM OF ERROR REGARDING HIS ABILITY TO CONFRONT OCHOA; OCHOA'S INVOCATION OF HER PRIVILEGE AGAINST SELF-INCRIMINATION WAS PROPER AND DID NOT IMPLICATE APPELLANT'S RIGHT TO CONFRONT HER ABOUT HER TESTIMONY; ANY ERROR WAS HARMLESS

Appellant argues that his right to effective cross examination was compromised when the court allowed Debra Ochoa to take the stand, and then invoke the Fifth Amendment privilege against self-incrimination. (AOB 231-261.) Not so.

A. Background

Prior to trial, appellant learned from Debra Ochoa's counsel that, because Ochoa was on felony probation or parole, she would assert her Fifth Amendment privilege against self-incrimination on questions about any firearm. (VIII RT 1754.) The prosecutor believed appellant obtained the revolver from Ochoa in Los Angeles. Appellant's trial counsel argued that it would inappropriate for the prosecutor to say, in the opening statements, that Ochoa will testify to anything at this point. (VIII RT 1754.) The prosecutor was aware that Ochoa would assert her privilege against self-incrimination, and stated that she would not mention Ochoa in the opening statement. (VIII RT 1755.) The prosecutor said she would ask Ochoa only non-incriminating questions, so Ochoa would have no call to assert her privilege against self-incrimination. (VIII RT 1755.)

During the prosecution's case-in-chief, Phillip Campbell testified that he lived in the Los Angeles area, and that he purchased two revolvers from his brother-in-law and then sold one to Feder in late 1995. (XI RT 2137-2140.) Feder testified that he bought a .357 Smith and Wesson revolver from Campbell, and then sold it to Ochoa when he was in Los Angeles. He said the recovered revolver looked identical to the revolver he sold to Ochoa. (XI RT 2127-2130.)

The court held a hearing outside the presence of the jury to determine whether Ochoa would invoke her privilege against self-incrimination. (XI RT 2178.) Ochoa testified that she had known appellant for about 14 years. (XI RT 2179.) Ochoa considered appellant a friend, and noted that appellant worked for her on many occasions. (XI RT 2179.) On cross-examination, appellant's trial counsel asked Ochoa: "Did you ever give, sell, furnish or provide [appellant] with a handgun?" (XI RT 2180.) Ochoa answered: "As a United States citizen, I refuse to answer on the ground that any question may tend or tend to believe, either side, to incriminate myself in violation of the Fifth Amendment." (XI RT 2180.) Appellant's trial counsel asked the court to instruct Ochoa to answer the question. (XI RT 2180.) The court declined, and asked, "Are you saying, then, [Ochoa] can't testify to the other stuff if she doesn't testify to this?" (XI RT 2181.) Appellant's trial counsel answered, "Yes." (XI RT 2181.)

The prosecutor argued that "there was a relationship between [] Ochoa and [appellant]" so she should be able to present evidence allowing an inference that appellant obtained the revolver from Ochoa. (XI RT 2183.) Appellant's trial counsel disagreed, noting that the testimonies of Campbell and Feder put the revolver in Ochoa's hands, and, because the prosecution refused to offer Ochoa a grant of immunity, the defense was

unable to cross-examine Ochoa. (XI RT 2183-2184.) Appellant moved to strike the testimonies of Campbell and Feder, due to the defense's inability to cross examine Ochoa about the gun. (XI RT 2184.) The court denied that motion, and also ruled that the prosecution could call Ochoa as a witness, but could not ask Ochoa about matters that she would assert her Fifth Amendment privilege. (XI RT 2184-2185.) The court noted that the defense was not foreclosed from calling Ochoa as a witness. (XI RT 2185.) The court explained that Ochoa, not the prosecution, was precluding the defense from putting on evidence directly linking her possession of the gun to appellant. (XI RT 2184, 2186.)

In the presence of the jury, Ochoa took the stand and only said that she had known appellant for about 14 years. (XI RT 2188-2189.) Appellant's trial counsel had no questions for Ochoa. (*Ibid.*)

B. Discussion

Preliminarily, to the extent that Ochoa's assertion of privilege violated appellant's right to confrontation, appellant forfeited that claim because he did not seek to compel her to invoke in front of the jury, and in fact failed to cross-examine her at all.[20] (*People v. Williams* (2008) 43 Cal.4th 584, 629.) Although the trial court did conduct a hearing to determine whether Ochoa would invoke, and, as part of that hearing, appellant suggested that she not be permitted to testify even about knowing appellant, appellant did not object that allowing her to testify at all violated his right to confrontation.

[20] Appellant did request that the trial court strike the testimony of Campbell and Feder, however, he does not seek review of that ruling here.

In any event, appellant identifies no error arising from the trial court's ruling. A defendant's rights to due process and to present a defense do not include a right to present to the jury a speculative, factually unfounded inference. (*People v. Mincey* (1992) 2 Cal.4th 408, 441.) "Allowing a witness to be put on the stand to have the witness exercise the privilege before the jury would only invite the jury to make an improper inference". (*People v. Frierson* (1991) 53 Cal.3d 730, 743.)

Evidence Code section 913, subdivision (a), prohibits the trial court and counsel from commenting on a witness's assertion of a privilege, and also provides that "the trier of fact may not draw any inference [from the assertion of a privilege] as to the credibility of the witness or as to any matter at issue in the proceeding." (*People v. Mincey, supra*, 2 Cal.4th at p. 441.) At the request of the adversely affected party, Evidence Code section 913, subdivision (b), requires the court to instruct the jury that it may not draw any inferences from the exercise of a privilege as to the credibility of a witness or as to any matter at issue in the proceeding. (*People v. Mincey, supra,* 2 Cal.4th at p. 441.) Here, the prosecutor asked Ochoa only whether she knew appellant, and if so, for how long. Appellant was not deprived of the opportunity or ability to test the truth of Ochoa's direct testimony, that she knew appellant for about 14 years. Moreover, the court did not preclude appellant from calling Ochoa as a witness calling Ochoa.

"[T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*United States v. Owens* (1988) 484 U.S. 554, 559, emphasis in original, citations omitted.) As in similar cases, this Court has long rejected claims

asserting that a trial court's exclusion of proffered evidence violated a defendant's federal constitutional rights to present a defense, to confront and cross-examine witnesses. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense." (*People v. Williams, supra,* 43 Cal.4th at p. 630, fn. 27, quoting *People v. Prince* (2007) 40 Cal.4th 1179, 1243.) There was no violation of appellant's right to confrontation.

Regardless, even if somehow Ochoa's assertion of her privilege against self-incrimination violated appellant's right to confrontation, any error was harmless under either standard. (*Chapman v. California, supra,* 386 U.S. at p. 24, or *People v. Watson, supra,* 46 Cal.2d at p. 836.) Evidence showing appellant to have been the robber/shooter was overwhelming. The inference to be drawn from the testimonies of Campbell and Feder that appellant possessed the revolver was corroborated by other evidence, mainly the testimony of Felix and Daniel (X RT 2081-2087; XI RT 2118-2121).

Appellant's claim should be rejected.

VIII. APPELLANT FORFEITED ANY CLAIM OF ERROR REGARDING THE GUILT PHASE ADMISSION OF THE VIDEO; THE VIDEO WAS PROPERLY ADMITTED IN BOTH THE GUILT AND PENALTY PHASES

Appellant argues that the court abused its discretion in not redacting the victim's dying screams and moans from the audio of the store's surveillance tape. (AOB 242-256.) Not so.

A. The Record

Prior to trial, appellant moved to exclude the "enhanced" audio-video tape from the store's surveillance system on grounds of *Kelly/Frye*[21] and Evidence Code section 352. (II CT 562-568; see II RT 77-81.) After the court and the parties watched the original and enhanced videos, appellant withdrew his *Kelly/Frye* objection. (II RT 121-135.) Appellant maintained that the audio of the tape should be excluded under Evidence Code section 352, and said the audio quality was "extremely poor," and there were "very unpleasant" noises made by the victim after being shot. (II RT 135-136.) After the court and the parties heard an audio tape of the surveillance video,[22] appellant renewed his objection. Appellant's trial counsel described the sounds made by the victim after being shot as "bone chilling, blood curdling," and argued the audio tape was "extremely prejudicial" and not "really probative" in the guilt phase. (II RT 141-142.) The court expressed a tentative ruling that the audio was relevant and its probative value outweighed the prejudice. (II RT 144-145.) Appellant clarified that he was objecting only to the "small portion that record[ed] the victim's dying." (II RT 144-145.) The court took the matter under submission. (II RT 146.)

---

[21] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

[22] At that time, the prosecutor informed the court that the audio from the store surveillance tape could only be heard when the tape was played on the store's machine. The audio tape the court and the parties heard was a recording, made by Detective Olson with a cassette player/recorder, of the audio while the surveillance video tape was playing on the store's machine. (II RT 135.)

Subsequently, the prosecutor informed the court that she had obtained a videotape player capable of playing the video and audio from the store surveillance tape at the same time and sought to play videotape, with the audio, during the prosecution's opening statement, but the court denied the request. (VIII RT 1752-1754.)

During the direct examination of the store owner Henry Benjamin, the prosecutor laid the foundation for the surveillance video and played the tape, showing four views on the television screen, each view from one of four different camera angles.[23] (IX RT 1886-1890.) The prosecutor then restarted the surveillance tape, this time showing only one camera angle on the full screen. (IX RT 1890-1891.) The prosecutor restarted the surveillance tape again, seeking to show another camera angle. (IX RT 1891.) In each of these viewings, the video began a few moments before the shooter entered the store and continued until police arrived with the exception of a two minute period after the shooter left and just before Faugh entered. (See IV CT 1024-1025; XIII RT 2638; see also XVII RT 3511.) This two-minute portion was mainly silent, except for moaning sounds coming from Francis before he died. (See IV CT 1024-1025; XIII RT 2638; see also XVII RT 3511.)

After the third viewing during the examination of Benjamin, appellant asked for a side bar and the following colloquy took place:

> [DEFENSE COUNSEL]: You really want to put all these people through this?
>
> [PROSECUTOR]: I want to be able to show these other two angles.

---

[23] The prosecutor used this four-view screen to orient the jurors to the store, and to the various positions of the cameras. It is unclear whether the shooting and the dying sounds were shown in the four-view screen.

[¶] . . . [¶]

[PROSECUTOR]: I want to be able to show these other two angles, so they are clearly visible. And each time you hear the speech, it's clearer.

[DEFENSE COUNSEL]: What we could do is maybe suggest that if any of the family members wish to leave before the next –

THE COURT: Why don't we take a recess. You can tell them outside.

[PROSECUTOR]: We could do that.

THE COURT: I don't want to throw them out because of the outbursts. They might have not seen this before. Maybe we can take a short recess. Then you can explain if you don't want to be in.

[DEFENSE COUNSEL]: Not going to get any better.

THE COURT: Not going to get any better. [¶] Is that his mother?

[PROSECUTOR]: I don't think his mother has been here yet. I know his father has. It's his mother-in-law.

THE COURT: Mother-in-law.

[DEFENSE COUNSEL]: I think that's right.

[PROSECUTOR]: Recess?

THE COURT: Calm them down a little bit.

[PROSECUTOR]: Yeah. Yeah. I think that's probably good.

(IX RT 1892-1893.)

After the recess, the prosecutor played the video again from a second camera angle, and then from a third camera angle. (IX RT 1893-1894.)

After the examination of Benjamin, the jurors were recessed for the day. (IX RT 1895-1896.) The court then asked the prosecutor to explain for the record why she played the video three times:

> THE COURT: Why don't we put on the record, [prosecutor], the reasons why – I am unclear why you needed to play that three times. I know you did because each one – there [are] four squares in this video, and you played three of them; is that correct?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: And each one showed something, number one, from a different perspective, visually different things and also the alleged robber from a different perspective. Certain ones were closer than others. Also the voice was clearer as you go through the video. So technically the third one, the voice was clearer at the time and it was a close-up shot. [¶] I know you had a reason when you talked about it at side bar. [¶] Could you just make it clear on the record?
>
> [PROSECUTOR]: Yes. The reason we wanted to do that was exactly for that reason, that each of the cameras show a different angle. We show all four at once. Obviously on the television they are much smaller, harder to see. [¶] So if we show one camera at a time full screen, then you are able to see more clearly. The audio is fairly good but muffled, and we have discovered that the more you listen to it, the [] clearer really it becomes, the second time you hear it, the third time you hear it. So if you hear it three times, it is much clearer, makes more sense than the first time you hear it.

(IX RT 1896-1897.)

During the examination of Richard Faugh, the prosecutor played the video with the four views, starting the video a few seconds before Faugh entered the store and ending when responding officers escorted Faugh out of the store. (X RT 1918-1921.)

During the penalty phase, the prosecutor sought to play the entire store surveillance tape, audio and video, including the two minutes of silence/moaning that had been redacted in the guilt phase, during closing argument. (IV CT 1022-1025; XVII RT 3511; see also XV RT 3098.) The court ruled that the prosecutor could not use the store surveillance tape in her closing argument unless the tape was in evidence for the penalty phase, and offered to allow the prosecutor to reopen her penalty case. (XVII RT 3511-3512.) Appellant objected to allowing the prosecutor to reopen, and objected to playing the two-minute portion containing Francis's moaning. (XVII RT 3512.) The court responded: "[T]his is the penalty phase of the trial though. [¶] [T]he victim's life, the last minutes of it [] are relevant in this portion of the case." (XVII RT 3512.) The court remarked, "I can't restrict the People from arguing the evidence." (XVII RT 3513.) The court stated that it would allow the prosecutor to play the full tape twice, once to enter it into evidence and a second time during closing argument. (XVII RT 3513.) Appellant's trial counsel objected, "I think twice is too much." (XVII RT 3513.) The court then gave counsel the following option:

> It either comes in in their penalty phase evidence and they can show it to the jury, if you're going to require that before they argue it, or we'll just make the whole tape with those two minutes on it an exhibit and then let them argue it in their final argument.

(XVII RT 3513-3514.) Appellant's trial counsel commented, "I think once is enough," and stipulated to the admission of the entire surveillance tape. (XVII RT 3514.)

During the prosecutor's closing argument in the penalty phase, the surveillance tape, including the two-minute portion with the moaning sounds, was played for the jury. (XVIII RT 3754.)

B. Discussion

Appellant contends that admission of the audio/video tape with the voice of Simon Francis when he was shot was unduly prejudicial, and that the trial court erred by admitting it in both the guilt and penalty phases. Appellant forfeited his objection during the guilt phase, and, in any event, fails to show that the trial court abused its discretion in admitting the tape in either phase.

Appellant has forfeited any claim of error regarding the guilt phase admission of the surveillance video's audio and visual record of appellant shooting Francis and any sounds Francis made after he was shot. In *People v. Morris* (1991) 53 Cal.3d 152 (disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1), the defendant, before trial, moved to exclude evidence. (*People v. Morris, supra*, 53 Cal.3d at p. 195.) The trial court held a hearing on the motion, but it made no ruling, and, when the evidence was later offered at trial, no objection was interposed. (*Ibid.*) This Court held that the defendant had forfeited his objection by failing to "press" for a ruling and failing to object when the evidence was introduced at trial thereby "depriving the trial court of the opportunity to correct potential error." (*Ibid.*) In *People v. Hayes* (1990) 52 Cal.3d 577, the defendant objected to certain evidence under Evidence Code section 1101. Although Evidence Code section 352 was mentioned by the trial court, the defendant never requested a ruling on an Evidence Code section 352 objection, and the trial court never made such a ruling. (*Id.* at p. 618.) Again, this Court found that "counsel's failure to obtain a ruling is fatal to defendant's appellate contention, for a party objecting to the admission of evidence must press for an actual ruling or the point is not preserved for appeal." (*Id.* at p. 619.)

