No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

DONNIE HOWARD, *Petitioner*

vs.

STATE OF CALIFORNIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

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QUESTIONS PRESENTED

1. Did the trial court's statements during jury selection equating being convinced beyond a reasonable doubt with being "sure" or "positive" of guilt violate petitioner's Sixth and Fourteenth Amendment rights to due process and jury trial?

2. Did the trial court's act of giving several varying and conflicting descriptions of the reasonable doubt burden of proof, some of which were misleading, undermine the strictness of the standard in the jurors' minds in violation of petitioner's Sixth and Fourteenth Amendment rights to due process and a jury trial?

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Petitioner Donnie Howard respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the California Court of Appeal entered on May 30, 2018.

OPINION BELOW

The California Court of Appeal, Division Five, issued its unpublished opinion in this case on May 30, 2018. A copy of that opinion is attached as Appendix B. The California Supreme Court's one-page order denying review of the court of appeal's opinion on September 12, 2018 is attached as Appendix B.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were the State of California, the original plaintiff and respondent, and Donnie Howard, defendant and appellant.

JURISDICTION

Because the California Supreme Court issued its order denying review on September 12, 2018, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

This case involves the guarantees in all criminal prosecutions contained in the Sixth and Fourteenth Amendments to the

United States Constitution, specifically the rights to due process and to a jury trial.

STATEMENT OF THE CASE

A. Procedural Facts

On September 23, 2014, the Alameda County District Attorney charged petitioner and co-defendants Ayodele Patterson and Lionel Harris by Information with the murder of Carolyn June Pavon (Cal Pen. Code,[1] § 187(a)) with a special circumstance allegation that the murder was committed during the commission of a burglary (§ 190.2(a)(17)(G)). The prosecution alleged as to co-defendant Patterson that he personally and intentionally discharged a firearm, causing great bodily injury and death. As to petitioner and co-defendant Lionel Harris, the prosecution alleged that a principal (Patterson) was armed with a firearm (§ 12022(a)(1)). The prosecution further alleged that petitioner had a prior conviction for first-degree residential burglary (§ 459). 1CT 13-18; 1RT 33.

Prior to trial, co-defendant Harris pleaded guilty to voluntary manslaughter and admitted the arming enhancement in exchange for a 12-year sentence, and during petitioner's trial a

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

[2] CALCRIM No. 220 stated, in pertinent part:

mistrial was declared as to defendant Patterson. 3RT 415. The jury thereafter returned a verdict of guilty of special circumstance murder as to petitioner and found the arming enhancement true. 6RT 1150-1154. On June 17, 2016, the trial court found that petitioner's prior conviction qualified as a "strike" and sentenced petitioner to life in prison without the possibility of parole. 2CT 347. On May 30, 2018, Division Five of the California Court of Appeal upheld petitioner's first-degree murder conviction, but found insufficient evidence of the burglary-murder special circumstance and reversed the trial court's "strike" finding, reducing petitioner's sentence to 25 years-to-life.

B. Facts Relevant to the Issues Raised

At the beginning of jury selection, the trial court described reasonable doubt in language modified from California Penal Code section 1096:

> In terms of reasonable doubt if you do serve as jurors, this is the standard of proof and this what you will hear as an instruction: Proof beyond a reasonable doubt is defined as follows: (sic) It is not a mere possible doubt because everything in human affairs is open to some possible or imaginary doubt. It's that state of 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.
> 1AugRT 16-17.

The court then stated:

> So basically, like I said, I think the law makes common sense. People may interpret that differently. *It's*

up to you as jurors how to interpret that instruction, but basically where it comes from, the theory is that it's better for ten guilty people to go free rather than one innocent person to be convicted.

On the other hand, the DA does not have an impossible job. The case does not have to be proven beyond all reasonable – I mean, beyond all possible doubt. Basically, you have to – *I think given the charges in this case or any criminal case, it makes sense before you find somebody guilty, you'd have to be positive, you'd have to be sure that the person is guilty*.

1AugRT 17; emphasis supplied.

The court repeated essentially the same statement four times, boiling down the reasonable doubt standard to being sure or positive, for each new group of jurors: "You basically have to be positive, you have to be sure before you find somebody guilty." 1Aug.RT 154; 2Aug.RT 189; 3Aug.RT 412. The court's statements were often made during questioning of the jurors:

THE COURT: On the other hand, let's say – [the prosecutor] over here, it's important to her also. Let's say at the end of the case, you're convinced beyond a reasonable doubt, *you're positive, you're sure either or both defendants are guilty*, would you hesitate to return a guilty verdict?

2Aug.RT 189; emphasis supplied.

In another exchange, the court repeated:

THE COURT: Okay. At the end of the case – it gets more serious. It's serious enough now. At the end it gets even more serious. *The question is, has the district attorney proven the case beyond a reasonable doubt, in other words, basically, you have to be positive, you have to be sure the person is guilty before you find any person guilty*.

MR. AU: Yes.

THE COURT: Would you require the district attorney to meet that burden before you ever found anybody guilty?

MR. AU: Well, I think that's what's required, yes.

THE COURT: Let's say you think the person probably is guilty or highly likely that he's guilty, but you're not beyond a reasonable doubt; would you still find the person not guilty; do you follow?

MR. AU: Yeah. If you're saying that I need to be 100 percent sure –

THE COURT: No, that's not it. The case doesn't have to be proven beyond all possible doubt, imaginary doubt. *And reasonable doubt, it's really up to you to determine what that is.* It's a very high standard. As I said before, it's better that 10 guilty people go free than one innocent person be convicted. Would you be able to abide by that type of standard?

MR. AU: No.

3Aug.RT 412; emphasis supplied.

The court also drew an equivalence between everyday decision-making and applying the beyond-a-reasonable-doubt standard: "Your job is to use your common sense, your fair and realistic judgment and *call it as you see it in an attempt to determine the truth in the context of reasonable doubt. In your day-to-day life, you're always making decisions such as this* in deciding whether what somebody tells you is accurate or inaccurate." 1Aug.RT 20-21; emphasis supplied.

The court repeated this instruction: "And it's your job to use[] your common sense, fair and realistic judgment to attempt to *determine the truth in the context of reasonable doubt.* [¶] *And in your day-to-day life, you're always making decisions* about what – whether if what somebody tells you is accurate or inaccurate." 2Aug.RT 156; emphasis supplied.

As noted above, the court twice told the jurors it was their job to interpret what beyond-a-reasonable-doubt meant: "The case doesn't have to be proven beyond all possible doubt, imaginary doubt. *And reasonable doubt, it's really up to you to determine what that is.* It's a very high standard. As I said before, it's better that 10 guilty people go free than one innocent person be convicted." 3Aug.RT 412; 1AugRT 17. The court reinforced this message when it told the jurors it was their job to interpret the law: "And also, [the attorneys] will try to – they're allowed to interpret the law, but it's you – *ultimately, you are the – you decide, based on what I give you, how you interpret the law*, but they're entitled to do that. It's entirely proper for them to argue the law." 1Aug.RT 26.

During the final instructions to the jury, the court gave California's standard beyond-a-reasonable-doubt jury instruction (CALCRIM No. 220[2]) and instructed on the burden of proof as applied to circumstantial evidence (CALCRIM Nos. 224 and 225[3]).

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[2] CALCRIM No. 220 stated, in pertinent part:
A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty. 6RT 1005.

[3] As given in this case, CALCRIM No. 224 stated:

6RT 1004-1005, 1007-1009.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted to decide whether the court's instructions to the jury during jury selection, which equated being convinced beyond a reasonable doubt with simply being "sure" or "positive" of guilt, violated petitioner's rights to due process and a jury trial. 1Aug.RT 17, 154; 2Aug.RT 189; 3Aug.RT 412. This Court's jurisprudence does not support a finding that such colloquial descriptions, equating being convinced beyond a reasonable doubt with simply having ordinary confidence in guilt, convey the level of certitude necessary for a finding of guilt beyond a reasonable doubt. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970).