Here, before trial, the court had issued a tentative ruling that the video was admissible. (II RT 144-145.) Appellant clarified that he was objecting only to the portion of the tape that included noises Francis made while dying, contending that the sounds were not necessary to prove the shots were fired or that Francis had died. (*Ibid.*) The court took the matter under submission. (II RT 146.) During the prosecutor's direct examination of Benjamin, the prosecutor played the tape three times through the shooting and appellant's exit from the store without any objection or request for a redaction. (IX RT 1892; see XIII RT 2638, XVII RT 3511; IV CT 1024-1025.) After the third viewing, at appellant's request, a side-bar conference occurred. But appellant did not object that the tape had been played, was about to be played again, or request that any sounds Francis had made be redacted. (IX RT 1892; see IX Rt 1886-1981, and People's Exh. 11.) Without objection, the tape was played again. (IX RT 1893.) Because appellant failed to object or otherwise seek a final ruling on his motion to exclude or redact the tape during the guilt phase, any claim on appeal is forfeited. (*People v. Hayes, supra*, 52 Cal.3d at p. 618.)

Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The "undue prejudice" referred to in Evidence Code section 352 "is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121, internal citations omitted.) Evidence should be

excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose. (*Ibid.*) This Court "evaluate[s] rulings under Evidence Code section 352 using the abuse of discretion standard." (*People v. Riccardi, supra,* 54 Cal.4th at p. 809; *People v. Mills, supra,* 48 Cal.4th at p. 191.)

Here, the trial court did not abuse its discretion in allowing the prosecution to play the store surveillance audio-video tape in either the guilt or penalty phases.

In the guilt phase, the portion of the surveillance video played for the jury was edited to exclude the two minutes of moaning sounds coming from Simon Francis as he lay on the floor dying, after the shooting but before the arrival of Faugh. (XIII RT 2638, XVII RT 3511; IV CT 1024-1025.) Rather, the surveillance video played during the testimony of Benjamin and Faugh, showed appellant entering the store, forcing Francis to open the cash drawer, to lie on the floor, shooting Francis twice, and leaving the store followed immediately by two distinct gunshot sounds. (IX RT 1885-1891; X RT 1926-1936, 1951-1959, 2026; XII RT 2396-2398.)

The surveillance tape, both its audio and video portions, was material to the prosecution's case. Identity was the sole issue in the guilt phase. The size and the voice of the robber/shooter, from the tape, was an important factor. The four camera angles gave the jury different perspectives of the robbery and shooting, and of the shooter. Seeing

appellant shoot Francis, and hearing any sounds Francis made as appellant shot him twice in the back, was horrific. But, as this Court has stressed, evidence that is emotional is not necessarily inflammatory. That is, merely because evidence may evoke emotions does not mean that the evidence will inflame the jurors and motivate them to use the information to punish rather than to logically evaluate the point upon which it is relevant. (*People v. Scott, supra*, 52 Cal.4th at p. 491; cf. *People v. Brady* (2010) 50 Cal.4th 547, 575 ["Emotional testimony is not necessarily inflammatory."].) Appellant fails to show that the trial court abused its discretion.

As to the penalty phase, the trial court's discretion to exclude evidence under Evidence Code section 352 is "much narrower . . . than at the guilt phase." (*People v. Bonilla* (2007) 41 Cal.4th 313, 354; see *People v. Jablonski* (2006) 37 Cal.4th 774, 834.) This Court explained:

> This is so for two reasons. On the one hand, because the "circumstances of the [capital] crime" are a statutorily relevant factor in the normative decision whether death is the appropriate penalty [], the prosecution is entitled at the penalty phase to show such circumstances in a bad moral light, including their viciousness and brutality. On the other hand, because the defendant has already been found guilty of the capital crime, the potential for prejudice on the issue of guilt is not present.

(*People v. Anderson* (2001) 25 Cal.4th 543, 591-592.)

Appellant shot Simon Francis twice in the back. The pain of those fatal injuries caused Francis to scream. Appellant left Francis on the floor to suffer and die, and after he exited the store he fired two more shots at a passing truck. These circumstances of the robbery and shooting were the basis for the death penalty charge. Because the determination of whether death is the appropriate penalty is moral and normative, the prosecution

was entitled to show the circumstances of the crime and play the entire store surveillance tape, including Francis's last moments after appellant shot him. (*People v. Anderson, supra*, 25 Cal.4th at pp. 591-592; *People v. Edwards* (2013) 57 Cal.4th 658, 755.)

Even if the trial court erred in not redacting Francis's dying sounds from the tape audio, the error was harmless. The video showed the shooting and the evidence identifying appellant as the person in the video were compelling. There is no reasonable probability that the jury would have reached a more favorable guilt phase verdict but for the audio of Francis's last moments as appellant shot him and left him to die. (*People v. Watson, supra,* 46 Cal.2d at p. 836; Evid. Code, § 353.)

As to the penalty phase, any error in admitting the surveillance video did not render appellant's penalty phase fundamentally unfair. (*People v. Edwards, supra*, 57 Cal.4th at p. 755.) The jury had seen the video several times during the guilt phase and was aware of what it showed, and, as evidence of the circumstances of the crime, specifically, appellant's act of killing Francis, the video was not evidence that would tend to invite a purely irrational response. (See *People v. Vines* (2011) 51 Cal.4th 830, 888-889.)

Appellant's claim should be rejected.

IX. THE TRIAL COURT PROPERLY ADMITTED REGINA ALSIP'S OPINION AND REPUTATION TESTIMONY CONCERNING KENNETH ALSIP; ANY ERROR WAS HARMLESS

Appellant argues that the court abused its discretion in allowing Regina Fay Alsip to give her opinion of Kenneth Alsip's veracity, and to testify about Kenneth's reputation for untruthfulness among those who knew him. (AOB 257-261.) The trial court properly admitted Regina's testimony; assuming error, there was no miscarriage of justice.

A. The Record

The defense called Kenneth Alsip as a witness on appellant's behalf. (XII RT 2273-2284.) Kenneth testified that while in juvenile hall, he and Tory were housed in the cell for about a week or two. (XII RT 2274-2275.) According to Kenneth, Tory bragged, "I did commit that murder [at Quik Stop], and the person that I'm going to let fall for me did not commit it." (XII RT 2275; see also XII RT 2285-2308 [testimony of defense private investigator Joe Maxwell, who interviewed Kenneth Alsip].)

In rebuttal, the prosecutor called Regina, Kenneth's mother. (XII RT 2472-2478.) The prosecutor asked Regina Alsip's opinion of Kenneth's veracity, and about Kenneth's reputation for untruthfulness among those who knew him:

Q. Ms. Alsip, are you the mother of Kenneth Alsip?

A. Yes, I am.

Q. And how old is Kenneth?

A. Nineteen.

Q. Did you raise him?

A. Yeah, mostly until he was, like, 13.

Q. And have you continued to have contact with him as he has become an adult?

A. Only, like, in juvenile hall and prison.

[¶] . . . [¶]

Q. Ma'am, you have raised him until he was 13, correct?

A. Uh-huh (yes).

Q. Since that time, you continued to have contact with him?

A. Uh-huh (yes).

Q. And how frequently do you have contact with him?

A. Not very often.

Q. When's the last time you have contact with him?

A. Probably about a week and a half, two weeks ago.

Q. Where did that occur?

A. Visiting at the jail over there – whoops. At the jail over here, before he goes to prison.

Q. Has he been in custody before that?

A. About a month before that (affirmative nod).

Q. And do you visit him when he is in jail?

A. Yes, I do.

Q. Do you visit him when he is in prison?

A. No, I haven't.

Q. Just in jail.

A. Uh-huh (yes).

Q. And when he is out of jail, do you see him from time to time?

A. Just whenever he wants to come over and see me, and I go see him when I got the chance.

Q. Do you feel that you know him well?

A. Not real well, but I know him well.

[¶] . . . [¶]

Q. In what way has he changed since he was younger?

A. I don't know. I guess he got older on me. I hardly ever see him, so not really sure.

Q. Do you also know people who know him?

A. Yes.

Q. Does that include family members?

A. Yes.

Q. Friends?

A. I don't know very many of his friends.

Q. How about neighbors?

A. No, I don't know any of his neighbors either.

(XII RT 2472-2474.)

The prosecutor then asked Regina for her opinion of Kenneth's veracity: "Based upon your contact with [Kenneth] as you raised him and also as he became an adult and based upon your contact with other family members who deal with him, do you have an opinion as to whether he is a truthful person or not?" (XII RT 2474.) The court overruled appellant's objection to a lack of foundation, and Regina answered: "Yeah, and then no. I mean, you know, he has been known to lie and – but most of the time, you know, [] he's truthful as far as I am concerned." (XII RT 2475.) The court sought clarification, "So sometimes he is truthful; sometimes he is not truthful. Is that what you are trying to say?" (XII RT 2475.) Regina replied, "Yeah, exactly." (XII RT 2475.) The prosecutor asked Regina whether she knew of instances in which Kenneth had lied to gain something for himself. (XII RT 2476.) Regina answered, "Yes. Like, with his father or something like that." (See XII RT 2476.)

The prosecutor asked about Regina's knowledge of Kenneth's reputation for untruthfulness among those who knew him: "Based upon your contact with family members who know him and deal with him, does your son have a reputation for whether he is a truthful person or not a truthful person." (XII RT 2476.) Regina answered, "I don't think most of them would trust him to tell them the truth." (XII RT 2476.) The court found Regina's answer to be nonresponsive, and asked Regina, "Amongst those who know him, does he have a reputation for being truthful or not." (XII RT 2477.) Regina answered, "They would probably think that he wasn't truthful." (See XII RT 2477.)

B. Discussion

The opinion of a lay witness concerning the character of another witness for honesty is admissible if the lay witness opinion is based on the personal observation and knowledge of the witness offering it. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1305-1306; Evid. Code, §§ 702, 780, 800, 1100, 1102.) A witness who has known a person for a reasonable length of time may be qualified to render an opinion if it is based on personal observation and knowledge. (*People v. McAlpin, supra,* 53 Cal.3d at pp. 1305-1306; see *People v. Sergill* (1982) 138 Cal.App.3d 34, 39.) Lay opinion testimony about the veracity of another witness is inadmissible because, with limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. (*People v. Melton* (1988) 44 Cal.3d 713, 744.) The trial court's ruling to admit opinion or reputation evidence is reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

Here, over appellant's foundation objection, the trial court properly admitted Regina's opinion of Kenneth's veracity, and her testimony of Kenneth's reputation for untruthfulness amongst those who knew him.

Regina is Kenneth's mother, and she raised Kenneth until he was about 13 years of age. Regina testified that she knew her son well. Although Kenneth had not resided with her for five or six years, she had continued to have contact with him. Based on her testimony, there was evidence that Regina had personal knowledge of Kenneth over a reasonable length of time sufficient to render an opinion, and the trial court did not abuse its discretion in ruling that she was qualified to do so. (*People v. McAlpin, supra,* 53 Cal.3d at pp. 1305-1306.)

As for Kenneth's reputation for untruthfulness, Regina knew family members that knew him. Contrary to appellant's assertion (AOB 259), reputation evidence is not limited to people where Kenneth resided or who Kenneth befriended. The issue is not the specific community to the exclusion of some other community, but whether a general reputation exists within a community, and that the witness has sufficient knowledge of it. (*People v. Cobb* (1955) 45 Cal.2d 158, 164; see *People v. Workman* (1955) 136 Cal.App.2d 898, 902-903.) Regina testified that she had knowledge of other family members and of Kenneth's reputation among those in the family. The trial court did not abuse its discretion in allowing Regina to testify over appellant's foundation objection as to Kenneth's reputation for untruthfulness among family members.

Even if the court erred, any error was harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836; Evid. Code, § 353.) Notwithstanding Kenneth's testimony that Tory claimed to have committed the murder, he could not have been the shooter in the surveillance tape. The shooter towered over Francis, who was known to be six feet tall. (See X RT 2026.) Tory was five feet, ten inches, in March of 1997. (XII RT 2463.) Appellant was six feet, seven inches, at the time of trial (XVII RT 3473), a height far closer to

the estimated height range of the shooter based on the surveillance video. Nick Lauderbaugh testified that appellant admitted that he had shot Francis. (X RT 2236.) The black jacket worn by the shooter belonging to Nathan, but in appellant's possession at the time of the murder. (XI RT 2219-2222, 2225-2226.) The gun was traced from where Nathan and Tory buried it after receiving it from Rose, back to Los Angeles, to a person who had known appellant for about 14 years. (XI RT 2127-2130, 2137-2140, 2188-2189.) Appellant had visited Los Angeles a few weeks prior to the shooting. (XI RT 2224.) Felix and Daniel established that appellant had the revolver after the shooting. (X RT 2081-2087; XI RT 2118-2121.) It is not reasonably probable that a verdict more favorable to appellant would have been reached had the trial court excluded Regina's opinion and reputation testimony regarding Kenneth's veracity. There was no miscarriage of justice.

Appellant's claim should be rejected.

X. THE COURT PROPERLY DECLINED TO GIVE THE DEFENSE'S REQUESTED CAUTIONARY INSTRUCTION ON EVALUATING THE TESTIMONY OF A DRUG ADDICT WITNESS

Appellant argues that the court erred in refusing a defense requested cautionary instruction on the testimony of drug addict witnesses. (AOB 262-266.) Not so.

A. The Record

Several prosecution witnesses, Tory, Robert Dircks, Daniel Herrera, and Gary Wolford, admitted using or being under the influence of drugs at the time of certain events described in their testimonies. (AOB 262-263.)

The defense requested the following jury instruction:

> The testimony of a drug addict must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs. [¶] The jury must determine whether the testimony of the drug addict has been affected by the drug use or the need to obtain drugs.

(IV CT 1040; XII RT 2337.) The court asked appellant's trial counsel, "Where does that come from?" (XII RT 2337.) Counsel replied "No California authority [] endorses the cautionary admonition for the testimony of a drug addict, however, several federal circuit courts have spoken approvingly of an instruction." (XII RT 2337.) The court then inquired, "What's the definition of a 'drug addict'?" (XII RT 2337.) Counsel remarked, "Somebody who was using what I thought was an awful lot." (XII RT 2337.) The court refused the instruction as an incorrect statement of law, explaining:

> I am not prepared to give this instruction, because, first of all, a drug addict might not be under the influence at the time the testimony is given. And I haven't seen any scientific evidence that the testimony of anybody who might be a drug addict but not using at the time is any worse than anybody else is [SIC].

(XII RT 2337-2338.)

B. Discussion

Appellant contends that it is error for a trial court to refuse to instruct the jury that the testimony of an addict-informant is inherently suspect and should be weighed with great caution. (AOB 263-264.)

A trial court "may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing, or if it is not supported by substantial evidence." (*People v. Moon* (2005) 37 Cal.4th 1, 30; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105.) The court "must refuse instructions that

highlight specific evidence." (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Such instructions "[invite] the jury to draw inferences favorable to one of the parties from specified items of evidence," [and are] considered "argumentative," and therefore should not be given. [Citations.] (*Ibid.*) The standard instructions on evaluating the credibility of witnesses are adequate to inform the jurors that they "may consider anything which has a tendency to prove or disprove the truthfulness of the testimony of the witness, including [] [t]he existence or nonexistence of a bias, interest, or other motive." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021-1022; CALJIC No. 2.20; see IV CT 925; XII RT 2490.)

Here, the trial court did not err in refusing a cautionary instruction on the testimony of a drug addict witness. As the trial court noted, the evidence was not sufficient to support the requested cautionary instruction on the testimony of a drug addict. As this Court has recognized, drug addiction is a "medical fact" and involves much more than just repeated use. (See *People v. Victor* (1965) 62 Cal.2d 280, 301-302.) The proposed instruction on evaluating the testimony of a drug user or addict would have been argumentative, highlighting the drug use or addiction of the witnesses, and calling for the jury to examine the testimony of these witnesses with "greater care" than a non-drug-using witness. (See *People v. Earp, supra,* 20 Cal.4th at p. 886.)

Regardless, the trial court's refusal to provide the proposed cautionary instruction was harmless, whether under the standard of review articulated in *Chapman v. California, supra,* 386 U.S. at page 24, or *People v. Watson, supra,* 46 Cal.2d at page 836. At appellant's request, the jury was properly instructed with a modified standard instruction on evaluating witness credibility as follows:

> In determining the credibility of a witness, you may consider the witness's capacity to hear or see that about which the witness testified and the witness's ability to recollect or to relate such matters. [¶] Specifically, in this regard, you may consider whether any witness was under the influence of alcohol and drugs or other intoxicants at the time the witness testified. If you believe that any witness was under the influence of alcohol, drugs or other intoxicants at the time he or she testified, this factor may be considered by you in judging the credibility of the witness.

(XIII RT 2559; IV CT 1044.) Appellant's trial counsel was able to highlight, during cross-examination and in closing arguments, the drug or alcohol use of the prosecution witnesses. (X RT 2061-2063; XI RT 2113-2116, 2121-2126; XII RT 2469-2471; XIII RT 2593-2595, 2600; cf. *United States v. Ochoa-Sanchez* (9th Cir. 1982) 676 F.2d 1283, 1289 [addict instruction unnecessary when addiction disputed or when the defense adequately cross-examines the witness about the addiction."].) Finally, the evidence showing that appellant was the shooter, including, specifically, the surveillance video, was quite strong.

Appellant's proposed instruction was argumentative and properly refused. Even if the court's rejection of appellant's argumentative instruction was error, there is no reasonable probability that appellant would have obtained a more favorable result but for the court's failure to give his proposed instruction.

Appellant's claim should be rejected.

XI. APPELLANT INVITED ANY ERROR IN FOREGOING AN INSTRUCTION ON GROSSLY NEGLIGENT DISCHARGE OF A FIREARM AS A LESSER INCLUDED OFFENSE TO DISCHARGING A FIREARM AT AN OCCUPIED VEHICLE; THERE WAS NOT SUBSTANTIAL EVIDENCE TO WARRANT THE LESSER OFFENSE INSTRUCTION; ANY ERROR WAS HARMLESS

Appellant argues that the court had a sua sponte duty to instruct the jury on the offense of discharging a firearm in a grossly negligent manner (§ 246.3), as a lesser included offense of discharging a firearm at an occupied vehicle (§ 246). (AOB 267-272.) Not so.

An uncharged offense is included in a greater charged offense if either (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), or (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). (*People v. Parson* (2008) 44 Cal.4th 332, 348-349.)

> The trial court must instruct on lesser offenses necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. On the other hand, if there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given.

(*People v. Kraft* (2000) 23 Cal.4th 978, 1063; see *People v. Leal* (2009) 180 Cal.App.4th 782, 792 ["The trial court does not have a duty to instruct on a lesser included offense if there is no substantial evidence in

support of it."].) Discharging a firearm in a grossly negligent manner (§ 246.3, subdivision (a))[24] "is a necessarily included lesser offense of" discharging a firearm at an occupied vehicle (§ 246). (*People v. Ramirez* (2009) 45 Cal.4th 980, 990.)

Although a court must generally instruct the jury on lesser included offenses whenever the evidence warrants the instructions, whether or not the parties request it, "a defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence." (*People v. Horning* (2004) 34 Cal.4th 871, 904-905.) In addition to the capital murder of Francis, the prosecutor charged appellant with discharging a firearm at an occupied vehicle (§ 246).[25] (I CT 189-193.) Below, the prosecution and defense agreed that there was no lesser offense that the court needed to instruct the jury on. (See XII RT 2480.) Appellant robbed the store and shot the clerk twice in the back. He then ran out of the store. Seeing a truck pass, appellant fired two shots with the revolver. According to Perry, appellant ran toward his truck. (IX RT 18972-1873.)

---

[24] Section 246.3, subdivision (a), provides, in part:

> [A]ny person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense . . ..

[25] Section 246 provides, in part:

> Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, [], or inhabited camper, [], is guilty of a felony . . ..

According to Tory, appellant fired at the passing truck. And when Tory asked appellant why he fired at the truck, appellant answered that he did not want any witnesses. (X RT 2059-2060, 2073.) There was a fresh dent just below the truck's passenger side door. (IX RT 1835, 1844-1845, 1868-1869.) There was no evidence to support a lesser included offense of discharging a firearm in a grossly negligent manner (§ 246.3). Even if there were, appellant's agreement that the trial court did not need to give such an instruction bars review.

Appellant argues that "Tory had significant credibility problems," and that the dent to Perry's truck "may or may not have resulted from being struck with a bullet." (AOB 268.) He suggests the possibility that he discharged the revolver with the intent to scare, but not the intent to strike Perry or Perry's truck. (AOB 269.) Appellant fails to establish error or substantial evidence that the discharge was negligent rather than intentional. There was no evidence that appellant fired up into the air or away from the truck. By willfully shooting at the truck, appellant violated section 246, not section 246.3, whether or not the bullet actually hit the truck. (Cf. *People v. Overman* (2005) 126 Cal.App.4th 1344, 1361 ["[S]ection 246 is violated when a defendant intentionally discharges a firearm either directly at a proscribed target"].)

In any event, the failure to instruct on lesser included offenses is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.' [Citations.]" (*People v. Blair* (2005) 36 Cal.4th 686, 747.) The jury's finding that appellant willfully shot at Perry's occupied truck established that the jury necessarily determined that his discharge of the

gun was not merely grossly negligent; so the omission of the grossly negligent discharge instruction was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; see, e.g., *People v. Elliot* (2005) 37 Cal.4th 453, 475.)

Appellant's claim should be rejected.

XII. THE TRIAL PROSECUTOR DID NOT TRIVIALIZE THE REASONABLE DOUBT STANDARD

Appellant argues that the trial prosecutor trivialized the reasonable doubt standard during his closing comments. (AOB 273-295.) Not so.

A. The Record

Prior to counsels' closing arguments, the court instructed the jury:

> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(XII RT 2495; IV CT 1135 [CALJIC No. 2.90]; see § 1096.)

During closing argument, the prosecutor said:

> You have got an instruction about reasonable doubt. The defense talked about it a little bit, and the judge also gave you an instruction that talked about reasonable doubt. Reasonable doubt is not all possible doubt. It has to be based on reason.
>
> If I take this quarter and flip it up in the air over a hard surface, it's possible it could land on heads or it's possible it could land on tails. It's reasonable either way. It's reasonable because it's based on physics, logic and reason.
>
> But if I flip this coin up in the air and expected it to land smack dab on its side and stay standing still, is it possible? Sure, it's possible. Anything is possible, but is it reasonable?

(XII RT 2617.) Appellant's trial counsel objected. The court found "[no] problem in the argument." (XII RT 2618; see also XII RT 2631.)

B. Discussion

It is misconduct for a prosecutor to misstate the law during argument. (*People v. Huggins* (2006) 38 Cal.4th 175, 253, fn. 21.) It is improper for the prosecutor to misstate the law, particularly when the misstatement attempts "to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)

> Where, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Thomas* (2012) 53 Cal.4th 771, 797.) A court does "not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Brown* (2003) 31 Cal.4th 518, 553-554; see *Boyde v. California* (1990) 494 U.S. 370, 385.)

Here, the trial prosecutor did not trivialize the reasonable doubt standard, and the jury would not have understood her remarks as suggesting the reasonable doubt standard required no more certainty of guilt than a coin flip. The trial prosecutor simply provided an example of a possible or imaginary, but unreasonable, occurrence, a flipped coin landing and resting on its edge. The prosecutor did not attempt to quantify the reasonable doubt standard, nor did she suggest that reasonable doubt was the standard people used in making everyday ordinary decisions in their lives. The prosecutor was merely stressing that doubt of guilt should be reasonable, not simply possible or imaginary. The trial court noted that the prosecutor did not complete his argument with the coin flip imagery, and that the jury would have the instructions on reasonable doubt. (XIII RT 2631.)

In any event, even if the prosecutor's comments could have been construed as trivializing the reasonable doubt standard, any misconduct was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Mendoza* (2007) 42 Cal.4th 686, 703 [prosecutor's misstatement of law during argument evaluated or prejudice].).) The court properly instructed the jury on "reasonable doubt." (XII RT 2495; IV RT 1135.) Even though the trial court did not sustain appellant's objection, having been properly instructed, the jury was impliedly directed by the court to rely on the instructions as definitive statements of the law. (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 703.) When an argument runs counter to the instructions, jurors are presumed to follow the instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

Further, the evidence against appellant was strong. The surveillance video shows a tall man enter the store and kill Francis. The shooter was wearing a jacket linked to appellant. The shooter used a gun linked to appellant. Appellant made statements and admissions to Tory regarding his intent prior to the robbery and murder of Francis, and admissions afterward about both Francis's murder and the shooting at Perry's truck.

Because the jury was properly instructed, and is presumed to have followed the instructions, the prosecutor's brief and incomplete remarks on coin flips were harmless beyond a reasonable doubt. Moreover, the evidence against appellant was quite strong.

Appellant's claim should be rejected.

XIII. APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHT TO BE PRESENT; ANY STATUTORY ERROR IN ACCEPTING THAT WAIVER WAS HARMLESS

Appellant argues that the court violated his right to be personally present at a critical phase of the trial. (AOB 296-315.) Not so. There was no violation of his constitutional right to be present. Any statutory violation arising from appellant's absence was harmless.

A. The Record

On Thursday April 8, 1999, following defense counsel's direct examination of appellant's mother, Bertha Bell-Udeze, counsel asked to take a short break to get a tissue. (XV RT 3071.) The court noted that after Bell-Udeze finished her testimony, appellant's trial counsel had a tear in his eye. (XV RT 3072.) As defense counsel was leaving the courtroom, the prosecutor indicated that she had no questions for Bell-Udeze. (XV RT 3070, 3073.) When the court asked Bell-Udeze to step down, Bell-Udeze "started crying, in loud sobbing tones." (XV RT 3073.) The court told the jurors to take a five-minute recess. (XV RT 3073.) Bell-Udeze continued crying as the jurors left. (XV RT 3037.)

As appellant's co-counsel helped Bell-Udeze down from the witness chair, appellant struck the counsel table with both hands and "started banging on the table." (XV RT 3073.) The court noted that appellant "started picking up the counsel table and then hitting the table and making noises." (XV RT 3074.) The court asked a bailiff about the incident, how long it lasted, and how many sheriff's deputies were required to subdue

appellant.[26] (XV RT 3074.) The bailiff responded that the incident lasted "[t]hree to five minutes," and that nine deputies were needed to subdue appellant and remove him from the courtroom. (XV RT 3074.) The court added that he was sure the jurors "heard something of the disturbance." (XV RT 3075.)

Appellant's trial counsel said, "I would like to know if [the jurors] discussed what was going on while they were in there." (XV RT 3075.) The court responded: "[I]f they heard the incident they might have been concerned about their own safety. . . . [¶] Whatever his outbursts are in the courtroom, he has to live with – . . .." (XV RT 3075.) Before moving on to discussing physical restraints on appellant, the court observed:

> There was an outburst in the courtroom. It's his action that provoked it. So whatever falls out from that, that's what happens. But took nine very strong people to subdue him.

(XV RT 3076.)

Appellant's trial counsel noted "there is an issue as to whether the District Attorney plans on . . . attempting to argue this [outburst] during argument." (XV RT 3086.) The court noted that "the incident didn't occur in front of the jurors," but the court was of the opinion that appellant's violent outburst in the courtroom may be admissible under section 190.3. (XV RT 3086-3087.) The court and the parties, without appellant present, then discussed penalty phase instructions. (XV RT 3089-3096.)

The next day, Friday April 9, 1999, appellant appeared in court in a wheelchair and wearing jail clothes. He was restrained by chains and wore a stun belt. (XVI RT 3104.) Appellant's trial counsel informed the court:

---

[26] The judge explained that for his safety, pursuant to practices and policies of the court, he left the courtroom while the sheriff's deputies were in the process of subduing appellant. (XV RT 3074-3075.)

> I had a conversation with [appellant] just a few minutes ago. [H]e tells me that he's having severe pains in his back and his legs and he's – doesn't appear to me to be very alert and responsive at this time. And my concern is that he is not going to be able to effectively assist in his own defense at this point today because of the injuries that he may or may not have received yesterday.
>
> I was a witness to the entire incident, and I understand why the deputies did what they did, but he was hit pretty hard quite a few times. And so it appears to me there may be a reasonable basis for him having pain that would preclude him from being able to go through the trial today.
>
> The alternative would be to exclude him from the trial but I think that can't be done under the case law unless it appears that he's going to disrupt the courtroom. He's indicated to me that he won't.

(XVI RT 3102.)

The court responded that "[appellant] said that before and he apologized for the first incident during the guilt phase . . .."[27] (XVI RT 3103.) The court continued:

> I really don't want to proceed without him being present. I like him to be present. . . . I don't want to exclude him from the courtroom if it's not necessary, if he can remain calm throughout the proceedings, ... [T]he fact that he decided not to wear his regular suit that he's been wearing is one indication of not – generally it's the defendant that wants to be dressed in civilian type clothes. That's one indication of uncooperativeness right there, I suppose, although it's his choice.

(XVI RT 3103.)

---

[27] During Nick Lauderbaugh's testimony in the guilt phase of trial, appellant had an outburst in open court. (See XI RT 2233-2235.)

An off the record discussion between counsel and appellant occurred, after which counsel informed the court, "I think he feels that the suit was pretty messed up from yesterday's scuffle." (XVI RT 3103.) The court remarked, "Okay. You could get him some other clothes for Monday." (XVI RT 3104.) The court then asked why appellant was in a wheelchair. (XVI RT 3104.) At trial counsel's direction, appellant answered, "Can't walk. My right leg is messed up pretty bad. . . . [A]nd my back and my neck." (XVI RT 3104.) The court then said, "if you [defense counsel] don't think he's alert enough to proceed, then I don't want to jeopardize things in that respect." (XVI RT 3104.)

Appellant's trial counsel stated, "And I don't want the jury to see him in these clothes." (XVI RT 3104.) The court responded, "They know he's in custody. [¶] You got to expect that." (XVI RT 3104.) The following colloquy occurred:

> [DEFENSE COUNSEL]: Well, I think that the case law is that they shouldn't.
>
> THE COURT: Well, [] he's the one that disrupted things yesterday. That's – if his suit is messed up, it's his own fault. You could have had clothes for him today if he needed a different suit. I'm not inclined to continue the matter for that reason.
>
> [DEFENSE COUNSEL]: I understand that. He seems pretty alert to me, he's responding –
>
> (Discussion off the record between defendant and counsel.)
>
> THE COURT: Plus you have your witness.
>
> [DEFENSE COUNSEL]: I am mindful of that.
>
> THE COURT: That's what is incredible to me, this whole thing occurred when you're putting on your case. . . . It's the penalty phase of his own trial. This is the time to not be disruptive and to let you put your case on . . ..

[DEFENSE COUNSEL]: Well, Your Honor, I'm mindful of that and I'm also mindful of the fact that I have witnesses who have traveled here at great expense.

[¶] . . . [¶]

[DEFENSE COUNSEL]: But, [], I also have an ethical duty to myself and the client and the court to not proceed if I feel that he's incapable of assisting in his own defense or if he's just not aware of what's going on.

THE COURT: Well, you haven't had much time to talk to him.

[DEFENSE COUNSEL]: I haven't.

THE COURT: You want to take a few more minutes?

[DEFENSE COUNSEL]: I would like to take a few more minutes.

THE COURT: And discuss it with him. It's to his advantage, I would think, since you have your psychologist here today –

[DEFENSE COUNSEL]: That's correct.

THE COURT: – to try to proceed.

[DEFENSE COUNSEL]: We will have two people here. So yes.

(XVI RT 3105-3106.) There was then a recess in the proceedings.

(XVI RT 3106.)

After the recess, appellant's trial counsel stated:

[Appellant] does not want to be here today. He wants to go back to his cell. He's asked me to – could he please go back to his cell. He understands that there will be testimony. He's willing to not be here. I told him what the testimony was going to be.

I believe that his presence will not be required for me to effectively present the testimony that I'm going to be presenting and any redirect or any other things I have to do today in court.