Moreover, other of the court's instructions further muddled

Before you may rely on circumstantial evidence to conclude the fact necessary to find the defendant guilty has been proved, you must be convinces that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and the other to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.
6RT 1007-1008.

CALCRIM No. 225 included essentially the same language applied to proof of the intent or mental state for the offense. 6RT 1008-1009.

and undermined the jury's understanding by equating deciding the case to everyday decision-making and informing the jurors they could interpret the law and the burden of proof themselves. 1Aug.RT 17, 20-21, 26; 2Aug.RT 156; 3Aug.RT 412.

The California Court of Appeal[4] did not explicitly consider petitioner's argument based on *Gaines v. Kelly,* 202 F.3d 598, 610 (2nd Cir. 2000), which concluded: "Not only do lengthy reasonable doubt charges run the risk of defining the concept in a manner that is not on point, but the very act of giving several varying definitions of reasonable doubt may itself undermine the strictness of the standard in the jurors' minds." The analysis in *Gaines* was based on this Court's holding that instructions on reasonable doubt must be reviewed "for constitutional error [by] asking whether 'there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.'" *Id.*, at 605, quoting *Victor v. Nebraska*, 511 U.S. 1, 6 (1994) and citing *Estelle v. McGuire*, 502 U.S. 62, 72 & n. 4,

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[4] The California Court of Appeal found both no federal constitutional violation in the court's statements to the jury about reasonable doubt during jury selection and that petitioner had forfeited the claim because his trial counsel had not objected below. App. A, pp. 10-11. However, the California Court of Appeal's citations to California statutory and decisional authority make clear that if it had found a violation of petitioner's federal constitutional rights, no objection would have been necessary to preserve the claim for appeal. App. A, pp. 10-11, citing *People v. Daveggio and Michaud*, 4 Cal.5th 790, 840 (2018) (court's comments about reasonable doubt during voir dire evaluated on their merits to determine whether they affected defendants' substantial rights within the meaning of California Penal Code section 1259).

(1991). Additionally, *Gaines* considered the cumulative effect of the varying reasonable doubt instructions, as required by this Court's precedent. See, e.g., *Taylor v. Kentucky,* 436 U.S. 478 (1978), 487, & fn. 15 (cumulative effect of errors may violate due process guarantee of fundamental fairness). The California Court of Appeal's approach thus conflicted with that of *Gaines* and *Estelle v. McGuire*, 502 U.S. 62, and failed to apply this Court's precedent requiring a review of the cumulative effect of misleading instructions that may violate federal due process, warranting a grant of certiorari.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO DECIDE IF THE TRIAL COURT'S INSTRUCTIONS ABOUT REASONABLE DOUBT DURING JURY SELECTION VIOLATED THE JURY TRIAL GUARANTEE OF THE SIXTH AMENDMENT AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE BY IMPERMISSIBLY LIGHTENING THE PROSECUTION'S BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT

The Fourteenth Amendment Due Process Clause requires that a criminal defendant's guilt be proven beyond a reasonable doubt and that the court correctly instruct the jury on the prosecution's burden of proof. *Winship*, *supra*, 397 U.S. at 364. The Sixth Amendment requires that the reasonable doubt determination be made by the jury. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Consequently, an instruction lightening the prosecution's burden of proof violates the accused's rights to due process and a jury trial. See *United States v.*

Gaudin, 515 U.S. 506, 519 (1995).

This Court observed in *Winship*, *supra*, 397 U.S. at 363:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." (Citation omitted.) ... "[A] person accused of a crime ... would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." (Citations omitted.)

Accordingly, "[T]he interests of the [criminal] defendant are of such magnitude that historically they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979).

The reasonable doubt burden of proof refers to "'a subjective state of certitude of the facts in issue.'" *Winship*, *supra*, 397 U.S. at 364, quoting Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly*, No. 4, pp. 1, 26 (1967). A defendant cannot be "adjudge[d]. . . guilty of a criminal offense without [the prosecution] convincing a proper factfinder of his guilt with utmost certainty," and the factfinder "'need[s] to reach a subjective state of near certitude of the guilt of the accused.'" *Id.*, at 364; *Victor v. Nebraska, supra*, 511 U.S. at 15, quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). This Court has repeatedly

described the reasonable doubt standard as requiring "utmost certainty" and emphasized the need for "'evidentiary certainty,'" that is certainty based on the government's proof. *Winship*, *supra*, 397 U.S. at 364; *Victor v. Nebraska*, *supra*, 511 U.S. at 15-17.

This case asks the Court to resolve the question of whether a violation of the rights to jury trial and due process occur when a trial court has instructed the jury during jury selection that being "sure" or "positive" of a defendant's guilt is sufficient to qualify as being convinced beyond a reasonable doubt. 1Aug.RT 17, 154; 2Aug.RT 189; 3Aug.RT 412. Simply stated, this Court's precedent establishes that such descriptions of the burden of proof are erroneous. Among various possible dictionary definitions of "sure" and "positive," the most straightforward fall short of federal constitutional standards: "sure" can be defined simply as "[c]onfident" and being "positive" can simply be defined as being "very confident." *The American Heritage Dictionary of the English Language* (5th Ed. 2011), pp. 1375, 1752; see Appendix A, p. 11. Thus, neither "sure" nor "positive" convey the necessary level of certitude. In short, the feelings of being "sure" and of being "positive" contrast with the *very high level of probability* – the feeling of being convinced *by evidentiary proof* -- that a juror must have when finding guilt beyond a reasonable doubt. *Victor v. Nebraska, supra,* 511 U.S. at 15-17.

Even though some of the trial court's descriptions of the burden of proof were accurate, the trial court's statements during jury selection provided the jurors with a boiled down, shortcut

definition, so that all the jurors needed to assess was whether they were "sure" or "positive" of guilt in order to determine whether the burden of proof had been met. 1Aug.RT 17, 154; 2Aug.RT 189; 3Aug.RT 412. In other words, although the court referenced, for example, the need for ten guilty persons to go free before an innocent person is convicted, the court repeatedly presented being "sure" or "positive" as *encapsulating* this standard. See, e.g.,1AugRT 17. Accordingly, it is reasonably likely the jury understood the burden of proof to mean, in shorthand terms, simply being "sure" or "positive."

Furthermore, due process requires that the cumulative effect of the varying comments the trial court made on the meaning of reasonable doubt be considered: "[W]hen a reasonable doubt charge gives several definitions of reasonable doubt, the likelihood that the jury will misunderstand any one definition is augmented by the other problematic definitions that give it broader context." *Gaines v. Kelly*, 202 F.3d at 609, citing *Victor*, 511 U.S. at 16, 19-20, 22. *Gaines, supra*, 202 F.3d at 609-611, found a due process violation where the court provided the jurors with three potentially confusing descriptions of the burden of proof: to "a moral certainty"; "reasonably and morally certain"; and to "a reasonable degree of certainty":

> Central to our decision today is the fact that when a reasonable doubt charge gives several definitions of reasonable doubt, the likelihood that the jury will misunderstand any one definition is augmented by the other problematic definitions that give it broader context. See *Victor*, 511 U.S. at 16, 19-20, 22, 114 S.Ct. 1239.... The present charge, for example, contains references to "a moral

> certainty," to "reasonably and morally certain," and to "a reasonable degree of certainty." There is in our view a reasonable likelihood that the jurors hearing all three terms given in a single charge concluded that deciding whether to acquit or to convict rested not on the evidence alone but also on abstract moral considerations.
> *Id.*, at 609-610.

Gaines also found misleading the court's additional instruction referring "a juror to 'his own judgment' as an independent basis for deciding the case, implying that bases for decision existed aside from the evidence." *Id.*, at 609.