> I think [appellant's] physical condition is such that he's going to be in pain, probably making some noise from having pain, moving around, which would distract me and disrupt the courtroom. Therefore, I think that the court can make a finding that under the case law that he can be excluded for that reason.
>
> I would be willing to waive any other irregularities that the court feels would be appropriate.

(XVI RT 3106-3107.) The court remarked:

> Well, the bailiff checked with the nurse over there – it's all hearsay, from the bailiff, but he checked with the nurse and the nurse said she checked him last night and this morning and he was fine.

(XVI RT 3107.) Appellant's trial counsel replied:

> I don't know anything about that. I can just tell you that based on my observations of what happened yesterday, if it were me I wouldn't – I would be in pieces. So I can certainly – I think there's a basis for what [appellant] is reporting to me as his condition. I think it's credible, certainly.
>
> And, [], that's – I certainly – I believe that he would be in such a state that even though he indicated before he wouldn't be disruptive, he was talking about being willfully disruptive. But I think that the fact that he's going to have these problems would distract and disrupt the proceedings. And I think this falls within the standard.

(XVI RT 3107.) The court then noted the option of proceedings on Monday. (XVI RT 3107.) Appellant's trial counsel responded: "I think tactically it's a decision that I want to make to proceed today, yes." (XVI RT 3107-3108.)

The court asked the prosecutor if she had "any objection to [appellant] not being present?" (XVI RT 3108.) The prosecutor answered:

> Well, I think if we make a sufficiently clear record – I have reviewed two cases, People versus Jackson at 13 Cal.4th 1164 and People v. Mayfield, 14 Cal.4th 668 – in the event the court wants to review them they're right here – they basically talk about the fact that a capital defendant basically needs to be present during the proceedings and really can't waive that right to be present. That if he's not present, then it's a violation of [Penal Code sections] 977 and 1043.
>
> And if that occurs, then it is error, but apparently the courts indicate that it's error of a statutory dimension, reverse is required only if it is reasonably probable that a result more favorable to the appealing party would have been in the absence of error, quoting *Watson*.

(XVI RT 3108.) The court replied: "Well, I'm not inclined to commit error with the idea that maybe I won't get reversed. I'm not going to take that approach." (XVI RT 3108.) The court commented: "He's here today and hasn't disrupted anything." (XVI RT 3108.) Appellant's trial counsel noted that appellant was disruptive the day before. (XVI RT 3108.) The court agreed that appellant could have been excluded yesterday, and then asked counsel:

> But now that he's here today and saying he's in pain and just can't comply with the proceedings – are you saying things might get disrupted again today . . .?

(XVI RT 3108-3109.) Defense counsel stated: "I am." (XVI RT 3109.)

The prosecutor observed:

> I think were have an additional concern in that [appellant has] indicated, I believe, that he wishes to be present in his civilian attire.

(XVI RT 3109.) Counsel noted there was a misunderstanding, and emphasized: "[Appellant's] wishes are to not be here." (XVI RT 3109.)

Counsel asked appellant if that was correct, and appellant answered, "Yes." (XVI RT 3109.) Counsel asked, "Dressed in street clothes or otherwise, right," and appellant replied, " Yeah. Yeah. Yeah." (XVI RT 3109.) The court then asked appellant's trial counsel:

> [W]e had an incident last night, do you feel that if I do not grant his wish not be present that that will – there's strong possibility of further disruption if the court proceeds?

(XVI RT 3109.) Counsel answered, "Yes." (XVI RT 3109.)

The court observed:

> First of all, he voluntarily wants to be gone, which by itself wouldn't be appropriate. But he disrupted things once during the guilty phase, which wasn't that significant, but yesterday seriously disrupted the proceedings. And that's all on the record.
>
> He's chosen not to appear today in his street clothes.
>
> And [defense counsel] has now indicated if I don't excuse him from these proceedings there's a very strong possibility there will be further disruptions of these court proceedings by [appellant].
>
> Seems to me that based on those factors, all those factors together, there's a basis to grant his wish to exclude him from the courtroom. And even if he didn't wish it, to exclude him from the courtroom based on the fact that he might disrupt proceedings.

(XVI RT 3109-3110.) The court then said to appellant:

> You understand that, [appellant]?
>
> In 17 years I have never had a case, unless the person didn't show up for trial . . . I never excluded anybody from the courtroom or had anybody voluntarily exclude themselves I don't think.

> Is that what you want to do today? You don't want to be present for these proceedings?

(XVI RT 3110-3111.) Appellant answered: "I'm in a lot of pain, Your Honor." (XVI RT 3111.) The court then stated:

> Okay. I don't want you to – if you're in a lot [of] pain and that's the reason you don't want to be here, I don't want to exclude you for that reason. I want to put the matter over so you felt [sic] better on Monday. Because I think this is your case, and I don't really like to proceed without you being here and not knowing what's going on.

(XVI RT 3111.) Appellant interjected: "If you could do that, put it off to Monday, that would be fine with me." (XVI RT 3111.) The court asked appellant, "Would that be better for you?" (XVI RT 3111.) Appellant replied, "yes." (XVI RT 3111.) The court commented:

> Now, [defense counsel], I know, has his witnesses here and from out of town and wants to proceed with those witnesses. [¶] [Defense counsel], I mean, I can't continue if [appellant] really wants to be here and the only reason he doesn't want to be here is he's in a lot of pain. This is a capital case.

(XVI RT 3111.) Appellant's trial counsel agreed. (XVI RT 3111.)

The court asked counsel, "So can your people be back here Monday?" (XVI RT 3111.) Counsel said he did not know. (XVI RT 3111.) Dr. Riley stated that she had "patients scheduled at the hospital on Monday," and that she "could be here Tuesday." (XVI RT 3111-3112.) The court asked counsel the estimated length of Dr. Riley's testimony. (XVI RT 3112.) Counsel answered, "An hour to an hour and a half." (XVI RT 3112.) The court asked if appellant could somehow be present for the doctor's testimony. (XVI RT 3112.) Counsel answered:

> In the shape that he's in? No. I think – I think it's pretty clear that he's not able to participate and now we want to keep him around?

(XVI RT 3112.) The court then told counsel, "Then your witness will have to be back Monday. Because I will not delay things." (XVI RT 3112.) Counsel responded:

> I'm not going to be ready to proceed with that witness on Monday. You're putting me in a position that I can't be put in that's untenable if she has patients at Stanford that she has to attend to.

(XVI RT 3112.) The court replied: "I'll order [Dr. Riley] to be here. How's that." (XVI RT 3112.) The court said: "Those aren't life or death situations with regard to your patients[?]" (XVI RT 3112.) Dr. Riley replied: "No, they're not like that. If I'm ordered to be here, I'll be here." (XVI RT 3113.) Appellant's trial counsel added, "She'll be here." (XVI RT 3113.) The court then commented:

> I don't like to do that but we told the jurors we would be done by the 16th. We thought we'd be well ahead of schedule, but now we're just kind of coming in there.

(XVI RT 3113.)

Appellant's trial counsel then stated:

> [Appellant] indicated that he would like to have it put over until Monday, but [], is that the standard, just because he wants it put over because he doesn't feel good? [¶] If the court makes a finding – I think the court did make a finding.

(XVI RT 3113.) The following colloquy ensued:

> THE COURT: I was prepared to until I asked him that question. If you think there's going to be disruption if I –
>
> [DEFENSE COUNSEL]: That's what I stated, I thought.

THE COURT: But then I asked [appellant] if he agreed to that then he said that he would rather have it be put over until Monday.

(XVI RT 3113.)

Following an off the record discussion between appellant and his trial counsel, counsel stated:

[Appellant] has indicated to me that he feels he's upset and that he would probably make noise because of his pain. I think that would be disruptive to the court proceedings.

(XVI RT 3113.) The court asked: "You think it will be disruptive for you too as his attorney?" (XVI RT 3113.) Counsel replied: "Absolutely." (XVI 3114.) The following discussion took place:

THE COURT: All right. I'll make a finding, then, [defense counsel] has had a further opportunity to consult with his client. [¶] And, [appellant], you don't object if we proceed without you today with regard to this witness from Palo Alto?

[APPELLANT]: No.

THE COURT: Okay. And [defense counsel] has indicated that he feels that there may be further disruptions if [appellant] was present. And I assume that would also be true on Monday, right, [defense counsel], that possibility?

[DEFENSE COUNSEL]: I think we have to revisit that issue on Monday.

THE COURT: But looking at it from today's perspective.

[DEFENSE COUNSEL]: I think you're right. It's certainly a strong possibility. And just for the record there is going to be more than one witness today.

THE COURT: Right. I understand that. You understand that, [appellant], these two psychologists testifying?

[APPELLANT]: Yes.

THE COURT: And you're willing to – even though I'm going to make a finding you are willing to absent yourself from being here for those two witnesses, correct?

[APPELLANT]: Yes.

THE COURT: Okay. And I think that based on all the circumstances there's a strong possibility that proceedings could be disrupted. [Defense counsel] is worried about that and, in addition, wants to proceed with his witnesses today.

The neuropsychologist has scheduling problems with her patients on Monday, was expected to testify yesterday, I think, and had to come back again today. And certainly from the court's stand point I want to proceed and don't want matters disrupted.

And from your stand point, [defense counsel], you don't want a repeat of yesterday's incident, although [appellant] is restrained and has a stun belt on today, things could be disrupted verbally or otherwise.

[DEFENSE COUNSEL]: Correct.

THE COURT: So based on all of the things that have been presented to me and looking at all those factors, I'm going to exercise my discretion and have [appellant] removed from the courtroom. It's also his wish to do that. So we can proceed with these witnesses.

[¶] . . . [¶]

[PROSECUTOR]: Are we going through just the two psychiatrists today?

[DEFENSE COUNSEL]: We're probably going to have –

[PROSECUTOR]: Before he's removed –

[DEFENSE COUNSEL]: Lisa O'Halloran and Scheron Bell.

THE COURT: You understand that [defense counsel] may also produce two other witnesses, [appellant]?

[APPELLANT]: Yeah.

THE COURT: You have no objection to that, right?

[APPELLANT]: No.

THE COURT: Okay.

(XVI RT 3113-3116.) Appellant was then removed from the courtroom. (XVI RT 3116; see also IV CT 1021.)

In appellant's absence, the court stated it received a note from the jurors, expressing concern of "walking past [appellant] while he is not restrained." (XVI RT 3116.) The note prompted the court to question the jurors as a group. (XVI RT 3117-3123.) During questioning, the court told the jurors, among other things:

> [T]he fact [appellant] is not present, you can't use that fact to consider the case. All right? So don't use the fact that he's not present today to consider the case.

(XVI RT 3119.) Also in appellant's absence, neuropsychologist Nell Riley, Scheron Bell, and Leatha O'Halloran testified before the jury. (XVI RT 3124-3207, 3208-3213, 3214-3221.) During a break in Dr. Riley's testimony, the court again instructed the jury:

> [A]s you can see, [appellant] isn't present. And the attorney wanted me to remind you that you can't speculate with regard to that or consider that in any way and in making your decision. Okay. So just pretend that he is here, basically, and don't speculate as to why he isn't here or make any conclusions from that and consider it in any way.

(XVI RT 3156.)

On Monday April 12, 1999, appellant was present. (XVI RT 3245.)

The trial court stated then for the record:

> [Appellant] is present today and he wasn't present on Friday because, [appellant's trial counsel], you indicated that, after talking to him at the end there, that you stated on the record that you felt that it was strongly possible he would engage in disruptive behavior again because he had to be here, and we didn't want the trial disrupted.
>
> And under the case presented, People versus Medina, at a 11th Cal.4th 694, disruptive behavior can result in exclusion from the courtroom. And he was extremely disruptive on Thursday, and we didn't want to have that again.
>
> But here he is today, not in a wheelchair. He is dressed in a nice suit, and he is going to be back here now.

(XVI RT 3287-3288.)

Appellant's trial counsel stated:

> I think the disruption that I was concerned about was, as I think I stated, was going to result or could have resulted from his physical pain and the fact that it would be not only disruptive to the jury and the proceedings but to me as well.

(XVI RT 3288.) The court disagreed:

> I didn't get that from what you said on Friday, that his disruptive behavior would only be because of the pain. My indication – because if you will recall, at that point, I indicated that I was prepared to put the case over till Monday to see if he felt better.
>
> You didn't want to put the case over because you had your witnesses here and then you talked to [appellant] again, and my indication from you was that – at least this is my interpretation of what you were saying is that, while he might be disruptive because of his pain, he might also be disruptive because I wasn't going to let him go back to his jail cell.

I don't want anything on the record here to indicate that we excluded him from the trial against his will or just because he was in some pain after that incident on Thursday. I mean, if that's the case, you can call your witnesses back here and we will put them back on again but – which you didn't want to do.

That was one of the things that I was considering when you made the request that he go back to his jail cell, that it was your portion of the case and he wouldn't be having to – he wouldn't be here – he wouldn't not be here and not able to confront the witnesses against him who are the witnesses presented by the People.

I just wanted to make sure we're all on the same page here, that there won't be any basis later to claim that he wasn't present for that portion of the trial and, therefore, the case ought to be reversed for that purpose.

(XVI RT 3288-3289.)

Appellant's trial counsel conceded:

I think that it's clear from the record that was taken on Friday that [appellant] did not want to be here, that I think the disruption – yes, I probably indicated that the disruption could have come from two sources. I am not now trying to back-pedal on what I said on Friday.

(XVI RT 3289.)

B. Discussion

A criminal defendant has both a constitutional and a statutory right to be present at every critical stage of a trial. (*People v. Romero* (2008) 44 Cal.4th 386, 418; *People v. Frye* (1998) 18 Cal.4th 894, 1010, overruled on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) A defendant may waive his constitutional right to be present. (*People v. Romero, supra*, 44 Cal.4th at p. 418; *People v. Price* (1991) 1 Cal.4th 324, 405; *People v. Frye, supra,* 18 Cal.4th at p. 1010.) And although a

defendant's right to waive his statutory right to be present under section 977 is limited, any statutory violation is harmless unless there is a reasonable probability the defendant would have obtained a more favorable result but for the error. (*People v. Moon, supra*, 37 Cal.4th at pp. 20-21.)

Here, appellant waived his constitutional right to be present. Appellant appeared in court wearing his jail clothes, sitting in a wheelchair, was complaining of severe pains, and did not appear alert or responsive. Although the court offered to put the case over for the weekend, after a lengthy discussion, appellant said that he did not want to be present that day, and that he understood that if he allowed the case to proceed in his absence, his attorney would be calling several defense witnesses to testify. After exploring various options with the parties, the court granted appellant's request to be absent, and had appellant removed. (XVI RT 3105-3116.)

That the court chose to proceed with witness testimony in appellant's absence, instead of continuing the trial, did not render appellant's waiver any less voluntary. The court did not need to continue trial proceedings, resulting in disruptions to the schedules of jurors, witnesses, counsel, and court personnel, to cater to appellant's moods. Appellant had the opportunity to proceed with the trial on Friday, continue the trial until Monday, or waive his presence for Friday and allow his attorney to continue. There was no violation of appellant's constitutional right to be present during the penalty phase testimony of his witnesses. (*People v. Romero, supra*, 44 Cal.4th at p. 418; *People v. Price, supra,* 1 Cal.4th at pp. 404-406; see *Taylor v. United States* (1973) 414 U.S. 17, 20 ["Petitioner had no right to interrupt the trial by his voluntary absence."].)

The California Supreme Court has explained:

> We are [] persuaded by the plain meaning of the statute that a capital defendant may not voluntarily waive his right to be present during the proceedings listed in section 977, including those portions of the trial in which evidence is taken, and that he may not be removed from the courtroom unless he has been disruptive or threatens to be disruptive. The Legislature evidently intended that a capital defendant's right to voluntarily waive his right to be present be severely restricted. Of course, we will generally defer to the trial court in determining when a defendant has been disruptive or when further disruption may be reasonably anticipated. The trial court's ability to remove a disruptive or potentially disruptive defendant follows not only from section 1043, subdivision (b)(1), but also from the trial court's inherent power to establish order in its courtroom.

(*People v. Jackson* (1996) 13 Cal.4th 1164, 1211.) Although appellant's waiver of his presence was not permitted under sections 977[28] and

---

[28] Section 977, subdivision (b)(1), provides, in part:

> In all cases in which a felony is charged, the accused shall be present . . .during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2). . . ..

1043,[29] any violation of the statutory requirement that appellant be present was harmless.

To put it mildly, appellant was disruptive on Thursday and had to be removed by nine deputies. When appellant appeared in court the next day, he was uncooperative.[30] (See XVI RT 3103.) He wore his jail clothes, not his suit, and he was seated in a wheelchair. He complained of having

---

[29] Section 1043 provides, in part:

> (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
>
> (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including the return of the verdict in any of the following cases:
>
> (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.
>
> (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.
>
> (d) Subdivisions (a) and (b) shall not limit the right of a defendant to waive his right to be present in accordance with section 977.

[30] Given appellant's uncooperative mannerism the day after his violent outburst, appellant's presence could arguably have been more damaging than his absence. (Cf. *United States v. Shepherd* (8th Cir. 2002) 284 F.3d 965, 967 [holding that the trial judge did not abuse his discretion by removing an uncooperative defendant from the courtroom during trial on the ground that the trial judge "thought that if [the defendant] remained in the courtroom his demeanor would harm his case in the eyes of the jury"].)

severe pains. Although appellant was not then behaving in a disruptive manner, appellant's counsel conceded that the potential for further disruption was real and present. Counsel said appellant did not appear alert or responsive. Yet, after further discussion, appellant showed himself to be alert and responsive. (See XVI RT 3105.) Although the court offered to continue the case until Monday, appellant stated clearly that he did not want to be present that day and waived his right to be present during his attorney's presentation of evidence. Appellant gave a knowing and intelligent waiver of his constitutional right to be present; thus, there was no violation of his constitutional right to be present. (*People v. Romero, supra*, 44 Cal.4th at p. 418; *People v. Weaver* (2001) 26 Cal.4th 876, 968.) Twice during appellant's absence on Friday, the court admonished the jury that it could not consider appellant's absence for any purpose. (XVI RT 3119, 3156.) Even though sections 977 and 1043 deprive a capital defendant of his ability to voluntarily waive his right to be present, and require him or her to remain in the courtroom (*People v. Jackson, supra*, 13 Cal.4th at p. 1211), there is no reasonable probability that appellant would have obtained a more favorable outcome had he been forced to remain in the courtroom in a wheelchair and jail clothes against his wishes. (*People v. Weaver, supra,* 26 Cal.4th at p. 968; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Accordingly, appellant's claim should be rejected.

XIV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL

Appellant argues that the court abused its discretion in denying his mistrial motion. (AOB 316-324.) The trial court properly denied the motion.

A. The Record

On Friday April 9, 1999, after appellant waived his right to be present and was removed from the courtroom, the court received a note from the jurors. (XVI RT 3116.) The note read:

> To whom it may concern:
>
> We the jury are concerned with walking pas[t] the defendant while he is not restrained. Yesterday's event could have caused injury to some jurors that were rushed into the jury room during the incident.

(XVI RT 3116; ACT 1340.) The court noted for the record that "the jurors were out of the courtroom when [appellant] became disruptive, . . . [a]lthough they might have heard the incident." (XVI RT 3116.)

The court questioned the jurors about the note:

> THE COURT: [] Good morning, finally, ladies and gentlemen. A couple of things. I know first of all you sent me a note, [Juror 11] did, and on behalf of all of you. It says, "We the jury are concerned with walking past the defendant while he's not restrained. Yesterday's event could have caused injury to some jurors that were returned into the jury room during the incident." [¶] Mr. [Juror 11], from the jury room did you hear the incident?
>
> JUROR 11: Yes.
>
> THE COURT: Okay. You remember I reminded all of you you're not supposed to read any newspaper articles or watch any media reports of things so I will assume that you didn't do that, and that this is based on the incident that had occurred in the courtroom that you heard from the jury room. [¶] Would that be correct, [Juror 11]?
>
> JUROR 11: That's correct.
>
> THE COURT: And it's unfortunate, but as I recall – as I recall the incident you were all out of the courtroom. The reason I sent you out was because the witness was crying and Jerry thought we were going to take a break. And so that's why I sent you out. Then the incident occurred after that.

But what I want to make sure is – you can't – you weren't here to know what happened, so not to speculate as to what happened in the courtroom about that incident. So there may be testimony about that now in this proceeding, but as to what you might think might have happened in the courtroom, you can't speculate. Okay.

So, number one, keep that in mind because you're not to do that in making your decision in the case. I believe the People will be calling a witness in the case now to describe the incident to you at some point in time. And, of course, if that happens, then you could use that information.

I want to make sure that because of what happened yesterday no one is feeling biased or prejudiced in the case at this point in time and feels they could not make a fair decision based on the evidence. So if anyone is having those thoughts, you should either express that to me in a note or you can raise your hand now we'll talk to you individually.

But you have been sitting here through this whole trial. I know there was one incident during the guilt phase of the trial, but you can't speculate as to what happened. Okay.

Yes, sir? []

JUROR 5: The reason we had him give you the note was because everybody wasn't in there yet, yesterday. It started before everybody got in. So there was shoving and pushes to get the rest of the jurors in. And it was basically the women were still behind us.

THE COURT: Okay.

JUROR 5: And they were scuffling to try and get in the room.

THE COURT: So you were in a position where I couldn't see you.

JUROR 5: Correct.

THE COURT: But just in the hallway.

JUROR 5: Like there were still four or five left.

THE COURT: Well, I understand that now. As you can see today, [appellant] is not present. Again, from that, the fact [appellant] is not present, you can't use that fact to consider the case. All right? So don't use the fact that he's not present today to consider the case.

But I don't think – it's not going to be a problem for you today. Okay. And if he's back here on Monday, we'll work it logistically so there won't be a problem with you – take care of any fears you might have.

Does that solve the problem you think?

Jurors are nodding their head[s] in agreement.

[DEFENSE COUNSEL]: I wondered, evidently there was some discussion among the jurors about the incident. I wonder if the Court would inquire as to the contents of that discussion.

THE COURT: [Juror 11] or [Juror 5], you're both speaking here, was there any discussion about the incident in the jury room?

JUROR 11: Basically trying to get everybody in hearing the scuffle and shutting the door and locking it and then hearing a lot of noise.

THE COURT: I know you locked the door. I went in to let you out yesterday afternoon and you had the door locked and you asked me for my ID. But you didn't discuss the facts of the case though?

JUROR 11: No.

JUROR 5: No.

THE COURT: Anything else, [defense counsel]? I'm satisfied. [¶] If anyone does feel that something is bothering them about that or feel they couldn't be fair and impartial, please let us know, write a note or something like that.

(XVI RT 3117-3120.)

Appellant's trial counsel moved for a mistrial "based on the fact that the jurors have had some discussion about this event in the jury room, but we don't know what the discussion was." (XVI RT 3121.) Out of the presence of the jury, the court spoke with counsel:

> THE COURT: Well, they just said they didn't have a discussion about it. All they discussed was getting inside there, as provoked by [appellant]. What do you expect?
>
> [DEFENSE CO-COUNSEL]: That's all perfectly understandable that they would discuss it, but the point is if they were discussing any aspects of the case where the defendants' personality or fear or anything that they are not entitled to discuss unless they're actually –
>
> THE COURT: Maybe you should talk to them after the case is over. Right?
>
> [LEAD DEFENSE COUNSEL]: That's – the tenor of the note indicated they were afraid of him because the note said "we have to walk behind him."
>
> THE COURT: He brought that on himself. He can – design a special jury instruction to deal with this issue. I have already told them they can't consider it.
>
> [LEAD DEFENSE COUNSEL]: Well –
>
> THE COURT: They seem to be pretty aware they didn't raise their hand that they were biased or prejudiced. They also seemed to be still inclined to be fair and impartial.
>
> So I would suggest maybe, [prosecutor] and [defense counsel], you could design some jury instruction to tell them that they can't consider this incident. I just asked them about whether they had discussions about the facts and they said they didn't. Just the, you know, scuffle.
>
> So if at the end of the whole case, depending on what the verdict is, I suppose you could talk to them about that and if there was some evidence that they were biased or prejudiced as a result of that, then a mistrial could be – a new trial could be granted.

But I don't think there is any basis to mistry the case at this point in time. But I'm not sure that would be a basis for a new trial. Probably wouldn't unless they were all so biased or prejudiced.

[PROSECUTOR]: I agree with what the Court said, but one thing just occurred to me when you were asking them you asked what they talked about, it was just about getting the women and closing the door, and you said, "but you didn't talk about the facts of the case." They may interpret that to relate to the evidence, I suppose, to –

THE COURT: I'll ask them if they discussed the incident.

(XVI RT 3121-3122.)

The court questioned Juror 11 further:

THE COURT: [Juror 11], [], when you discussed in chambers (sic) getting everybody inside, after that, you were all inside that room there, did you discuss the incident that was occurring in the courtroom at that time?

JUROR 11: Well, we discussed the jurors that were shoved into the room so we could close the door, they were shaken about that.

THE COURT: Okay.

JUROR 11: And you could hear the screaming and yelling out here.

THE COURT: Okay. Did you discuss what was going on or anything like –

JUROR 11: No, what we discussed is making sure that we were okay, walking to and from if any incident were to happen.

THE COURT: So just your own safety.

JUROR 11: Right.

> THE COURT: Okay. I'm not sure that this wouldn't be something that the jurors have discussed in the past because juries have to file out behind defendants in cases. [¶] And if counsel want to ask [Juror 11] a question, [defense counsel], any questions you want to ask him about that?
>
> [LEAD DEFENSE COUNSEL]: Not at this time. Thank you.

(XVI RT 3122-3123.) The court denied the defense motion for a mistrial. (XVI RT 3123.)

B. Discussion

A trial court should declare a mistrial only "if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Lewis* (2008) 43 Cal.4th 415, 501.) "[A] ruling denying a motion for mistrial is reviewed under the deferential abuse of discretion standard." (*People v. Elliott* (2012) 53 Cal.4th 535, 575.) A defendant may not complain of prejudice necessitating a mistrial where any prejudice he may have suffered resulted from his own voluntary act (*People v. Hendricks* (1988) 44 Cal.3d 635, 643; *People v. Williams* (1988) 44 Cal.3d 1127, 1156 [a defendant is not permitted to profit from his own misconduct].)

There is nothing in the record to suggest that the jury was unduly prejudiced against appellant. The trial court was present when appellant began his outburst. After receiving the note, the trial court questioned the jurors. The jurors expressed fear for their safety, but they gave no indication that they could not be fair and impartial due to appellant's outburst, and they did not discuss appellant's outburst among themselves. The court instructed the jurors not to speculate about what may have happened in the courtroom, and then informed the jurors that the prosecutor may later call a witness to describe the incident (see § 190.3, factor (b)). The trial court voir dired the jurors regarding appellant's outburst, and was

able to observe their responses and demeanor to the questioning. (Cf. *People v. Pride* (1992) 3 Cal.4th 195, 260 [deferring to trial court's evaluation of juror in denying motion for mistrial].)

The trial court found that the jurors were not unduly prejudiced by appellant's own misconduct. The trial court instructed the jury not to speculate about the event. Appellant fails to show that the trial court erred by finding that the jurors were not unduly influenced by his outburst and that there was no prejudice as a result of his own conduct, and he fails to show that the court's admonition was insufficient to cure any prejudice he attempted to create. (*People v. Lewis, supra,* 43 Cal.4th at p. 501.) Appellant fails to show that the court's denial of his motion for a mistrial was arbitrary, capricious, or wholly outside the bounds of reason. (*People v. Elliott, supra,* 53 Cal.4th at p. 575; *People v. Hendricks, supra,* 44 Cal.3d at p. 643.)

Accordingly, appellant's claim should be rejected.

XV. APPELLANT FORFEITED ANY CLAIM THAT THE COURT FAILED TO ADEQUATELY VOIR DIRE THE JURY FOLLOWING HIS OUTBURST; THE COURT'S INQUIRY WAS ADEQUATE

Appellant argues that the court's inquiry of the jurors, to assess any prejudicial effect from his violent outburst, was inadequate. (AOB 325-328.) Appellant forfeited this claim by failing to complain below and failing to seek or make a more extensive voir dire. Even if not forfeited, the claim is without merit.

Appellant cannot complain on appeal that the court's inquiry was inadequate when he failed to object or suggest additional inquiry was needed I order to protect his rights and interests. (*People v. Holloway* (2004) 33 Cal.4th 96, 126-127; *People v. Taylor, supra,* 48 Cal.4th at p. 638; see also *Turner v. Murray* (1986) 476 U.S. 28, 37.) The trial court

questioned the jurors as a group, and elicited specific answers from Jurors 5 and 11. At the end of the court's inquiry, the court asked appellant's trial counsel if he had any questions, and counsel answered, "Not at this time." Accordingly, appellant forfeited any claim that the court's examination was inadequate.

Even assuming this claim has not been forfeited, the court's inquiry was adequate.

> The decision whether to investigate possible juror bias, incompetence, or misconduct, as well as the ultimate decision whether to retain or discharge a juror, rests within the sound discretion of the trial court. If any substantial evidence exists to support the trial court's exercise of its discretion, the court's action will be upheld on appeal.

(*People v. Maury* (2003) 30 Cal.4th 342, 434.) "[O]nce the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged." (*People v. Burgener* (1986) 41 Cal.3d 505, 520, overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753-754.) The court's duty is to make whatever inquiry is "reasonably necessary to determine if the juror should be discharged." (*People v. Cowan* (2008) 50 Cal.4th 401, 506, quoting, *People v. Burgener, supra,* 41 Cal.3d at p. 520.)

Here, the jurors' note to the court expressed concern for their safety. The note did not provide information suggesting that the jurors would be unable or unwilling to follow the court's instructions, to decide the appropriate penalty based solely on the evidence presented at trial, or that they were unable to be fair and impartial.

The trial court questioned the jurors, and asked whether, because of appellant's violent outburst, any of them felt biased or prejudiced, or that they could not make a fair decision based on the evidence. No juror gave any indication that he or she could not be fair and impartial. In response to the court's questions about any discussions the jurors may have had about appellant's outburst, the jurors said that they discussed their safety, but that they did not discuss appellant's outburst among themselves and they did not discuss the facts of the case.

The court's inquiry provided adequate basis to find that appellant's violent outburst did not affect the jurors' ability and willingness to follow the court's instructions, to decide the appropriate penalty based solely on the evidence presented at trial, and to be fair and impartial. (Cf. *People v. Farnam* (2002) 28 Cal.4th 107, 139-142.)

Appellant's claim should be rejected.

XVI. APPELLANT FORFEITED ANY CLAIM OF ERROR; THE JURORS WERE PROPERLY INSTRUCTED AND NO ADDITIONAL PINPOINT INSTRUCTION WAS REQUIRED

Appellant argues that the death penalty should be reversed because the jury was not instructed to disregard their personal experiences of the courtroom outburst in determining the appropriate penalty. (AOB 329-333.) Appellant forfeited any claim of error. Even if not forfeited, appellant's claim is without merit.

Appellant put his outburst before the jury when his own expert witness, Riley, discussed it in connection with his opinion. (See XVI RT 3168.) Appellant did not request a limiting instruction regarding Riley's reference to the outburst (see *People v. Ledesma* (2006) 39 Cal.4th 641, 697-698), or an instruction directing jurors to disregard their personal

experiences of the courtroom outburst in their determination of the appropriate penalty. The court did suggest to the parties that they "could design some jury instruction to tell them that they can't consider this incident." (XVI RT 3122.) Neither party proposed an instruction. (Cf. *People v. Clark, supra,* 52 Cal.4th at p. 942.) Appellant forfeited any claim of error regarding the lack of a limiting instruction.