Here, as in *Gaines*, the court's statements contextualizing the reasonable doubt standard increased the likelihood that jurors misapplied the standard. In addition to the court's statements describing being convinced beyond a reasonable doubt as being "sure" or "positive" of guilt, the court repeatedly told the jurors that they make factual findings by a reasonable doubt in "day-to-day life" and informed the jurors they were the ones who would determine what reasonable doubt meant and that it was up to them to interpret the law. 1Aug.RT 17, 20-21, 26; 2Aug.RT 156; 3Aug.RT 412. These statements allowed the jurors to look to bases for the decision outside the evidence and to demand merely a level of confidence they would reach in common, daily decision-making.

In summary, the court's improper references to being convinced beyond a reasonable doubt as being "sure" or being "positive" must be considered in the broader context of the court's other misleading statements. Those misleading statements informed the jury that applying the reasonable doubt standard involved fact-

finding the jurors engaged in in everyday life and that the jurors could resort to relying on their own independent judgment, rather than the evidence or the law as defined by the judge. It is true that the trial court made other statements tending to define the reasonable standard more strictly and correctly – such as giving the jurors the standard California instruction defining reasonable doubt and telling them that it was more important that one innocent person not be convicted than that ten guilty persons go free. Nevertheless, the court repeatedly conveyed to the jury that they could use a shortcut to determine guilt simply by assessing whether they were "sure" or "positive" of guilt. As a result, the court communicated that the jurors could replace the more stringent and accurate descriptions of the burden of proof with an assessment of whether the jurors were simply confident of guilt. The cumulative effect of all of these instructions was to lower the degree of certainty necessary to a finding of guilt beyond a reasonable doubt, in violation of petitioner's due process and jury trial rights.

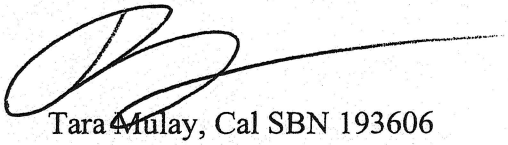
This Court's precedent makes clear that misinstruction on the reasonable doubt burden of proof is structural error. "[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Accordingly, petitioner requests that this Court grant the petition for a writ of certiorari and vacate petitioner's conviction and sentence.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the California Court of Appeal should be reversed.

Dated: December 8, 2018

Respectfully submitted,



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APPENDIX A

Opinion of the California Court of Appeal

People v. Donnie Howard, A149081

Filed 5/30/18 P. v. Howard CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DONNIE HOWARD, Defendant and Appellant.	A149081 (Alameda County Super. Ct. No. H56262B)

June Pavon was shot to death during a burglary of her home. One of the intruders, Lionel Harris, pled no contest to voluntary manslaughter and testified against the other two, appellant Donnie Howard and his co-defendant Ayodele Patterson, during their joint jury trial. A mistrial was granted as to Patterson, but the case against appellant proceeded to a verdict. The jury convicted appellant of first degree murder with a felony-murder special circumstance and found that he had been armed with a firearm in the commission of the offense, and the court determined he had been previously convicted of a first degree burglary. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)(G), 12022, subd. (a)(1).)[1] Appellant was sentenced to life without the possibility of parole.

In this appeal, appellant contends: (1) the trial court made numerous statements during voir dire that trivialized the burden of proof beyond a reasonable doubt; (2) the court should have granted his motion for a mistrial based on evidence suggesting that Patterson had implicated him during a police interrogation; (3) the evidence was

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

insufficient to show appellant acted as a major participant and with reckless indifference to human life, as is necessary to support a felony-murder special circumstance allegation for a non-killer; and (4) the accusatory pleading did not adequately allege a prior conviction under the Three Strikes law. We agree with the final two contentions and will order appellant's sentence modified to 25 years to life for first degree murder.

I. BACKGROUND

A. *Discovery of the Victim's Body*

June Pavon, the victim in this case, was eighty years old lived alone with her dog in a home on Spring Drive in the Hayward Hills. Her house had an attached garage with a door at the top of a flight of stairs leading into her kitchen. A side door to the garage had been broken during a burglary of her home in May 2010. Pavon had not been home during the May burglary.

On the afternoon of Friday, June 25, 2010, Pavon spoke with her daughter Malia on the telephone. On Sunday, June 27, 2010, worried because Pavon was not answering her telephone, Malia and her husband went to Pavon's house and discovered her dead body on her living room couch. Pavon had been shot four times at close range in the face and chest and her house had been ransacked.

Three empty jewelry box drawers from a bedroom jewelry case were found on the living room floor, the contents of Pavon's purse had been dumped onto a living room chair, and her wallet was open on the living room floor. In Pavon's bedroom, a jewelry box and a piece of jewelry were lying on the bed and a jewelry case drawer was lying on the floor. Another piece of jewelry was found on the steps and keys and coins were found outside the garage door. The side door to the garage was damaged and appeared to be the point of entry.

No useable DNA or fingerprints were found at the scene.

B. *Charges Against Appellant, Patterson and Harris*

On September 23, 2014, the district attorney filed an amended information charging appellant, Ayodele Patterson, and Lionel Harris with Pavon's murder. (§ 187, subd. (a).) It was alleged that Patterson had personally and intentionally discharged a

firearm causing great bodily injury and death (§ 12022.53, subd. (d)) and that as to appellant and Harris, a principal had been armed with a firearm (§ 12022, subd. (a)(1)). Harris pled guilty to voluntary manslaughter and admitted an arming allegation and was given an agreed sentence of 12 years in exchange for his truthful testimony about the Pavon murder.

C. *Harris's Testimony Against Appellant and Patterson*

At the joint jury trial of appellant and Patterson, Harris testified that he had been close friends with Patterson for many years, knew his family well, and considered him to be like a brother. He met appellant at Patterson's house when he was 17 or 18 years old and sometimes hung out with him, though he was not as close to appellant as he was to Patterson. Harris and Patterson had committed a residential burglary together, which was known as a "house lick," and Harris had pawned some jewelry from that crime at a pawn shop. Harris had committed a separate burglary with appellant, and afterwards they went to a local store where the clerk bought things for cash. During both of the burglaries, the men wore gloves. Patterson owned a long rifle, and Harris later saw it with its stock cut off and its handle covered in duct tape.

On the day of the Pavon murder (Saturday, June 26, 2010), Patterson called Harris and invited him to come over and hang out. After Harris arrived, Patterson took a phone call, left the room, and came back and told Harris he had a "lick on [the] line," meaning there was a house he wanted to burglarize. Harris told Patterson he just wanted to hang out, but Patterson insisted he come along.

The two walked past some basketball courts near Patterson's apartment and up a tree-lined dirt path. It was getting dark. Patterson gave Harris a pair of blue gloves, which Harris put on. As they were walking, Harris saw the butt of the sawed-off rifle sticking out of the top of Patterson's pants. After they passed the basketball courts, they were joined by appellant, who was also wearing blue gloves. Patterson said there was a big black dog at the house and it was agreed that Harris would be the lookout. Appellant did not say anything about a dog.

When they arrived at Pavon's house, they walked down an alleyway between the garage and a shed. Appellant and Patterson stopped at a side door to the garage and Harris continued walking around the corner to the backyard patio. There, he looked through the kitchen window and saw Pavon get a glass of water. He did not know whether she had seen him, and he went back around the corner to let appellant and Patterson know that someone was in the house. The side door to the garage was open and when he walked inside the garage he saw that the door leading from the stairs inside to the kitchen was also open. He had not heard anyone breaking into the house.[2]

Harris walked up the stairs and into the kitchen, where he saw Patterson standing between the kitchen and the living room, holding his gun at his side pointing down toward the floor. Patterson whispered to Harris that there was a lady in the living room and asked him what he wanted him to do. Harris said they should come back when she was not there and Patterson said, "Fuck that" and "We going to do this. We going to do this. [] I'm fitting to lay her down." Patterson then entered the living room and approached Pavon, who was sitting on her couch reading a book with her dog next to her. He fired a shot into her chest from about a foot away and Pavon made a screech. Patterson paused after the first shot then fired three more in rapid succession, with the last one hitting her nose. Pavon's dog moved to a position under the table.