In any event, there was no error. The jury was properly instructed that its penalty determination had to be based on the evidence in the record and considered in light of the statutory factors. The jurors were not present in the courtroom during appellant's outburst and the court instructed them not to speculate about the incident. As to the specifics, appellant's own expert first disclosed the specifics of what happened and used it as part of the basis for her expert opinion regarding appellant's mental deficits and character for violence. (See XVI RT 3168.) In rebuttal, the prosecutor presented testimony from the deputies involved regarding what occurred, specifically, that appellant kicked and swung at deputies, threw one over a railing, placed one in a headlock, and that nine deputies were needed to subdue him.

Where a defendant has placed his character at issue, the parties may comment favorably or unfavorably on his demeanor and courtroom behavior. (*People v. Valencia* (2008) 43 Cal.4th 268, 307-308.) "As to the outburst, defendant himself bears any responsibility for whatever impact it may have had on the jury." (*People v. Sully* (1991) 53 Cal.3d 1195, 1243.) The standard jury instructions the court gave were "adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." (*People v. Valencia, supra,* 43 Cal.4th at p. 309, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177.) Appellant's jury received all the instruction necessary regarding how to

analyze penalty phase evidence as it pertained to the statutory factors. (*People v. Valencia, supra,* 43 Cal.4th at p. 309; see *People v. Sully, supra,* 53 Cal.3d at p. 1243.)

Appellant's claim should be rejected.

XVII. APPELLANT FORFEITED ANY CLAIM OF ERROR REGARDING THE PENALTY PHASE RESTRAINTS; RESTRAINTS WERE JUSTIFIED BY APPELLANT'S SECURITY RISK; ASSUMING THAT ANY JUROR SAW RESTRAINTS, THERE WAS NO SUBSTANTIAL LIKELIHOOD THE JURORS WERE IMPERMISSIBLY INFLUENCED TO APPELLANT'S DETRIMENT

Appellant argues that the court abused its discretion by deferring to courtroom security personnel the decision as to what physical restraints to place on appellant. He also argues that the court erred in not instructing the jurors sua sponte not to consider the physical restraints in their determination of the appropriate penalty. (AOB 334-349.) Appellant forfeited this claim. Even if not forfeited, it is without merit.

A. The Record

After appellant's outburst and struggle which required nine deputies to subdue him and restore order, the court noted that the sergeant in charge of the bailiffs wanted restraints placed on appellant. The court stated that there were ample grounds for restraints based on what had occurred, and voiced concern for the safety of court personnel as well as counsel. (XV RT 3077-3078.) The sergeant proffered three options: one was to totally chain appellant; the second was to have a deputy, armed with a Taser, next to appellant; and, the third was to place a stun belt on appellant. The third option was dependent on the availability of deputies trained in the use of stun belts. (XV RT 3079.) Appellant's trial counsel felt appellant's outburst was precipitated to a very great extent by his mother's emotional

outburst, and surmised that it would not happen again, though counsel stated that he would not object "to some kind of restraint." (XV RT 3080.) The bailiffs recommended chains and a stun belt on appellant. (XV RT 3084-3085.) Following a discussion on jury instructions, the court decided that it would make a final decision on the physical restraints the next day, and stated that it would try to get the stun belt. (XV RT 3096.) Appellant's trial counsel stated, "I am not going to object to it." (XV RT 3096-3097.)

The following day, Friday April 9, 1999, out the jury's presence, appellant appeared in court in a wheelchair, and dressed in jail clothes because his suit had been messed up in his scuffle with the bailiffs. (XVI RT 3103.) He was chained and wearing a stun belt. (XVI RT 3104.) Appellant waived his right to be present in court that day and was not seen by the jury. (XVI RT 3116.)

On Monday April 12, 1999, appellant appeared in court. He was not in a wheelchair, and he wore a suit, but he was chained and wearing a stun belt. (XVI RT 3287-3288; IV CT 1032.) As to the restraints, the court explained:

> [T]here was a necessity for restraints on Friday because of what happened on Thursday, we had nine bailiffs take him to subdue him. He threw up the counsel table. And by the time nine people finally got him under control, he was in the spectator section. The spectators fled the courtroom.
>
> Luckily, the jurors were out. So it was clearly necessary to restrain him on Friday and, [], I can't restrain him just because of [] somebody in the jail [] thinks he should be, but there has to be reason for it. There certainly was a reason for it on Friday, and I am going to continue to think that there is a reason for it unless someone tells me differently.

But based on what happened Thursday afternoon, he was a danger to the entire courtroom and the staff and the deputies. And so several deputies were bruised and clearly in some pain. So it was necessary for the safety of the entire courtroom, in my opinion, to restrain him on Friday. That's also after consulting the bailiff and the deputies and security because of what had happened [on] Thursday.

So unless I hear differently from you, I am going to continue to have – . . . [¶] [t]he stun belt and the chains on.

(XVI RT 3290-3291.) Appellant's trial counsel responded, "I don't think we are going to have any problem." (XVI RT 3291.) The court and the parties then moved on to other matters. (XVI 3291-3293.)

Before the jury entered, the prosecutor inquired:

I don't know if [defense counsel] has considered it. [¶] Given the note that we had from the jury on Friday morning, whether [counsel] wants to at all say anything to the jury or have the Court say anything to the jury about their safety or [appellant].

(XVI RT 3293.) The court responded:

[T]he restraints. I have a note here on that. [¶] Do you want me to tell the jurors that they are not to consider any restraints that are placed on [appellant]?

(XVI RT 3294.)

The court and appellant's counsel discussed the visibility of the restraints:

[DEFENSE COUNSEL]: I don't think what they can see –

THE COURT: I can see a handcuff on him.

[DEFENSE COUNSEL]: I can see the handcuffs.

THE COURT: I can see a belt on him. It's not a cummerbund.

[DEFENSE COUNSEL]: They probably don't know that.

THE COURT: It is pretty innocuous, but the change is there, [defense counsel].

[DEFENSE COUNSEL]: I understand that. If there is some way we could keep them from seeing that, but I don't see how.

THE COURT: He is going to be here for a while, moving around. If you don't want me to say anything, that's fine. [¶] There is legal authority to give that kind of an instruction, but there is also authority that you don't want it brought to the jurors' attention.

[DEFENSE COUNSEL]: I don't think I want to draw their attention to it right now. If I think it's a problem, I will ask for it.

THE COURT: The only thing I thought of in regards to the note they wrote, they were concerned about their own personal safety.

[DEFENSE COUNSEL]: We may want –

THE COURT: That may be why you want to say something to them.

[DEFENSE COUNSEL]: Me?

THE COURT: I am not going to share with them that – of their personal safety without telling them the defendant's restrained. [¶] Because I am the person that on Thursday morning said I don't think there is going to be any problem because we're in the middle of your case and there wouldn't be any incident. Then [appellant] did what he did.

[DEFENSE COUNSEL]: We haven't heard anything from the jurors regarding – to follow up on that, have we?

THE COURT: Do you want to just leave it alone? That's fine. Start fresh today?

[DEFENSE COUNSEL]: They were admonished on Friday about why he wasn't there. [¶] Is that –

[PROSECUTOR]: They were told not to speculate.

THE COURT: They were told not to consider it.

[DEFENSE COUNSEL]: I think we will leave it at this point. If they raise the issue, which they might, then we can address it.

(XVI RT 3294-3295.)

B. Discussion

Appellant forfeited any claim that the court improperly deferred to courtroom security personnel the decision as to what physical restraints to place on him. Appellant did not object at trial to being restrained or to the type of the physical restraints used. (*People v. Foster, supra,* 50 Cal.4th at p. 1321; *People v. Duran* (1976) 16 Cal.3d 282, 289.) As to the failure to instruct, although the court noted that it could see a handcuff and a belt and offered to provide an instruction, there was no evidence that the jurors saw restraints, and appellant expressly declined to have the jury told about the restraints. (XVI RT 3294-3295.) Accordingly, any claim of error from the court's failure to instruct is waived. (See *People v. Duran, supra,* 16 Cal.3d at pp. 289-291; cf. *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1 [distinguishing forfeiture and waiver].).)

Assuming this claim has not been forfeited, the record shows the court did not yield its authority to court personnel, but properly found manifest necessity for the restraints. (*People v. Stevens* (2009) 47 Cal.4th 625, 642; *People v. Medina* (1995) 11 Cal.4th 694, 730.) When deciding whether restraints are warranted, a court may consider factors traditionally relied upon in evaluating security problems, such as the degree to which the

defendant poses a security risk or is likely to disrupt the proceedings. (*Deck v. Missouri* (2005) 544 U.S. 622, 629; *People v. Duran, supra,* 16 Cal.3d at p. 291.) The showing of necessity must be a matter of record, and the court must exercise its own discretion whether particular security measures are appropriate. (*People v. Stevens, supra,* 47 Cal.4th at p. 642; *People v. Combs, supra,* 34 Cal.4th at p. 837.)

The record clearly shows there was a manifest need to physically restrain appellant. After banging on the table and standing up, appellant kicked at and struggled with deputies, throwing one over a railing. Nine bailiffs were needed to subdue him. The court stated the need for physical restraints:

> [W]e had nine bailiffs take [appellant] to subdue him. He threw up the counsel table. And by the time nine people finally got him under control, he was in the spectator section. The spectators fled the courtroom.
>
> [¶] . . . [¶]
>
> But based on what happened Thursday afternoon, he was a danger to the entire courtroom and the staff and the deputies. And so several deputies were bruised and clearly in some pain. So it was necessary for the safety of the entire courtroom, in my opinion, to restrain him . . ..

(XVI RT 3290-3291.)

There was extensive discussion on various restraint options. Although during a discussion immediately after appellant's outburst, the court remarked that it would order "whatever the bailiffs fe[lt] [was] appropriate" (XV RT 3081), the court stated that it would make a final decision the next day regarding what restraints to approve. (XV RT 3096.) The court's comment immediately following the outburst, thus, cannot be

understood as an abdication of the court's authority and responsibility to determine the least restrictive measure that would assure the safety of the people in the courtroom. The court was merely soliciting the advice and recommendation of the bailiffs. The court's order on Monday, April 12th, for the stun belt and chains was based on manifest need. On the previous Thursday, appellant had thrown over a table, injured several deputies, and nine deputies were needed to subdue him. (XVI RT 3290-3291.) The court expressly found that appellant was a danger to himself, the deputies, and others in the courtroom. (*Ibid.*)

In assessing whether a restraint would "ensure effective security,", the court was entitled to solicit advice and consider the knowledge and experience of courtroom security personnel.[31] (*People v. Virgil, supra,* 51 Cal.4th at p. 1271.) Soliciting advice and recommendations from court security personnel is not an abdication of authority and responsibility.

Appellant next argues that the court should have instructed the jury sua sponte that the use of physical restraints should have no bearing on the penalty determination. (AOB 344-346.) Assuming this claim was not waived, there is no reasonable possibility the court's failure to instruct had any impact on the jury's verdict.

---

[31] In *People v. Mar* (2002) 28 Cal.4th 1201 (*Mar*), this Court stated that a trial court should consider, along with legitimate security concerns, the psychological impact and the potential physical harm of the stun belt on the defendant before ordering its use. (*Id.* at pp. 1205-1206, 1226-1230.) Appellant's trial occurred over three years before this Court issued its *Mar* opinion, thus, neither the court nor counsel could have foreseen the concerns this Court expressed there. (*Id.* at p. 1230.) Further, appellant did not testify, removing any concerns about the psychological impacts of using the stun belt. (See *People v. Virgil, supra,* 51 Cal.4th at p. 1271.)

Where visible restraints are used, the trial court has a sua sponte duty to instruct the jury not to consider physical restraints for any purpose during the guilt phase. (*People v. Duran, supra,* 16 Cal.3d at pp. 291-292 ["In those instance when visible restraints must be imposed the court shall instruct the jury sua sponte that such restraints should have no bearing on the determination of the *defendant's guilt*."], italics added; see CALJIC No. 1.04.) There is no sua sponte duty where the restraints are not visible. (*People v. Lividatis* (1992) 2 Cal.4th 759, 775.) After a defendant has been convicted, it is less clear that an instruction is required. This Court recently explained:

> The purpose of requiring the instruction is to prevent the jury from inferring that, because a defendant charged with a violent crime is restrained, he is "a violent person disposed to commit" the charged crime." Where, however, [], a defendant has been convicted of a special circumstance murder, the rationale requiring a sua sponte instruction is no longer applicable.

(*People v. Lopez* (2013) 56 Cal.4th 1028, 1081.)

The record shows that, at least from the court's perspective, one handcuff was visible, as was the contour of the stun belt under appellant's clothing. (See XVI RT 3294.) However, it was not clear whether the restraints were actually visible to the jury. The court asked appellant's trial counsel whether he wanted an instruction to the jurors not to consider the physical restraints placed on appellant for any purpose. Counsel responded: 'I don't think I want to draw their attention to it right now. If I think it's a problem, I will ask for it." (XVI RT 3294.)

"[T]he risk of substantial prejudice to a shackled defendant is diminished once his guilt has been determined." (*People v. Medina* (1990) 51 Cal.3d 870, 898.) The defense should be permitted "to assess the

relative cost and benefit of a cautionary instruction in a particular case." (*People v. Ramos* (1984) 37 Cal.3d 136, 159, fn.12.) The case against appellant was compelling, specifically, the surveillance video showed appellant callously murder Francis during the robbery. Appellant's counsel chose to refer to the outburst through his expert witness and thereby allowed the jury to learn what appellant did and that nine bailiffs were needed to subdue him. Assuming that the court had any duty to instruct in this case, because the record does not clearly establish the jurors could see the restraints, appellant had already been convicted of a special circumstance murder, and appellant had affirmatively declined the court's offer to instruct the jury not to consider the restraints, there is no reasonable probability that the absence of a jury instruction affected the jury's verdict. (*People v. Lopez, supra,* 56 Cal.4th at p. 1081; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1214.)

Appellant's claim should be rejected.

XVIII. APPELLANT FAILS TO ESTABLISH THAT HIS TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE FOR NOT OBJECTING TO THE USE OF THE PHYSICAL RESTRAINTS, OR FOR NOT REQUESTING AN ADMONITION TO THE JURY THAT APPELLANT WAS EXCUSED FOR GOOD CAUSE

Appellant argues that his trial counsel was ineffective for not objecting to the use of the physical restraints, and for not requesting an admonition to the jury that his presence from the trial was excused for good cause. (AOB 350-358.) Appellant fails to establish either deficient performance or prejudice as to either ground. A defendant asserting ineffective assistance of counsel must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that he

suffered prejudice as a result. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.) Prejudice means that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to defendant, that is, a probability sufficient to undermine confidence in the outcome. (*Richardson v. Superior Court, supra*, 43 Cal.4th at p. 1050.)

> If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation."

(*People v. Ledesma, supra,* 39 Cal.4th at p. 746.)

In this case, appellant's counsel was present for both appellant's outburst and the court's assessment of the manifest necessity for restraints. Assuming that both of appellant's counsel had no concerns for their own safety, in light of appellant's outburst and struggle, plus the need for nine deputies to subdue him, it is reasonable to believe counsel understood the court's need to make the security of others in the courtroom paramount. Counsel properly conceded the legitimate need for restraints, thus, it is reasonable to believe that counsel concluded an objection was unnecessary or that it would have been futile. "Counsel is not ineffective for failing to make frivolous or futile motions." (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

Likewise, counsel could have reasonably concluded that there was no basis to object to the court's approval of the stun belt. The safety of those in the courtroom was paramount. Nine bailiffs were needed to subdue

appellant and, even after being shackled with handcuffs and leg irons, appellant continued to struggle. (See XVII RT 3465.) The least restrictive and least conspicuous restraint must also "ensure effective security." (*People v. Virgil, supra,* 51 Cal.4th at p. 1271.)