Harris became angry and yelled at Patterson, wondering why he had shot Pavon. Patterson started picking up casings and told Harris to help him, but Harris did not do so. Patterson started going through Pavon's purse and the entertainment center in the living room and then walked into another room. Harris felt shocked and angry and left without going through any of Pavon's belongings. He did not see appellant inside the house and did not see him again that night. The last place he saw appellant had been at the side door of the garage.

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[2] Harris told the police during an interview that he had seen appellant kick in the door leading from the alleyway to the garage and that appellant got some jewelry from the burglary. At trial he testified that this was a lie, and he made up the story to help himself.

After the shooting, Harris returned to Patterson's house, and Patterson returned about 15 minutes later. He said he had stashed the gun outside. Harris spent the night at Patterson's house because it was too late to take the bus home, but they did not talk very much.

Harris saw appellant once or twice after the shooting but never discussed it with him. About a year later, he attended a party and saw David Hall, with whom he had committed a street robbery. Police were called to the party, and after they left he saw Hall with the duct taped gun that Patterson had used to shoot Pavon. Patterson was not at the party. Harris acknowledged he had been a member of the Taliban gang, but testified he was no longer a member when he was arrested for this crime in April 2014. A friend of his had been shot in 2011, and he testified against the shooter in that case without getting any deal for his testimony.

D. *Appellant Pawns Jewelry the Day After the Burglary and Murder*

It was stipulated that on Sunday, June 27, 2010, appellant pawned one piece of scrap 14 karat yellow gold jewelry weighing 1.6 grams at a pawnshop in Oakland.

E. *Recorded Conversation Between Appellant and Patterson*

Appellant was interviewed by the police several times regarding the Pavon murder and burglary and consistently denied involvement. In April 2014, the police interviewed him and Patterson separately and then placed them alone in a room together and recorded their conversation. At the time, appellant had pled guilty to an unrelated burglary for which he would receive a four-year prison sentence.

At the beginning of the video, Patterson indicated he knew their conversation was being recorded. Appellant said, "I'm already goin' to the pen, bro, it's over;" "I'm tellin' you, bro, you're gonna have to take one, blood;" and "I'm tellin' you, bro. . . [¶]. . . I'm sitting here for no reason, blood." Patterson told appellant, "They just showed me a smooth video. And I'm sittin' here like, why the fuck would you even say anything about me bein' in some shit that I didn't—you know what I mean." Appellant said the police had showed him a video and reiterated, "I'm already down, but I'm already goin' to the pen, blood, it's over for me." Patterson assured appellant, "I ain't fittin' to put

your name in something that you didn't do, nigga." Appellant told him, "You need to tell 'em what happened, nigga," and Patterson responded, "[T]ell em' what happened? I don't even know what the fuck happened, that's the thing."

Appellant said it was already over for him because he was already in jail. "[W]hat are we sittin' here lyin' to each other for when we fittin' to go to prison?" He told Patterson, "[Y]ou should already just take responsibility" and "You already know what happened, blood. Ain't no use in sittin' here just goin' back and forth with these people, blood. I'm in this shit for nothin.' You know I wasn't there, blood." Patterson asked, "Who said you was there, bro" and appellant responded, "You said it. That's what they sayin.' Patterson denied it and said, "Wasn't nobody there. I don't even know who was there. So how the fuck, bro, you gonna believe them over me, nigga?" Patterson said the police didn't have any evidence and that this was a "wrap" for both of them and appellant responded, "How is it a wrap for both of us? You just said I ain't got nothin' to do with it. Then tell 'em, blood."

Appellant repeated that everybody had talked, including "L" (the nickname for Harris) and Patterson repeated, "It's a wrap." Patterson said, "[W]e both fittin' to be gone for a long time for somethin' that we both didn't do, bro," to which appellant responded, "Somethin' I didn't do, blood. You know what you did, blood. Go on and take that. . . ." He continued, "You got me sittin' in here for nothin', blood. 'Cause we fuck with each other tuff, but that's the only reason," and "They got us on hella shit, bro. All the licks, all the shit, blood." Patterson said, "I didn't say nothin' about nothin', bro. I don't see how it's that hard to keep your fuckin' mouth shut. I don't understand." Appellant said, "Blood, I'm tellin' you, man . . . They showed me the video. They said —but all the shit, blood." Patterson told appellant, "Obviously you mother fuckers got somethin' against me. You mother fuckers want me to go down for somethin' that supposedly I did. Right? Supposedly. Right?" Appellant replied, "I'm tellin' you, blood, I ain't got nothin' to lie about," and Patterson responded, "Then they tryin'—then they tryin' to say that you was with me when you wasn't. It was nobody."

F. *Alibi Witness*

Takeisha White testified that her boyfriend Jack got released from custody and came to stay with her on May 12, 2010. He brought appellant with him and appellant stayed at White's house for about a month and a half. White got into a fight with Jack and kicked him and appellant out of her house just before July 4, 2010. Because of that event, she remembered that appellant was still at her house the previous Saturday, on June 26, 2010. Appellant made everyone breakfast, stayed at the house during the day, and then drank socially through the evening before going to bed with White's roommate at 2:30 a.m. on Sunday morning.

II. DISCUSSION

A. *Court's Comments Regarding Reasonable Doubt*

Appellant argues the judgment must be reversed because the court's comments during voir dire "trivialized" and "misdescribed" the burden of proof beyond a reasonable doubt. He complains that the court equated the beyond-a-reasonable-doubt standard with being "positive" or "sure" the person was guilty, that it compared the process of determining guilt beyond a reasonable doubt with daily decision-making, and that it told the jurors it was their job to determine the legal definition of proof beyond a reasonable doubt. We are not persuaded.

1. Background

At the beginning of jury selection, the trial court indicated that it and the attorneys would be discussing "four main principles" pertinent to a criminal case: the right to a jury trial, the presumption of innocence, proof beyond a reasonable doubt, and the defendant's right not to testify. The court paraphrased a portion of CALCRIM No. 220, the standard instruction on reasonable doubt: "In terms of reasonable doubt, if you do serve as jurors, this is the standard of proof and this is what you will hear as an instruction: [¶] Proof beyond a reasonable doubt is defined as follows: it is not a mere possible doubt because everything in human affairs is open to some possible or imaginary doubt. It's 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."

The court continued, "So basically, like I said, I think the law makes common sense. People may interpret that differently. It's up to you as [] jurors how to interpret that instruction, but basically where it comes from, the theory is it's better for ten guilty people to go free rather than have one innocent person to be convicted. [¶] On the other hand, the DA does not have an impossible job. The case does not have to be proven beyond all reasonable – I mean, beyond all possible doubt. Basically, you have to – I think given the charges in this case or in any criminal case, it makes sense before you find somebody guilty, you'd have to be sure that the person is guilty. . . . [¶] . . . [¶] . . . [¶] . . . In a criminal case, the defendant is presumed to be innocent. That presumption requires that the People prove each element beyond a reasonable doubt. Until and unless this is done, the presumption of innocence prevails. Now, this is a legal principle. Obviously, the defendants' names in this case and in other criminal cases, they were not pulled out of a hat. It's a principle of law that you basically promise that you are not going to find anybody guilty until the case is proved beyond a reasonable doubt, that is the burden on the People."

The court explained it would be the jury's job to decide the facts. "Many cases what happens is – I don't know if it's going to happen in this case at all, but in many criminal cases they're unlike television where it's not wrapped up in 60 minutes with commercials. Oftentimes there's a conflict in the evidence, and many times what will happen is one witness, a group of witnesses will say one thing happened and another witness or group of witnesses will say something entirely different happened. [¶] Your job is to use your common sense, your fair and realistic judgment and call it as you see it in an attempt to determine the truth in the context of reasonable doubt. In your day-to-day life, you're always making decisions such as this in deciding whether what somebody tells you is accurate or inaccurate. Sometimes you decide what someone tells you is accurate and sometimes you may decide what somebody tells you is completely inaccurate, and how do you do that? [¶] Once, again, use your common sense."

Later during voir dire, the court questioned a prospective juror about whether she would want to convict a person who had not been proved guilty beyond a reasonable doubt. Assured she would not, the court continued, "Let's say at the end of the case, you're convinced beyond a reasonable doubt, you're positive, you're sure either or both defendants are guilty, would you hesitate to return a guilty verdict?" The juror indicated it would not be easy for her to make a decision, but she would be able to do so.

Toward the end of voir dire, the court questioned a prospective juror who had indicated that a person on trial was probably (60 percent) guilty. The court reiterated, "[T]he reason we have the presumption of innocence is that we want to make sure that you are presumed innocent, that you never, ever would find anybody guilty unless and until the case was proven beyond a reasonable doubt, so it's the presumption." The following exchange occurred: "[The Court]: Now, the question is, [Mr. A.], do you consider yourself a fair person? [¶] [Prospective Juror]: Yes. [¶] The Court: Do you have such a feeling – well, do you feel that you would ever convict anybody of any crime unless it was proven beyond a reasonable doubt? [Prospective Juror]: What was the question again? [¶] The Court: Okay. At the end of the case – it gets more serious. It's serious enough now. At the end it gets even more serious. The question is, has the district attorney proven the case beyond a reasonable doubt, in other words, basically, you have to be positive, you have to be sure the person is guilty before you find any person guilty. [Prospective Juror]: Yes. [¶] The Court: Would you require the district attorney to meet that burden before you ever found anybody guilty? [¶] Prospective Juror: Well, I think that's what's required, yes. [¶] The Court: Let's say you think the person probably is guilty or highly likely that he's guilty, but you're not beyond a reasonable doubt; would you still find the person not guilty; do you follow? [¶] Prospective Juror: Yeah. If you're saying that I need to be 100 percent sure – [¶] The Court: No. that's not it. The case doesn't have to be proven beyond all possible doubt, imaginary doubt. And reasonable doubt, it's really up to you to determine what that is. It's a very high standard. As I said before, it's better that 10 guilty people go free rather than one innocent person be convicted. Would you be able to abide by that type of

standard? [¶] [Prospective Juror]: No. [¶] The Court: All right. Thank you. You're excused."

At the conclusion of the case, the jury was instructed with CALCRIM No. 220: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

2. Forfeiture

Appellant did not object to any of the trial court's comments and has forfeited his claim of judicial error during voir dire. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1357 (*Seumanu*); *People v. Monterroso* (2004) 34 Cal.4th 743, 759; *People v. Edwards* (1991) 54 Cal.3d 787, 840.) Although appellant argues that section 1259 allows him to challenge a jury instruction affecting his substantial rights notwithstanding his failure to object,[3] his challenge in this case is not to the correctness of a jury instruction but " ' "the trial court's misleading and erroneous 'amplification' " ' " of the reasonable doubt instruction. (*Seumanu*, at p. 1357.) "As is clear, his claim is one of judicial error, not misinstruction of the jury, and that claim is subject to the requirement that a defendant

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[3] Section 1259 provides in relevant part, "The appellate court may. . . .review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

make a timely and specific objection in order to preserve the issue for appeal." (*Ibid.*; but see *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790 [415 P.2d 717, 754–755] [court's comments about reasonable doubt during voir dire evaluated on their merits to determine whether they affected defendants' substantial rights under § 1259].)

3. Merits

Even if we assume an objection was unnecessary to preserve appellant's challenges to the trial court's comments, we would reject those challenges on their merits.

Appellant first argues it was misleading for the court to equate proof beyond a reasonable doubt with being "sure" or "positive." We disagree that these terms understated the burden of proof. The term "sure" is defined in the dictionary as "firmly established," "reliable, trustworthy," "marked by or given to feelings of confident certainty," "characterized by a lack of wavering or hesitation," "admitting of no doubt," "indisputable," and "without doubt or question." (Merriam-Webster's Collegiate Dictionary (11th Ed. 2004), p. 1257.) "Positive" is defined as "incontestable." (*Id.* at p. 968.) "Jurors are presumed to understand [the] meaning and use of words in their common and ordinary application. (*Linden Partners v. Wilshire Linden* Associates (1998) 62 Cal.App.4th 508, 531.) There is no reasonable likelihood the court's comments led the jury to believe it could convict appellant under a lesser standard than proof beyond a reasonable doubt. (See *People v. Cash* (2002) 28 Cal.4th 703, 741.)

Unlike the authorities cited by appellant, the trial court did not conflate the determination of proof beyond a reasonable doubt with everyday decision-making, such as going on vacation, getting married, scheduling flights and changing lanes when driving. (Cf. *People v. Johnson* (2004) 119 Cal.App.4th 976, 985; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35–37.) It did not suggest appellant could be convicted based on the preponderance of the evidence or some standard less stringent than proof beyond a reasonable doubt. (Cf. *People v. Brannon* (1873) 47 Cal. 96, 97; *People v. Garcia* (1975) 54 Cal.App.3d 61, 68–69.) Rather, the court repeatedly emphasized that the beyond-a-reasonable doubt

standard was a "very high" one, and was predicated on the maxim that it was better for ten guilty people to go free than for one innocent person to be convicted. (See *United States v. Doyle* (2d Cir. 1997) 130 F.3d 523, 538.)

Appellant also argues that the court erred in telling the jurors they could use their common sense when evaluating the witnesses' credibility. We disagree. It is well established that jurors may use their common sense in evaluating the evidence. (*People v. Centeno* (2014) 60 Cal.4th 659, 669; *People v. Boyette* (2002) 29 Cal.4th 381, 437; *People v. Venegas* (1998) 18 Cal.4th 47, 80.) Indeed, "[t]o tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1240.)

Finally, appellant asserts the trial court erred by telling the jurors it was up to them to determine what constituted reasonable doubt, thus allowing them to "freely decide the level of proof needed to convict." In context, the court was not telling the jurors they could make up their own standard of proof, but was telling them it was their duty as the finders of fact to determine whether guilt had been proved beyond a reasonable doubt. This was an accurate statement of the law. (See *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1426 [jury is finder of fact that must be convinced of defendant's guilt beyond a reasonable doubt].)

B. *Denial of Motion for Mistrial*

Appellant brought a motion for mistrial predicated on the prosecution's improper suggestion that both he and Patterson had made statements to police placing him at the scene of the crime. We reject the claim.

1. Background

Both appellant and Patterson gave videotaped statements to the police. Appellant consistently denied any involvement in the burglary, but said that Harris had told him about the crime. Patterson admitted being inside the house and to being the shooter before changing his statement and accusing appellant of being the shooter. His statements were ruled inadmissible during the joint trial with appellant under *People v.*

Aranda (1965) 63 Cal.2d 518, 528–530; *Bruton v. United States* (1968) 391 U.S. 123, 126–137.)[4]

When the police arrested Harris in April 2014, they played excerpts of the videotaped statements made by appellant and Patterson in an effort to get him (Harris) to confess. The videotaped statements were not admitted into evidence, but during his direct examination, Harris testified that he initially lied to police about his involvement but decided to talk after being shown a video. When he was cross-examined by counsel for co-defendant Patterson, Harris explained that he decided to tell the truth after the officer "gave that scenario and after I seen the video." During cross-examination by appellant's counsel, Harris was asked whether the police had told him that appellant and Patterson had "ratted [him] out" and Harris answered yes. He admitted that when he was told that appellant and Patterson had implicated him, he initially said he didn't know why they had brought his name into it.

Appellant's counsel then asked Harris whether, in the video he saw, appellant told the police that Harris had told him (appellant) that he (Harris) had committed the crime. The prosecutor objected that the question called for the self-serving hearsay statement that appellant only knew about the crime because Harris had told him about it. The court agreed and ruled appellant's statement inadmissible, but was concerned that if the statement was not allowed, the jury would infer that appellant and Patterson must have themselves been present because they both were saying that Harris was guilty.