Appellant suggests that the alternative of having a bailiff posted behind appellant armed with an inconspicuous Taser was less restrictive and would have been equally effective. After considering the advice from the court security personnel, the court reasonably rejected such an option. (See XVI RT 3290-3291.) Appellant's counsel was given an opportunity to suggest additional options, but elected not to do so. (XVI RT 3291.) In light of the manifest need established in the record, counsel reasonably may have concluded that the restraints were appropriate, that other means might be more restrictive or highlight the fact that appellant was restrained, or that any objection to the court's choice would have been futile.

Appellant fails to show that his counsel was deficient for failing to object, or that, but for counsel's failure to object, appellant would have obtained a more favorable result.

Appellant next contends that his counsel was ineffective because counsel failed to request an additional instruction to inform the jury that appellant's absence on the day following his outburst was for "good cause." However, such an instruction would have been erroneous and contrary to the instructions actually given directing the jury not to speculate on appellant's absence. Appellant fails to show how counsel was deficient for failing to request such an instruction.

After appellant voluntarily waived his constitutional right to be present, his counsel proceeded with defense mitigation evidence. Appellant's expert psychologist, Riley, testified about appellant's outburst

the day before. "Good cause" can be broad and vague. Had the jury been instructed that appellant was excused for good cause, the jury's attention would have been called to the absence contrary to the court's instruction, and likely would have considered "good cause" to mean that appellant posed a danger and needed to be kept out of the courtroom. An instruction that appellant was excused for good cause could have the undesired effect of highlighting the danger and volatility of appellant. Counsel was not deficient for declining to request an instruction that would have invited the jury to speculate on appellant's absence.

Appellant fails to establish prejudice. There is no reasonable probability that appellant would have obtained a more favorable result but for counsel's failure to request an instruction informing the jury that appellant was absent for "good cause."

Appellant's ineffective assistance of counsel should be rejected.

XIX. THE COURT PROPERLY ALLOWED THE PROSECUTION TO PLAY FOUR MINUTES OF FRANCIS'S WEDDING VIDEO

Appellant argues that the court abused its discretion in allowing the prosecution to play an approximate four-minute video of Simon Francis's wedding ceremony and celebration. (AOB 359-368.) The redacted video was properly admitted as victim impact evidence and appellant's claim is without merit.

A. The Record

Appellant filed a motion to limit victim impact evidence, of the prosecutor's intention to introduce portions of Francis's wedding video. (II CT 569-586.)

At the hearing, the court and the parties discussed the wedding video as victim impact evidence:

[DEFENSE COUNSEL]: To limit the victim impact evidence. One of the things that they propose to do is use parts of a six-hour wedding videotape as victim impact.

THE COURT: We're talking about the death penalty phase?

[DEFENSE COUNSEL]: If there is one, yes. And, you know, I will oppose that, of course.

THE COURT: The wedding video?

[DEFENSE COUNSEL]: Yeah. The victim and his wife were married about a month before this incident. And I'm informed by letter now that there are certain parts of the video that they want to use. In fact, it would be helpful, I suppose, if that – are you going to cut the video down to those particular –

[PROSECUTOR]: Yes.

[DEFENSE COUNSEL]: So if we could have that ahead of time so the Court could see it.

[PROSECUTOR]: Okay.

THE COURT: How long is it?

[¶] . . . [¶]

THE COURT: I mean the video. Well, it's six hours? How long?

[PROSECUTOR]: Well –

THE COURT: Why don't you show a photograph of the people married or something?

[PROSECUTOR]: I have been watching it mostly fast forward, so I don't know that it's fully six hours.

THE COURT: Why would you show a whole wedding video?

[DISTRICT ATTORNEY]: I don't intend to show the whole wedding.

THE COURT: Why wouldn't you show a photograph of the people as a couple?

[PROSECUTOR]: Because what I would like to do, the wedding video was a very special thing for them, it covered the whole day. He never even got a chance to see it.

THE COURT: So?

[PROSECUTOR]: So that's an impact and a loss to him. It shows him as a living, breathing person.

[¶] . . . [¶]

THE COURT: Obviously he was a living, breathing person. And on 402 basis I probably wouldn't let you show more than a few minutes, if any, of it. I mean, you can show the – or 352. You can show the couple and everything, but to show a – but them coming down the aisle and that sort of thing – but that's just my first impression. But that doesn't sound like it's something that's going to be admissible. So we can talk about it. [¶] Okay. I mean, it's designed to play on the emotions of people, isn't it?

[PROSECUTOR]: I think it's designed to show what his life was and what he lost.

THE COURT: You can do that in description. You're putting a video on to appeal to the emotions of the jury.

[PROSECUTOR]: I think what we're trying to do is make him real and his family real to the jury as opposed to just showing a flat photograph.

THE COURT: I would assume, [defense counsel], that's what you're argument is?

[DEFENSE COUNSEL]: Yes, it will be.

THE COURT: Plan to appeal to the emotions of the jury.

[DEFENSE COUNSEL]: Well, I think there's some case law about what's admissible and what isn't. The impact on the victim is actually not – I mean on the – the – the impact on the decedent is not relevant. It's the impact on the family. I don't know that showing him as a living, breathing person is even relevant, but it certainly is inflammatory. But that's why I want to set the motion.

(II RT 81-83.) The court set another hearing to consider whether to limit or exclude the wedding video. (II RT 83; II CT 547.)

On January 6, 1999, the prosecutor filed an opposition to appellant's motion to limit victim impact evidence. (III CT 636-648.)

On January 8, 1999, the court conducted the subsequent hearing regarding the admissibility of the wedding video:

THE COURT: [I]t seems to me that the law in California presently is that victim impact evidence is admissible. And the question for the Court is really one of 352 and where do you draw the line and how much evidence do you allow in. []

[¶] . . . [¶]

THE COURT: . . . What I'm concerned about is – I did do some more research and read the cases cited by the district attorney. It's interesting to note that most of them deal with claims of prosecutorial misconduct during argument and things that were said, you know, two or three statements that were made.

[DEFENSE COUNSEL]: What I think the prosecution wants to do is bootstrap this kind of thing into the ability to play this beautiful wedding video that's going to tug at the hearts of all the jurors. And I think that that's way beyond the line that's drawn by the California Supreme Court and by Payne, the U.S. Supreme Court.

THE COURT: First of all, I think under 352 I will not sit here and listen to four hours of the videotape of the wedding. I'll tell you that right away.

[DEFENSE COUNSEL]: I don't think –

THE COURT: If you want to put together some clips of a wedding, it's like showing a photograph of the couple together. I mean, the question I have is how soon after the wedding id this incident occur?

[PROSECUTOR]: I believe they were married in December.

[DEFENSE COUNSEL]: Within 30 days.

DETECTIVE OLSON: Yeah, within 30 days.

THE COURT: Within what?

[DEFENSE COUNSEL]: 30 days.

THE COURT: 30 days. So it's basically to show that he had his whole life in front of him with regard to the marriage and things. So – it's going to be a happy marriage and all that.

[PROSECUTOR]: It shows he – shows the victim with his wife together, him as a live, living, breathing person, happy person. And it also does show kind of the extent that he had contact with the community. Because there's just – there's a ton of people present. There's I don't even know how many bridegrooms.

THE COURT: There's big weddings and small weddings. You can send out 500 invitations, you will get a lot of people. But that doesn't mean you get to show the whole video of the wedding. Because, as [defense counsel] says, one of the things that it is going to do is tug on the heart strings of people. And you can't tug that much because you will get into a problem of undue prejudice. And I assume if we get to that point then you have problems. [¶] So it seems to me we have to cut a middle ground here. Of course, I haven't seen the tape. That's one of the things you will have to show me.

[DEFENSE COUNSEL]: Your Honor, I would request that the Court order that the prosecution prepare a reasonable number of still pictures from the wedding video. That will show what they need to show. I'm not objecting to showing them as a couple, showing them at the altar perhaps. That's going to come in.

THE COURT: Because there's – now we have technology that people film their weddings all the time. I don't think you can exclude a video and use just because it's more – because there's more action or living people on the video. I mean, the old days we took photographs. Now everybody has a video camera there as well as photographs. So this is just the 90's. Everybody takes a video of their wedding. I think that's just as admissible as a photograph. [¶] On the other hand, I don't think it can be lengthy. There must be some panning of the audience or maybe he's standing there with all the groomsmen or something like that. But just a short clip. Because basically what you're doing in this situation is showing this is the life of the person, right?

[PROSECUTOR]: Yes.

THE COURT: To counteract on the other side you're showing this is the life of the defendant, assuming we get to that point. And the wedding is only one part of someone's – of someone's life. You can have testimony that he had just gotten married. I presume his spouse is going to testify in this case, right?

[PROSECUTOR]: Yes.

THE COURT: You know, oral testimony can tell us about their relationship and how things were, you know, all those things you want to show. And you don't show a whole wedding because a wedding is, you know, a unique event and it does – these people that watch soap operas and things like that get into thinking even those are real life things when they really aren't. They make people emotional. [¶] So you have to temper those things. And my feeling is a portion of the tape may be

admissible. But you're going to have to cut it and just show it as one, you know, clip saying you know, this I part of his life. He just got married 30 days ago and here's a small clip of what that was. [¶] Another reason not to show the whole video, of course, is it's unduly time consuming.

[PROSECUTOR]: Yes.

THE COURT: And you can show it in other ways, through testimony. [Defense counsel] points out photographs. I'll have to see it first. Okay.

[DEFENSE COUNSEL]: Well, I would like any decision to be deferred.

THE COURT: I don't want to see the whole video but I want to see a portion of it.

[¶] . . . [¶]

THE COURT: [Y]ou give me what you want to show, [District Attorney], and, I mean, I take it from what you submitted you want to show the whole thing.

[DISTRICT ATTORNEY]: No, I think that was clear from my response. No, my intention is only to show five to ten minutes.

THE COURT: Okay. Let's see what your five minute clip is then I can make a better, more-informed decision. . . .

(II RT 153-158.)

On January 28, 1999, the court previewed a five-minute redaction of the wedding video that the prosecutor proposed to play for the jury. The court tentatively ruled the proposed edit of the wedding video was admissible, except for a segment in which the bride was shown receiving communion in a Catholic Church. (II RT 226-237.)

On February 19, 1999, appellant filed supplemental points and authorities regarding victim impact evidence. Appellant asked the court to hold a hearing to review all victim impact evidence, and to exclude speculative assertions about acts and events that may have transpired in the life of the victim had he not been murdered, and characterizations and opinions of the victim's family members about the crime, the defendant, and/or the appropriate sentence. (III CT 836-840.)

On February 25, 1999, the court determined that appellant's broad request was premature, and added that *Payne v. Tennessee* (1991) 501 U.S. 808 (*Payne*) provided the prosecution "some latitude now with regard to victim impact evidence." (II RT 285-287.)

During the penalty phase of the trial, the approximate four-minute segment of the wedding video, with the communion segment deleted, was played for the jury. (XIV RT 2764-2765.)

In her closing, the District Attorney remarked:

> [Simon Francis] never got to see the wedding video . . ..
>
> [¶] . . . [¶]
>
> . . . You saw that video not to make you emotional because it's a wedding. In fact, it probably made you smile because it was really pretty cute. When they ate the wedding cake and dabbed it on their noses or when Simon danced to "Tequila" and threw the garter. It was just cute.
>
> The reason you saw that, ladies and gentlemen, was so that you could appreciate even just for a couple of minutes that Simon Francis was a real, live human being, that he was a unique person, that he was not an abstraction, not a corpse, that he was living person with hopes and dreams and fears. . . ..

(XVIII RT 3740-3741.)

B. Discussion

"The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial fundamentally unfair." (*People v. Hamilton* (2009) 45 Cal.4th 863, 927, citing *Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Section 190.3, subdivision (a), allows evidence and argument on the specific harm caused by the defendant, including the emotional impact on surviving victims and family. (*People v. Brown* (2004) 33 Cal.4th 382, 397-398; *People v. Edwards* (1991) 54 Cal.3d 787, 833-836.) "'The determination whether and to what extent to admit a videotape of the victim's life at the penalty phase of a capital case is within the sound discretion of the trial court.'" (*People v. Vines, supra,* 51 Cal.4th at pp. 887-888, quoting *People v. Kelly* (2007) 42 Cal.4th 763, 801 (conc. opn., Werdegar, J.).)

Appellant recognizes that this Court has consistently rejected his argument regarding similar victim impact videos. (AOB 362.) Appellant does not argue that this four-minute wedding video differs, in any significant manner, from videos that this Court has found to have been proper victim impact evidence. (See, e.g., *People v. Vines, supra,* 51 Cal.4th at pp. 887-888; *People v. Brady, supra,* 50 Cal.4th at p. 579; *People v. Dykes* (2009) 46 Cal.4th 731, 783-785.)

The four-minute video of Francis's wedding ceremony and celebration falls within the ambit of permissible victim impact evidence. The wedding video was not lengthy, approximately four minutes as edited. The video was not a tribute, eulogy, or memorial to Francis, but more of a "home video" of the wedding ceremony and celebration, a real event. The video did not convey outrage or call for vengeance. The video was not enhanced by narration, background music, or visual techniques designed to

generate emotion. There was no mention of Francis's childhood in the video. The wedding had occurred about a month before Francis was murdered. Additionally, the trial court gave the following defense proposed instruction to the jury:

> Evidence in the form of testimony of the victim's family and friends and the playing of a wedding videotape has been introduced for the purpose of showing the specific harm caused by the defendant's crime.
>
> Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether or not the defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence.

(XIX RT 3693-3694; IV CT 1157.)

The video helped the jury understand "the full extent of the harm caused by the [shooting], including its impact on the victim's family," "remind[ed] the jury that the person whose life was taken was a unique human being," and gave the jury "a quick glimpse of the life [appellant] chose to extinguish." (*Payne v. Tennessee, supra,* 501 U.S. at pp. 830-831 (conc opn., O'Connor, J.); cf. *People v. Vines, supra,* 51 Cal.4th at pp. 887-888 [five-minute video in which the victim is seen singing, dancing, and rapping with relatives]; *People v. Brady, supra,* 50 Cal.4th at p. 579 [four-minute video of victim celebrating Christmas with family, and six-minute video highlighting funeral services]; *People v. Dykes, supra,* 46 Cal.4th at pp. 783-785 [eight-minute video of victim with family enjoying trip to amusement park].) By introducing aggravating evidence of the harm caused by appellant's crime, the prosecutor reminded the jury that just as

appellant should be considered as an individual, so too the victim was an individual whose death represents a unique loss to society and in particular to his family. (*People v. Prince, supra*, 40 Cal.4th at p. 1286, quoting *Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

Regardless, there is no reasonable possibility that the four-minute video of Francis's wedding ceremony rendered appellant's trial fundamentally unfair. (*People v. Pearson* (2013) 56 Cal.4th 393, 467.)

Appellant's claim should be rejected.

XX. THE COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING EVIDENCE THAT APPELLANT REQUESTED THE PLAYING OF "GANGSTA RAP" DURING THE BEATING OF PATRICK CARVER

Appellant argues that the court its discretion under Evidence Code section 352 in admitting evidence that he requested the playing of "gangsta rap" during the beating of Patrick Carver. (AOB 369-382.) Not so.

A. The Record

The court held a hearing under Evidence Code section 402 to determine the admissibility of Lawrence Smith's testimony regarding the circumstances of Patrick Carver's beating. (XV RT 2910.) According to Smith, before beating Carver, appellant asked Joey to put on a Dr. Dre tape that Smith described as "gangsta rap." (XV RT 2917.) Appellant's trial counsel objected on grounds of relevance and Evidence Code section 352. (XV RT 2917-2918.) The court commented: "That's just a kind of phrase describing rap music. Doesn't say they were in a gang, just music. . . . They put it on for a particular reason. It's relevant." (XV RT 2918.) Appellant's trial counsel argued that "gangsta rap" was "a term of art," and that there was nothing to say that Smith was qualified to say what is or what is not gangsta rap. (XV RT 2918.) The court then questioned Smith:

THE COURT: Do you listen to a lot of rap music?

[SMITH]: (Affirmative nod)

THE COURT: Do you now?