On redirect examination, Harris testified that for a long time he had lied to the police about even being present at the scene of the burglary, but he had come clean after the police had played part of a video of appellant talking. Harris explained that the

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[4] Under the *Aranda/Bruton* rule, "a defendant is deprived of his or her Sixth Amendment right to confront witnesses when a facially incriminating statement of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the statement only against the declarant." (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 68.) In light of the decision in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the rule in *Aranda/Bruton* extends only to out of court statements that are testimonial in nature. (*Gallardo*, at pp. 68–69.)

detective had fast forwarded through the video to show him the parts that might make him talk, and he saw "[t]hey're really pointing [at] me." He admitted seeing Pavon walk into her kitchen after the detective told him, "They put themselves inside the house and they put you in the house."

In a conference with counsel outside the presence of the jury, the court indicated it was troubled by appellant's attorney's efforts to introduce appellant's hearsay statement that he had not been present at the scene of the crime and only knew about it because Harris had told him about it. However, the court was more concerned about the prosecutor's redirect examination, in which the detective was quoted as telling Harris that appellant and Patterson had admitted being inside the house and were implicating Harris as well. Appellant's counsel stated he had not objected to the prosecution's line of questioning because it opened the door to admitting all of appellant's out-of-court statements denying the crime. Patterson's counsel indicated he had not objected because it was clear from the record that the detective's statements were not truthful and were designed to get Harris to confess. On the next court date, counsel for both appellant and Patterson agreed to a stipulation that had been proposed via email to let the jury know that appellant had always denied involvement in the burglary and the homicide, and to allow consideration of Harris's interview for the limited purpose of assessing his credibility. The parties could not similarly stipulate that Patterson had denied involvement in the crime, because Patterson had in fact admitted being present.

Before the next session of court began, and having learned that appellant would be presenting an alibi witness, Patterson's counsel moved for a mistrial on behalf of his client. Counsel argued that the defense strategies were now divergent and noted that Patterson would be unable to enter into any stipulation saying he had never been inside the house, because such a stipulation would be false. The court granted the mistral as to Patterson because the jury would infer he had admitted involvement in the crimes even though that evidence had been excluded.

Appellant's counsel moved for mistrial on behalf of appellant, claiming he would have employed a different strategy and more vigorously attacked Patterson if appellant

had been tried separately from the outset. The court denied the motion, concluding the prejudice to appellant was not irreparable.

The following stipulations were read to the jury: (1) "Defendant Donnie Howard gave several videotaped interviews to the Hayward Police . . . regarding Ms. Pavon's murder on June 26th of 201[0]. One of the videotaped interviews was in 2011. At no time during any police interviews did Donnie Howard ever admit to being present at the scene of Ms. Pavon's murder or burglary." (2) "The portions of the April 3, 2014 Lionel Harris statement that were used by all attorneys to question witness Lionel Harris were admitted for the limited purpose of showing the state of mind of the witness. The prior statements from his transcript may only be considered with [sic] assessing the credibility of the witness Lionel Harris."

After appellant was convicted, his attorney brought a motion for new trial based on the court's granting of a mistrial as to Patterson. The court denied the motion.

2. Analysis

A trial court's ruling on a motion for mistrial is reviewed under the deferential abuse of discretion standard. (*People v. Williams* (1997) 16 Cal.4th 181, 210; *People v. Hayes* (1990) 52 Cal.3d 577, 610.) A motion for mistrial should be granted if a trial court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) " 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*Ibid.*) A motion for mistrial presupposes error plus incurable prejudice. (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 38.)

In this case, the incurable prejudice alleged by appellant stems from the prosecutor's elicitation of evidence that the detective had told Harris that appellant and Patterson had "put themselves inside the house and they put you in the house." As noted, this was not true as to appellant, who never admitted being present at the scene of the burglary or murder. But the stipulation made it clear that appellant had not actually made such an admission, and that the detective's statement to Harris was a ruse to get him to

confess. The court did not abuse its discretion in concluding the admonition was sufficient to cure any prejudice resulting from the suggestion that appellant had acknowledged being present at the scene. (*People v. Valdez* (2004) 32 Cal.4th 73, 128; *People v. Franklin* (2016) 248 Cal.App.4th 938, 955–956.)

Appellant argues the prosecution violated his right to due process by presenting false or misleading evidence, an action which requires reversal if it there is any reasonable likelihood it could have affected the jury. (*Giglio v. United States* (1972) 405 U.S. 150, 153–154; see also *People v. Seaton* (2001) 26 Cal.4th 598, 647 [prosecution must correct any falsity of which it is aware in the evidence it presents].) We disagree. The prosecutor did not elicit false testimony or evidence, as it was true the detective had told Harris that appellant and Patterson had "put themselves inside the house and [] put you in the house." While the statement would have been misleading if left unqualified, the stipulation made it clear the detective was not telling Harris the truth and appellant had not in fact admitted being at the scene during any of his police interviews.

Appellant argues that because Patterson was not available for cross-examination, the use of the detective's statement violated his right to confront the witnesses against him. Again we disagree. The Sixth Amendment's Confrontation Clause prohibits the admission of testimonial hearsay evidence when the declarant is unavailable for cross-examination, but " 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " (*People v. Sanchez* (2016) 63 Cal.4th 665, 674, citing *Crawford, supra*, 541 U.S. at p. 59, fn. 9.) The jury was instructed that the statement used to cross-examine Harris was to be considered only for the limited purpose of showing Harris's state of mind. The Confrontation Clause is not implicated.[5]

C. *Special Circumstance Allegation*

The People proceeded on the theory that Patterson was the shooter. Appellant argues the evidence was insufficient to show he was a "major participant" in the burglary

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[5] In light of our conclusion, we need not address the People's argument that appellant forfeited this issue by failing to object on constitutional grounds or appellant's argument that his counsel was ineffective in failing to object.

and acted with "reckless indifference to human life" as is necessary to support the felony-murder special circumstance when the defendant is not the actual killer and does not intend to kill. (§ 190.2, subd. (d); *People v. Banks* (2015) 61 Cal.4th 788, 797–798 (*Banks*); *People v. Clark* (2016) 63 Cal.4th 522, 609 (*Clark*); *People v. Estrada* (1995) 11 Cal.4th 568, 575 (*Estrada*).) The People respond that both elements were satisfied because the evidence showed appellant planned the burglary and knew Patterson was armed. We conclude that while this evidence may have been enough to show appellant acted as a major participant in the burglary, it is insufficient to establish reckless indifference to human life as that element has been defined by our Supreme Court.

1. Felony-Murder Special Circumstance under California Law

California's felony-murder special circumstance renders a defendant eligible for the death penalty or life without the possibility of parole and applies when the trier of fact finds "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" specified felonies including burglary. (§ 190.2, subd. (a)(17)(G).) Section 190.2, subdivision (d), describes the scope of the felony murder special circumstance for an aider and abettor who neither kills nor intends to kill: "*[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant*, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole . . . ." (§ 190.2, subd. (d), italics added.)

The "reckless indifference" and "major participant" elements of section 190.2, subdivision (d), derive verbatim from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). (*Estrada, supra*, 11 Cal.4th at p. 575.) "*Tison* and a prior decision on which it is based, *Enmund v. Florida* (1982) 458 U.S. 782 [(*Enmund*)], collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a

reckless indifference to the grave risk of death created by their actions. Section 190.2(d) must be accorded the same meaning." (*Banks*, *supra*, 61 Cal.4th at p. 794.) Though *Tison* and *Enmund* both concerned the death penalty, section 190.2, subdivision (d), imports the *Tison* standard in its entirety regardless of whether the punishment imposed is death or life without the possibility of parole. (*Banks*, *supra*, 61 Cal.4th at p. 804; *Estrada*, *supra*, 11 Cal.4th at p. 575–576.)

Section 190.2, subdivision (d), "thus imposes both a specific actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life." (*Banks*, at p. 798.) In *Estrada*, *supra*, 11 Cal.4th 568, our state Supreme Court considered the scope of the mens rea requirement in the context of a claimed instructional error: "[*Tison*] instructs that the culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry *a grave risk of death*' (481 U.S. at p. 157[]), and it is this meaning that we ascribe to the statutory phrase . . . in section 190.2(d)." (*Estrada*, at p. 577, italics added.)