[SMITH]: Yes.

THE COURT: Okay. You know the difference – you know all the different types of rap music?

[SMITH]: Yes.

THE COURT: What's gangst[a] rap?

[SMITH]: Gangst[a] rap is rap singing about gang violence, gang drugs.

THE COURT: Are you in a gang?

[SMITH]: No.

THE COURT: You just like the music?

[SMITH]: Uh-huh (yes).

(XV RT 2918-2919.)

Appellant's trial counsel again objected that it was "absolutely irrelevant." (XV RT 2919.) The court responded: "We're in the penalty phase of a death penalty case. It's relevant." (XV RT 2919.) Counsel asked: "That they are listening to gangst[a] rap? Why not just rap?" Court replied: "What they are doing is putting on music and then they beat this guy up just like they do it in the song." (XV RT 2919.) Counsel remarked that the content of the song was hearsay. (XV RT 2919.) The court agreed, but noted that Smith was just describing what kind of music it was, not the lyrics. (XV RT 2919.) Counsel argued that there was a foundational issue, and reiterated his objection under Evidence Code section 352. (XV RT 2919-2920.)

The court chose to continue with the Evidence Code section 402 hearing:

> [PROSECUTOR]: Mr. Smith, you were asked to put on some music?
>
> [WITNESS]: Yes.
>
> THE COURT: Wait a minute. [¶] First of all, who said to put on music?
>
> WITNESS: Mr. Bell. Mr. Bell asked my friend Joey to put on a specific tape by Dr. Dre.
>
> [PROSECUTOR]: Did Joey do that?
>
> WITNESS: Yes, he did.
>
> Q. Are you familiar with that music?
>
> A. Yes, I am.
>
> Q. Are you familiar with that music being known as gangst[a] rap?
>
> A. Yes, I am.
>
> Q. When this music was put on, did [appellant] react in any way?
>
> A. Yes. He also said – after the music was put on, Mr. Bell told Joey, he says, "You know how I get," he says, "when I hear my Dre."
>
> Q. Can you – did you observe any behavior by Michael Bell when that –

(XV RT 2920-2921.) Appellant's trial counsel objected that the statement, "You know how I get when I hear my Dre," was "not an element of the crime." The court responded: "it's a fact surround (sic) it." (XV RT 2921.)

The prosecutor continued questioning Smith: "What kind of music is Dr. Dre? (XV RT 2921.) Smith answered: "Dr. Dre is a gangst[a] rap band. It's a band that sings about violence, riding and low riders, smoking weed." (XV RT 2922.) Appellant's trial counsel objected on ground of hearsay. (XV RT 2922.) The court overruled the objection. (XV RT 2922.)

Before the jury, the prosecutor asked Smith about the music played during appellant's assault of Carver:

> Q. And when [Carver] came back to the house, who was present?
>
> A. Umm, myself, Joey Black, Patrick Carver, his girlfriend, Mr. Bell, and Joey Black's younger brother Steven.
>
> Q. Okay. Once he got to the house what's the first thing that happened?
>
> A. The first thing that happened was we confronted him about the situation. And Mr. Bell told him to pull out his – his knife that he had in a sheath.
>
> Q. Okay. Now, had there been any discussion before that happened about music?
>
> A. Yes.
>
> Q. Can you tell us what happened?
>
> A. Mr. Bell had told Mr. Black to put on a tape.

(XV RT 2971.) Appellant's trial counsel objected on ground of relevance, but the court overruled the objection. (XV RT 2971.)

The prosecutor continued:

> Q. He told –
>
> A. Mr. Bell had told Mr. Black, my friend Joey Black, to put on a gangsta rap tape named Dr. Dre.

Q. And did he say something specific about Dr. Dre?

A. Yes.

(XV RT 2971.) Appellant's trial counsel again objected on grounds of Evidence Code section 352 and relevance, and asked the court to "consider those as continuing objections." (XV RT 2971.) The court agreed to do so and then overruled the objection. (XV RT 2971.) The prosecutor asked:

Q. Did he say something in particular about the Dr. Dre?

A. Yes. He told, he told Mr. Black, he said, "You know how I get when I hear my Dre."

(XV RT 2972.)

B. Discussion

Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

This Court "appl[ies] the deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352." (*People v. Kipp, supra,* 26 Cal.4th at p. 1132.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.'" (*People v. Thomas* (2011) 52 Cal.4th 336, 354-355.) The court's discretion to exclude evidence under Evidence Code section 352 is "much narrower at the penalty phase than at the guilt phase." (*People v. Bonilla, supra,* 41 Cal.4th at p. 354; see *People v. Jablonski, supra,* 37 Cal.4th at p. 834.) This Court has explained:

> This is so for two reasons. On the one hand, because the "circumstances of the [capital] crime" are a statutorily relevant factor in the normative decision whether death is the appropriate penalty [], the prosecution is entitled at the penalty phase to show such circumstances in a bad moral light, including their viciousness and brutality. On the other hand, because the defendant has already been found guilty of the capital crime, the potential for prejudice on the issue of guilt is not present.

(*People v. Anderson, supra,* 25 Cal.4th at pp. 591-592.)

The jury had already found appellant guilty of special circumstance murder. The jury was then hearing evidence to determine whether death was the appropriate penalty. In the aggravating evidence of appellant's assault on Carver, the fact that appellant requested, and Joey Black played, a tape of gangsta rap was a circumstance in that assault. (See *People v. Virgil, supra,* 51 Cal.4th at p. 1276 [circumstances of uncharged violent crimes made expressly admissible by § 190.3, factor (b)].) The trial court did not abuse its discretion in admitting testimonial evidence that appellant requested the playing of "gangsta rap" during the beating of Patrick Carver.

Regardless, even if erroneous, the admission of the testimony that appellant had requested and listened to "gangsta rap" during the assault on Carver was harmless.

Error in the admission of evidence under factor (b) is reversible only if "there is a reasonable possibility it affected the verdict," a standard that is "essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. at p. 24. (*People v. Collins* (2010) 49 Cal.4th 175, 220.)

The jury saw the surveillance video showing the callous and brutal manner appellant fired two bullets killing Francis and had found him guilty of that crime. The jury heard about appellant possessing a shank while in

custody on two occasions (XIV 2821-2827; XVII RT 3503-3506), and about appellant's dangerous attempt to evade police while intoxicated, and his volatility when the police tried to arrest him (XIV RT 2795-2818). The jury heard the details of how he cruelly beat Patrick Carver. It is not reasonably possible that the jurors made the serious and weighty determination of whether death was the appropriate penalty based on something as trivial as the type of music appellant requested to hear. (See *People v. Silva* (1988) 45 Cal.3d 604, 636 [erroneously admitted factor (b) evidence trivial compared to defendant's crimes and other proper penalty evidence]; cf. *People v. Moore* (2011) 51 Cal.4th 1104, 1137-1138 [error in admitting evidence that defendant inmate possessed baggie of urine to show attempted assault harmless]; *People v. Lancaster* (2007) 41 Cal.4th 50, 94-95 [error admitting evidence that handcuff keys found in defendant's cell harmless].) Listening to music with violent themes or lyrics is markedly different than actually committing violent acts.

Appellant's claim should be rejected.

XXI. SECTION 190.2 IS NOT IMPERMISSIBLY BROAD

Appellant argues that the death penalty is invalid because section 190.2 is impermissibly broad. (AOB 383-385.) Not so.

As appellant recognizes, this Court has repeatedly rejected this challenge of California's death penalty law. (AOB 384; see, e.g., *People v. Elliott, supra,* 53 Cal.4th at p. 595 ["California's death penalty law, which permits capital punishment for many first degree murders, including unintentional felony murders, is not overly broad."].) Appellant provides no reason for reconsideration of this Court's consistent rejection of the "impermissibly broad" challenge of California's death penalty law. This Court should again reject this claim.

XXII. CONSIDERATION OF CIRCUMSTANCES UNDER SECTION 190.3, FACTOR (A), DOES NOT RESULT IN ARBITRARY OR CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

Appellant argues that section 190.3, factor (a), allows arbitrary and capricious imposition of the death penalty. (AOB 386-388.)

As appellant acknowledges, this Court has consistently rejected this argument. (See, e.g., *People v. Brown, supra,* 33 Cal.4th at p. 401; *People v. Lewis* (2001) 26 Cal.4th 334, 394.) The United States Supreme Court has rejected this argument as well. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 976.) Appellant offers no reason for this Court to reconsider its prior rulings.

XXIII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT LACK SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

Appellant argues that California's death penalty statute contains no safeguards to avoid arbitrary and capricious imposition of the death penalty. (AOB 389-416.) Each of appellant's challenges have been previously rejected by this Court and appellant presents no reason to warrant reconsideration of those decisions.

Appellant contends that the jury must find aggravating circumstances true beyond a reasonable doubt. (AOB 392-407.) This Court has rejected such claims before and has held that the jury need not find beyond a reasonable doubt that an aggravating circumstance exists, that the aggravating circumstances outweigh mitigating circumstances, or that death is the appropriate penalty. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1355; *People v. Bunyard* (2009) 45 Cal.4th 836, 860-861; *People v. Ward* (2005) 36 Cal.4th 186, 221.)

Appellant contends that the absence of intercase proportionality review renders California's capital punishment scheme unconstitutional. (AOB 408-409.) This Court has rejected any claim that intercase proportionality review is constitutionally required. (*People v. Barnett, supra,* 17 Cal.4th at p. 1182; see *Pulley v. Harris* (1984) 465 U.S. 37, 50-51.)

Appellant contends that allowing the prosecutor to rely on unadjudicated criminal activity is unconstitutional unless such evidence is proven beyond a reasonable doubt. (AOB 409-411.) This Court previously rejected this claim. (*People v. Anderson, supra,* 25 Cal.4th at pp. 584-585; *People v. Medina, supra*, 51 Cal.3d at pp. 906-907; *People v. Balderas* (1985) 41 Cal.3d 144, 204-205.)

Appellant contends that the use of the restrictive adjective "extreme" in the factor (d) language acted as a barrier to consideration of all relevant mitigating evidence by the jury. (AOB 411-412.) This claim has been repeatedly rejected by this Court.[32] (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

---

[32] Appellant contends there was a reasonable likelihood that the jury misunderstood the factor (d) instruction to bar consideration of non-extreme mental or emotional disturbance as a mitigating factor. He notes that this Court "has previously held that use of the standard factor (d) instruction is not error if the jury is also instructed in the language of factor (k)" (AOB 412), but claims that "there was neither instruction nor argument by counsel that would have disabused the jury of the notion that only 'extreme' mental disturbance qualified as a mitigating factor" (AOB 412). Contrary to appellant's assertion, the trial court did instruct the jury here with factor (k) (XIX RT 3691), as well as the following defense proposed instruction:

> [G]etting back to 8.85 again, factor (k) . . ..
>
> You may consider any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the

(continued...)

Appellant contends that it was error to instruct that statutory mitigating factors were relevant only in mitigation. (AOB 413-416.) This Court has repeatedly rejected this claim and appellant presents no reason to reconsider those decisions. (*People v. Morrison* (2004) 34 Cal.4th 698, 730.)

Appellant's claim should be rejected.

(...continued)

> defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial.
>
> Such evidence may include, but is not limited to, the following:
>
> Whether the defendant's premature birth and early physical problems affect his adult psychology and personality;
>
> Whether the defendant's lack of bonding as a newborn with his mother affected his adult psychology and personality;
>
> Three, whether the defendant suffers from attention deficit hyperactivity disorder. That's the ADHD;
>
> Four, whether the defendant suffers from a learning disability or low intelligence;
>
> Five, whether the defendant suffers from a brain dysfunction which affects his ability to learn and make rational decisions;
>
> And, six, evidence relating to the defendant's children, brother and mother.
>
> You must disregard any jury instruction given to you which conflicts with this principle.

(XIX RT 3694; IV CT 1148.) This Court should be confident that the jury here did not limit evidence of mental or emotional disturbance to *extreme* mental or emotional disturbance.

XXIV. CALIFORNIA'S DEATH PENALTY SENTENCING SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Appellant argues that California's death penalty scheme violates the equal protection clause because certain safeguards in sentencing afforded to non-capital defendants are not afforded to capital defendants. (AOB 417-420.) This Court has consistently rejected this argument. (*People v. Valdez* (2012) 55 Cal.4th 82, 180; *People v. Russell* (2010) 50 Cal.4th 1228, 1274; *People v. Blair, supra,* 36 Cal.4th at p. 754.) Appellant provides no reason to reconsider this issue. Appellant's claim should be rejected.

XXV. CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellant argues that the regular use of the death penalty as a form of punishment violates international norms and the Eighth Amendment. (AOB 421-425.) As appellant acknowledges, this Court has consistently rejected challenges to California's use of the death penalty based on international norms and the Eighth Amendment. (See, e.g., *People v. Thomas, supra,* 53 Cal.4th at p. 837.) Appellant offers no new reason for this court to revisit those prior decisions.

In November of 2012, California voters rejected Proposition 34, a ballot measure which would have repealed the death penalty and retroactively replaced the death penalty with life in prison without the possibility of parole. (See http://www.smartvoter.org/2012/11/06/ca/state/prop/34/.) Whatever trend can be divined from public opinion polls, neither trends nor polls afford a basis for this Court to revisit its prior decisions upholding California's capital punishment scheme.

International norms neither control nor guide the meaning of the Eighth Amendment. (See *Roper v. Simmons* (2005) 543 U.S. 551, 575, 578 (*Roper*).) With Eighth Amendment jurisprudence, international norms serve in a confirmatory role. (*Roper v. Simmons, supra,* 543 U.S. at p. 578.) "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Appellant's claim should be rejected.

XXVI. THERE WERE NO ERRORS TO CUMULATE

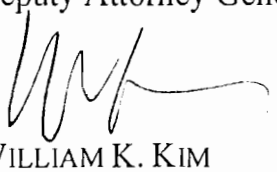
Appellant argues that the cumulative prejudicial effect of the errors in the guilt and penalty phases requires reversal of the judgment. (AOB 426-428.) As explained above, appellant has identified no error, and to the extent there were errors, those errors were harmless. There were no errors to cumulate. (*People v. Beeler* (1995) 9 Cal.4th 953, 994.) Assuming that there was any error, even those respondent contends were harmless, any adverse effect attributable to such an assumed error did not tend to aggregate with adverse effects from any other assumed error, and there was no possible accumulation of harms amounting to prejudice. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 40.) This claim should be rejected.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Dated: November 8, 2013. Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
KATHLEEN A. MCKENNA
Supervising Deputy Attorney General
SEAN M. MCCOY
Deputy Attorney General



WILLIAM K. KIM
Deputy Attorney General
Attorneys for Respondent

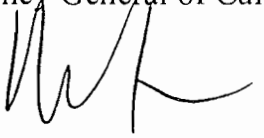
FR2001XS0002
95091337.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains 49,356 words.

Dated: November 8, 2013.

KAMALA D. HARRIS
Attorney General of California



WILLIAM K. KIM
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Bell*
Case No.: **S080056**

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 that same day in the ordinary course of business.

On November 8, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

Melissa Hill
Attorney at Law
P.O. Box 2758
Corrales, NM 87048
Representing appellant, BELL
(TWO COPIES)

Gary B. Wells
Attorney at Law
6083 Figarden Drive, PMB 203
Fresno, CA 93722-3226

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

Fifth Appellate District Court of Appeal
State of California
2424 Ventura Street
Fresno, CA 93721

County of Stanislaus
Superior Court of California
P.O. Box 1098
Modesto, CA 95353-1098

The Honorable Birgit Fladager
District Attorney
Stanislaus County District Attorney's Office
832 12th Street, Suite 300
Modesto, CA 95354

Kent Faulkner
Deputy Public Defender
Stanislaus County Public Defender's Office
P.O. Box 3428
Modesto, CA 95353-3428

Governor's Office, Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

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 November 8, 2013, at Fresno, California.

Debbie Pereira-Young
Declarant

Debbie Pereira-Young
Signature

FR2001XS0002
95091430.doc