2. *People v. Banks*

In *Banks*, our Supreme Court considered the circumstances under which an accomplice who lacks the intent to kill may be statutorily eligible for the death penalty. (*Banks*, *supra*, 61 Cal.4th at p. 794.) The defendant (who was sentenced to life without the possibility of parole) was the getaway driver for an armed robbery of a medical marijuana dispensary, who dropped his accomplices off and waited a few blocks away for about 45 minutes. (*Id.* at pp. 795–796.) During the burglary, one of the robbers shot and killed a security guard. (*Id.* at p. 795.) The defendant picked up some of the accomplices and drove them away from the scene. (*Id.* at p. 795.)

In considering whether the defendant was a major participant who acted with reckless indifference to human life, the court noted that felony-murder participants may be placed on a continuum. (*Banks*, *supra*, 61 Cal.4th at pp. 800, 802, 811.) On one end, for example, is the getaway driver who was " 'not on the scene, who neither intended to kill nor was found to have had any culpable mental state,' " and who is not eligible for

the death penalty or life without the possibility of parole. (*Id.*, at p. 800.) At the other extreme is the actual killer or an aider and abettor who attempted or intended to kill, and who is eligible for such punishment. (*Ibid.*) The court provided a list of nonexclusive factors to determine where on the continuum an accomplice to felony murder lies: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Id.*, at p. 803, fn. omitted.)

The court in *Banks* found the evidence insufficient to demonstrate the defendant had acted with reckless indifference to human life. (*Banks*, *supra*, 61 Cal.4th at pp. 807–811.) Although it could be inferred that the defendant knew he was participating in an armed robbery, nothing in the evidence supported the conclusion beyond a reasonable doubt that he "knew his own actions would involve a grave risk of death." (*Id.*, at p. 807.) His awareness that his confederates were armed and that armed robberies carry a risk of death was insufficient to establish the requisite reckless indifference to human life because " 'there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself.' " (*Id.* at p. 808, citing *Enmund*, *supra*, 458 U.S. at p. 799.) The court disapproved the court of appeal decisions in *People v. Lopez* (2011) 198 Cal.App.4th 1106 (*Lopez*) and *People v. Hodgson* (2003) 111 Cal.App.4th 566 (*Hodgson*), to the extent those decisions suggested that knowledge an accomplice is armed, in and of itself, can support a finding of reckless indifference. (*Banks*, *supra*, 61 Cal.4th at p. 809, fn. 8.)

The court rejected the People's argument that participation in a robbery or burglary automatically demonstrates a reckless indifference to human life because those

crimes appear on the list of felonies deemed inherently dangerous by the Legislature for purposes of the felony-murder rule itself. "Section 189 codifies the first degree felony-murder rule [citation]; participation in the crimes it lists [including robbery and burglary] subjects one to liability for first degree murder. To make participation in such crimes also sufficient, without more, to establish categorically reckless indifference to human life would collapse the *Tison* inquiry into the felony-murder inquiry and treat all felony murderers as equally culpable and eligible for death. But the central holding of *Enmund*, and *Tison* after it, was that for purposes of the death penalty, not all felony murderers are equally culpable and eligible for death. The People's position embraces the very punishment—death eligibility for participation in felony murder *simpliciter*—the Supreme Court has declared unconstitutional. [Citations.]" (*Banks*, *supra*, 61 Cal.4th at p. 810.)

Finally, turning to the People's arguments concerning the "case specific features of the armed robbery," the court in *Banks* concluded the defendant's gang membership was insufficient to establish reckless indifference in the absence of any evidence the defendant's accomplices and fellow gang members had previously committed violent crimes. (*Banks*, *supra*, 61 Cal.4th at pp. 810–811.) The court also rejected the claim that reckless indifference could be inferred because the accomplices carried "zip ties" to deal with a security guard. (*Id.* at p. 811.) The victim's coworkers believed him to be an unarmed guard and "there was no evidence [the defendant] believed otherwise, or even that he knew a guard would be present. Because nothing in the record reflects that [the defendant] knew there would be a likelihood of resistance and the need to meet that resistance with lethal force, the evidence failed to show [he] 'knowingly engag[ed] in criminal activities known to carry a grave risk of death." (*Id.* at p. 811.)

3. *People v. Clark*

Approximately one year after *Banks*, our Supreme Court decided *Clark*, *supra*, 63 Cal.4th 522, in which it again addressed the quantum of evidence required to support a felony-murder special circumstance when the defendant was convicted as an aider and abettor. The defendant in *Clark* (who had been sentenced to death) was more than just a

mere getaway driver, having masterminded and organized the after-hours burglary and attempted robbery of a computer store, and having orchestrated the crime itself from a car in the store's parking lot. (*Id.*, at pp. 536–537, 612–614.) An accomplice who actually entered the store and handcuffed three employees inside the men's restroom fatally shot the mother of one of the employees, who had arrived at the store to pick up her son from work. (*Id.* at p. 537, 613.) The court held that this evidence was insufficient to show the defendant had acted with reckless indifference to human life. (*Id.* at p. 614.)[6]

In assessing the defendant's mens rea, the court in *Clark* restated and applied a version of the factors enumerated in *Banks*, including (1) a defendant's knowledge that weapons would be used; (2) his physical presence at the crime and his opportunity to restrain his accomplices or aid the victim; (3) the duration of the felony (a longer period of restraint often providing a greater window of opportunity for violence); and (4) the defendant's knowledge of his cohorts' likelihood of killing. (*Clark, supra*, 63 Cal.4th at pp. 618–621.) Additionally, as a matter of first impression, the court considered the defendant's efforts to minimize the risk of violence in the commission of the felony, concluding such evidence "can be relevant to the reckless indifference to human life analysis" though it would not "in itself, necessarily foreclose" such a finding. (*Id.* at pp. 621–622.)

Applying these factors to the case before it, the court in *Clark* found the evidence of reckless indifference to be insufficient to support the burglary- and robbery-murder special circumstances. It noted that the defendant did not carry a weapon and the sole weapon carried by an accomplice was a gun loaded with only one bullet. (*Clark*, *supra*, 63 Cal.4th at pp. 618–619.) There was no evidence the shooter had a propensity for violence, no evidence the defendant knew of any such propensity, and no evidence the defendant had an opportunity to observe the shooter's demeanor immediately before the shooting so as to ascertain he was likely to use lethal force. (*Id.* at p. 621.) The

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[6] Because other special circumstances were found to be true in *Clark*, the reversal of the felony-murder special circumstance did not require the reversal of the defendant's sentence of death. (*Clark*, *supra*, 63 Cal.4th at pp. 623–624.)

defendant was across the parking lot at the time of the shooting and there was no evidence he instructed his accomplice to use lethal force; to the contrary, the victim was a woman who arrived unexpectedly on the scene and the defendant had no chance to intervene or prevent her killing. (*Id.*, at pp. 619–620.) The robbery had been planned for after closing time, when most employees would be gone, and the defendant expected his accomplices to handcuff the remaining employees in a bathroom, thus minimizing the contact between the perpetrators and victims. (*Id.*, at pp. 620–621.) Finally, the court considered the effect of the defendant's efforts to minimize the risk to human life when planning the robbery: "[T]here appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Clark*, *supra*, 63 Cal.4th at p. 623.)

4. Application of *Banks* and *Clark* to Appellant

The evidence presented by the prosecution supported an inference that appellant agreed in advance to commit the burglary with Patterson, accompanied him to the scene, forced open the door to the attached garage, and later pawned some jewelry that may have been taken from the house. We assume, without deciding, that this evidence was sufficient to show he acted as a major participant in the burglary. (See *Clark*, *supra*, 62 Cal.4th at p. 614.) The question remains, under *Banks* and *Clark*, was the evidence in this case legally sufficient to show appellant acted with the reckless indifference to human life that is necessary to support the special circumstance finding under section 190.2, subdivision (d)? In answering this question, we look to whether the prosecution presented evidence that is " ' "reasonable, credible, and of solid value" ' to support a finding beyond a reasonable doubt" that defendant had the requisite mental state. (*Banks*, *supra*, 61 Cal.4th at p. 804.) We conclude it did not.

The "reckless indifference to human life" necessary to support a felony-murder special circumstance allegation requires a defendant to be " ' "*subjectively* aware that his or her participation in the felony involved a *grave risk of death*." ' " (*Banks*, *supra*, 61 Cal.4th at p. 807, italics omitted, second italics added.) The People argue that the following combination of facts shows appellant had the requisite mental state: He

participated in the burglary with a comrade he knew to be armed with a gun; the participants all wore gloves, thus taking an "unusual step" to avoid leaving evidence behind; and they entered the house despite Pavon being present. We are not persuaded.

First, there is no suggestion appellant was himself armed with a weapon or did anything to encourage or facilitate the shooting. While the evidence supports a finding that appellant knew Patterson was carrying a gun, the planning of or participation in a felony, even one in which the other perpetrators will be armed, is not by itself sufficient to show reckless indifference. (*Clark*, *supra*, 63 Cal.4th at pp. 614–623; *Banks*, *supra*, 61 Cal.4th at pp. 807–810.) "In *Tison* as well, the Arizona Supreme Court had employed the same logic as the Court of Appeal here, reasoning that the constitutional culpability requirement was satisfied by the fact a participant in an armed robbery could anticipate lethal force might be used. The United States Supreme Court was unpersuaded, ... for 'the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. [Citation.] This understanding of the requisite culpability 'amounts to little more than a restatement of the felony-murder rule itself'. . . . *Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating 'a grave risk of death' satisfies the constitutional minimum.*" (*Banks*, at p. 808, italics added.) The record in this case does not support the inference appellant was subjectively aware of a grave risk of death when he committed the burglary.

Nor does the use of gloves by Patterson and the others suggest appellant was aware of a grave risk of death. Obviously, Patterson, Harris and appellant used the gloves because they hoped to avoid leaving fingerprints at the scene of a residential burglary. But this effort to avoid future apprehension did not, as a matter of logic, make it more likely Patterson would use his gun against an innocent victim or make appellant subjectively aware of a grave risk of death.

The People assume in their analysis that appellant entered the house knowing Pavon was at home. There is no evidence appellant knew in advance that the house was occupied. Though Patterson told Harris there was a dog at the house as they were walking

toward the scene of the crime, he said nothing about the resident and did not tell Harris or appellant that someone would be present. In any event, the expectation that there might be contact with the victim of a burglary or robbery does equate to an appreciation of a grave risk of death. In *Clark*, *supra*, 63 Cal.4th at pages 620–621, the evidence of reckless indifference was deemed insufficient to support the robbery-murder special circumstance even though the defendant knew an accomplice armed with a gun would be coming in contact with some of the employees of the store he had targeted and would attempt to restrain them by handcuffing them inside the store bathroom. In *Banks*, *supra*, 61 Cal.4th at page 795, the defendant knew his accomplices would be committing an armed robbery of a marijuana dispensary during business hours, virtually ensuring an encounter with employees, customers and a guard. Still, the court found the evidence of reckless indifference to be insufficient in those cases, concluding the mere possibility of lethal force could not suffice.

Moreover, Harris testified that appellant was not present when he (Harris) entered the house and spoke to Patterson just prior to the shooting. Appellant was not present when Pavon was shot, and Harris never saw appellant inside the house. Thus, there is no evidence appellant had an opportunity to stop the shooting or aid the victim. (See *In re Miller* (2017) 14 Cal.App.5th 960, 975–976 [no reckless indifference when defendant absent from the scene of the killing and had no opportunity to stop it or aid the victim].)

Finally, though there was evidence appellant was aware that Patterson had committed crimes in the past, there was no suggestion those crimes involved violence, nor was there evidence that Patterson had violent propensities known to appellant. (*Miller*, *supra*, 14 Cal.App.5th at pp. 975–976.) While there is ample evidence appellant aided and abetted a residential burglary and is thus guilty of felony murder, the evidence is not sufficient to support a finding of reckless indifference as that term has been defined by our Supreme Court. The special circumstance allegation must be reversed.

E. *Adequacy of Three Strikes Allegation*

Appellant seeks reversal of the trial court's finding that he suffered a prior first degree burglary conviction within the meaning of the Three Strikes law. He contends he

was not given sufficient notice of this allegation, because it was not adequately pled and proved by the prosecution. We agree.[7]

Under the caption "FIRST PRIOR CONVICTION AS TO DEFENDANT DONNIE HOWARD," the first amended information alleged: "The undersigned further alleges that before the commission of the offense specified above, said defendant DONNIE TONY HOWARD, on or about December 17, 2009, was convicted in the Superior Court of the State of California, in and for the County of ALAMEDA, of the crime of a FELONY, to wit: FIRST DEGREE RESIDENTIAL BURGLARY, a violation of section 459 of the PENAL CODE of California, and received a prison term therefore." The pleading did not reference the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12), the five year-serious felony enhancement under section 667, subdivision (a), the prior prison term enhancement under section 667.5, subdivision (b), or any other enhancement or sentencing provision. After the jury returned its verdict convicting appellant of murder with special circumstances, appellant waived his right to a jury trial on the prior conviction allegation and the trial court found it to be a "strike."

The Three Strikes law requires that qualifying prior felony convictions be pleaded and proved. (§ 667, subd. (c); 1170.12, subd. (a).) Additionally, a defendant "has a cognizable due process right to fair notice of the specific enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.) Two recent decisions have concluded that a defendant could not be subjected to a sentencing provision based on a prior conviction when the charging document alleged the prior conviction but did not identify the sentencing provision. In *People v. Nguyen* (2017) 18 Cal.App.5th 260, 266–267, the court struck a five-year enhancement under section 667, subdivision (a) as unauthorized when the prosecution

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[7] The finding was not used to increase the sentence imposed by the court, which was life without the possibility of parole for murder with special circumstances. (See, e.g., *People v. Smithson* (2000) 79 Cal.App.4th 480 [Three Strikes law inapplicable to sentence of life without the possibility of parole]; cf. *People v. Hardy* (1999) 73 Cal.App.4th 1429.) But because we are reversing the special circumstance, our resolution of this issue will affect his sentence as modified.

had expressly alleged the prior conviction was a "strike," but had not referenced the five-year enhancement in the accusatory pleading. In *People v. Sawyers* (2017) 15 Cal.App.5th 713, 723 (*Sawyers*), the court struck a finding under the Three Strikes law when the accusatory pleading had pleaded a prior serious felony but had not mentioned the Three Strikes law. Applying these authorities, the Three Strikes allegation in the instant case cannot stand.

The People argue appellant had adequate notice that his prior conviction would be treated as a "strike" because the district attorney extended a pretrial offer to allow appellant to plead guilty to second degree murder and "strike the strike so it would be 15 to life not doubled." The court rejected a similar argument in *Sawyers*, concluding that nothing in the proceedings had amounted to an informal amendment of the pleadings and the defendant had not forfeited his challenge by failing to object to the imposition of a Three Strikes sentence. (*Sawyers*, *supra*, 15 Cal.App.4th at pp. 723–724, 727.) The true finding under the Three Strikes law must be reversed.

III. DISPOSITION

The true findings on the felony-murder special circumstance allegation and under the Three Strikes law are reversed. The sentence is modified to 25 years to life for first degree murder. The judgment is otherwise affirmed.[8]

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[8] By separate order filed this same date, we have summarily denied appellant's companion petition for writ of habeas corpus. (*In re Donnie Howard*, A153922.)

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A149081)

APPENDIX B

California Supreme Court Order Denying Review

September 12, 2018

Court of Appeal, First Appellate District, Division Five - No. A149081

S249842

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DONNIE HOWARD, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice