Filed 2/7/13 P. v. Ali CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>AHMED ALI,<br><br>Defendant and Appellant. | D058357<br><br><br><br>(Super. Ct. No. SCD215890) |

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed.

A jury found Ahmed Ali guilty of one count of murder (Pen. Code, § 187, subd. (a))[1]; four counts of attempted murder (§§ 187, subd. (a), 664); two counts of shooting at an inhabited structure or vehicle (§ 246); one count of being a convicted felon in possession of a firearm (former § 12021, subd. (a)(1)); and one count of unlawfully possessing a firearm (former § 12316, subd. (b)(1)). The jury further made true findings

1 Unless otherwise indicated, all further statutory references are to the Penal Code.

on firearm and criminal street gang enhancements (§§ 12022.53, subds. (c), (d), (e)(1), 186.22, subd. (b)(1)). The trial court sentenced Ali to an indeterminate prison term of 135 years to life, plus a determinate term of 60 years.

Ali argues that the judgment should be reversed because (1) the prosecutor committed prejudicial discovery violations; (2) the trial court should not have admitted the preliminary hearing testimony and other statements by a central prosecution witness who was deceased at the time of trial; (3) the trial court should have granted immunity to two defense witnesses who refused to testify; (4) the trial court should have admitted those witnesses' statements through the testimony of investigators who could have related the witnesses' relevant out-of-court statements; (5) the trial court should have instructed the jury concerning evidence of third party culpability; (6) the trial court should have instructed the jury how to view the testimony of witnesses who received benefits from the prosecution; (7) the prosecutor committed misconduct during closing argument and by engaging in discovery violations; (8) the trial court should have granted the motion to release juror contact information; (9) the trial court should have granted the motion for a new trial based on prosecutorial misconduct and juror misconduct; and (10) the cumulative effect of the alleged errors requires reversal. Ali also requests that we review sealed records to evaluate whether the trial court erred in ruling on certain discovery motions. We conclude that Ali has failed to establish reversible error, and accordingly we affirm the judgment.

I

FACTUAL BACKGROUND

On the night of July 22, 2008, shootings occurred at two different locations in San Diego.

The first shooting occurred around 9:30 p.m. when two men walked up to and shot at a car that was driving out of the Harbor View apartment complex. The apartment complex was known as a location where members of the Neighborhood Crip gang congregated. One witness described the apartment complex as a "war zone" between the Neighborhood Crip gang and the nearby Lincoln Park gang. Three men were riding in the targeted car, at least two of whom were affiliated with the Neighborhood Crip gang. Before shooting at the car, one of the shooters said, "What's up, cuz," with "cuz" being a term that refers to Crip gang members. Bullets struck the car, but no one in the car was shot or seriously injured. A bullet also entered a nearby residence.

The second shooting, which occurred at an apartment complex on College Avenue, was reported to police shortly before 11:00 p.m. Two men approached a group of people congregating by the stairs at the apartment complex and opened fire. Larry Lumpkin was fatally shot in the head. Maurice McElwee sustained a minor gunshot wound to his chest. Although the College Avenue apartment complex was not in any particular gang's territory, it was a common place for members of the O'Farrell Park and Skyline Piru gangs to congregate. Those gangs were rivals of the Lincoln Park gang. Some of the people fired upon at the College Avenue apartment complex were members of the O'Farrell Park or Skyline Piru gangs.

On August 7, 2008, the police received information about both shootings when a member of the Lincoln Park gang, Jesse Freeman, spoke to police after being arrested on an unrelated offense. Freeman told police that a fellow Lincoln Park gang member, Ali, claimed to have committed both of the July 22, 2008 shootings along with someone named "L" or "Lex." Freeman also gave police information about other crimes, including bank robberies, committed by different Lincoln Park gang members. Freeman made similar disclosures to police in subsequent interviews.

After the disclosure from Freeman, police examined the ballistics evidence from the two July 22, 2008 shootings and discovered that the same firearm was used in both incidents. Police next searched Ali's apartment and found a shell casing that was shown through forensic analysis to have been discharged from a gun that was fired at both of the July 22, 2008 shooting scenes.

Police arrested Ali in connection with the July 22, 2008 shootings. Freeman testified at a preliminary hearing held on November 14, 2008, describing Ali's admission to committing the shootings. According to Freeman's testimony, Ali told him that he carried out the shootings to "'put in some work'" for the Lincoln Park gang and get at members of rival gangs. Because Freeman was in danger from having testified against a fellow gang member, the police relocated Freeman to Arizona after the preliminary hearing. Freeman was found dead under a freeway overpass in Arizona on November 22, 2008, having suffered blunt force head trauma. Local police investigation into Freeman's death was inconclusive as to whether the death was a homicide, a suicide or an accident.

Ali was tried for one count of murder based on Lumpkin's death (§ 187, subd. (a)); four counts of attempted murder based on the chest wound to McElwee and the shots fired at the three victims in the car at the Harbor View apartments (§§ 187, subd. (a), 664); two counts of shooting at an inhabited structure or vehicle (§ 246); one count of being a convicted felon in possession of a firearm (former § 12021, subd. (a)(1)); and one count of unlawfully possessing a firearm (former § 12316, subd. (b)(1)). The information also alleged firearm and criminal street gang enhancements (§§ 12022.53, subds. (c), (d), (e)(1), 186.22, subd. (b)(1)).

Because Freeman was no longer alive at the time of trial, his preliminary hearing testimony was read into the record at trial. The jury also heard recordings of Freeman's interviews with police.

Among the other evidence against Ali at trial was the testimony of two eye witnesses. First, one of the men who came under fire at the College Ave apartments on July 22, 2008, testified that he picked out Ali from a photographic lineup in February 2009 as one of the shooters, stating that he was 60 to 70 percent certain at the time of the identification. Second, a teenage boy, James Gomez, who saw the shooters at the College Avenue apartments before they opened fire, identified Ali as one of the shooters.

Ali presented testimony from friends and family members, who said they were with Ali at his apartment at the time of the shootings. Defense counsel argued that instead of Ali committing the shootings, Freeman or some other Lincoln Park gang member could have committed them and could have framed Ali, or the shootings could have been committed by someone associated with a different gang.

The jury convicted Ali on all counts, and the trial court sentenced him to prison for an indeterminate prison term of 135 years to life, plus a determinate term of 60 years.

## II

## DISCUSSION

### A. *Ali Has Not Established That Any Issue Concerning Discovery in This Action Requires Reversal of the Judgment*

We first discuss several issues relating to the conduct of discovery in this action.

#### 1. *The Trial Court Did Not Err in Ruling on the Motion for Discovery of Investigating Officer Personnel Files*

Prior to trial, Ali made motions for discovery of information in the personnel files of (1) San Diego Police Detective Duane Malinowski; and (2) San Diego County District Attorney investigator Shane Lynn. Malinowski was the arresting officer on Ali's case, and Lynn was heavily involved in investigating the shootings for which Ali was convicted. Specifically, Ali sought evidence from Malinowski's and Lynn's personnel files, encompassing — among other things — evidence of dishonesty and excessive use of force or aggression. The trial court determined that evidence showing a pattern of harassing gang members as to Malinowski and allegations of fabrication of evidence and threatening witnesses as to Lynn would be relevant in this case.

The trial court reviewed the relevant personnel records in camera for the purpose of determining whether they contained such items and found no discoverable material. On appeal, Ali requests that we review the personnel records provided to the trial court in camera to determine whether the trial court abused its discretion in determining that no

information from Malinowski and Lynn's records should be provided.[2] The Attorney General does not oppose the request.

A defendant is entitled to discovery of a law enforcement officer's confidential personnel records if those files contain information that is potentially relevant to the defense. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537-538); Evid. Code, §§ 1043-1045.) The discovery procedure has two steps. First, the defendant must file a motion seeking such records, containing affidavits "showing good cause for the discovery or disclosure sought [and] setting forth the materiality thereof to the subject matter involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).) If good cause is shown, the trial court then reviews the records in camera to determine whether any of them are relevant to the intended defense. (*Id.*, § 1045, subd. (b).) A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard. (*People v. Breaux* (1991) 1 Cal.4th 281, 311-312.)

Following established procedure, "the records have been made part of the record on appeal but have been sealed, and appellate counsel for defendant have not been permitted to view them." (*People v. Hughes* (2002) 27 Cal.4th 287, 330; see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.) We have independently examined the personnel

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2 Ali does not challenge the trial court's decision to limit its review to the narrowed categories that it identified. Instead, he asks us to review the confidential records to determine whether the trial court properly concluded that none of the records contained material falling into the narrowed categories.

files in camera. Based on that review, we conclude that the trial court did not abuse its discretion in refusing to disclose any further information from those files.

2. *The Trial Court Did Not Err in Ruling That the Prosecution Was Entitled to Withhold Certain Confidential Evidence*

Ali also requests that we review sealed records to determine whether the trial court abused its discretion in determining that good cause had been shown for the prosecution to withhold confidential information in discovery.

We begin with the applicable statutory background. Under section 1054.7, the prosecution is required to provide discovery to the defense as described in section 1054.1, "unless good cause is shown why a disclosure should be denied, restricted, or deferred." (§ 1054.7.) Good cause is statutorily limited to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (*Ibid*.) Similarly, under Evidence Code section 1040, subdivision (b)(2), a public entity has a privilege to refuse to disclose official information if "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . ." (Evid. Code, § 1040, subd. (b)(2).) Both statutes involve the same balancing process by the trial court, in which the trial court has the "task of weighing the government's claim of privilege against the defendant's constitutional right to present a defense," taking into account "'the consequences to the public of disclosure and the consequences to the litigant of nondisclosure.'" (*People v. Jackson* (2003) 110 Cal.App.4th 280, 290-291 (*Jackson*).)

Section 1054.7 states that the trial court must conduct an in camera proceeding to consider whether the prosecution has made a showing of good cause to deny or regulate disclosure of confidential information, and provides that if the trial court grants relief "the entire record of the showing shall be sealed." (§ 1054.7; see also Evid. Code, § 915, subd. (b) [providing for in-chambers hearing to determine privilege claimed under Evid. Code, § 1040].)

These statutory provisions were applied in this case, when, on several occasions, the trial court considered whether the prosecution had shown good cause to redact or withhold certain items of evidence. According to the statutory procedures, the trial court sealed the record of those proceedings. Ali and the People agree that we should conduct a review of the sealed records to determine whether the trial court abused its discretion. (See *Jackson*, *supra*, 110 Cal.App.4th at pp. 290-291 [reviewing whether the trial court abused its discretion in ruling that the prosecution could withhold certain confidential discovery].)[3]

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3 We note that Ali designated that certain of the sealed reporter's transcripts of the in camera hearings held pursuant to section 1054.7 be made a part of the appellate record. Based on Ali's designation, the sealed reporter's transcripts from January 15, 2010, January 22, 2010, January 29, 2010 and June 9, 2010 have been made part of the appellate record. The parties' briefing identifies in camera hearings held pursuant to section 1054.7 on additional days. However, Ali did not request that the transcripts of those hearings be made part of the appellate record, and accordingly we do not review the rulings made at those hearings. (See *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385 ["It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal."].)

We have reviewed the sealed transcripts contained in the appellate record and have determined, based on the testimony reported therein, that the trial court did not abuse its discretion in finding good cause for the prosecution to withhold discovery of certain confidential information. The evidence supports a finding that release of the confidential information would compromise ongoing law enforcement investigations, and that it did not contain any material that was favorable to the defense. (See *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).)

3. *Ali Has Not Established That the Prosecution Committed Discovery Violations Amounting to a Deprivation of Constitutional Rights*

Ali's final discovery-related argument is that the prosecution engaged in certain discovery violations and thereby infringed his constitutional rights.

We first review the legal standards applicable to Ali's claim that his constitutional rights were infringed when the prosecution failed to provide discovery. "Under the federal Constitution's due process clause, as interpreted by the high court in *Brady v. Maryland*, *supra*, 373 U.S. [at page 87]), the prosecution has a duty to disclose to a criminal defendant evidence that is '"both favorable to the defendant and material on either guilt or punishment."'" (*In re Bacigalupo* (2012) 55 Cal.4th 312, 333.) "'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt and innocence.' [Citations.] Materiality, in turn,

requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result."'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043 (*Salazar*).) Thus, under *Brady*, "there is no 'error' unless there is also 'prejudice.'" (*In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 7.)[4]

Ali contends that the prosecutor violated the obligation to provide discovery under *Brady*. But instead of focusing on any specific items, Ali claims that "[t]here was a pervasive failure to provide material discovery to the defense . . . ," and he "was prejudiced at every turn." In a portion of Ali's argument that is separate from his discussion of legal principles, Ali reviews the long history of discovery proceedings in this case.[5] However, Ali does not take the necessary step of developing his appellate

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4 In the reply brief, Ali attempts to extend his argument beyond the claim of a *Brady* violation, contending that "the multiple discovery abuses by the prosecutor were one of several manifestations of misconduct that occurred at every stage of the pretrial and trial proceedings," and that "multiple acts of prosecutor misconduct . . . violate the constitution." As we understand this argument, Ali is advancing a prosecutorial misconduct argument based on alleged *Brady* violations and on other unspecified misconduct by the prosecutor. Ali's argument is indistinguishable from the prosecutorial misconduct argument that we address and reject in part II.D., *post*.

5 Ali's review of the procedural history concerning discovery issues consumes 10 pages of his brief. The procedural recitation is arranged in chronological order, with subheadings covering "pretrial discovery disputes" and "mid-trial discovery disputes." In most cases, a short paragraph gives a broad overview of a discovery motion or a hearing held on a specific date, and in the case of the mid-trial issues, Ali sets forth discovery-related issues that arose on specific days of trial.

argument to explain which items of withheld or delayed discovery were material and created prejudice.

Because Ali has failed to discuss any specific discovery violations that he contends warrant reversal, his appellate briefing is woefully inadequate. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106). Our role is to evaluate "'legal argument with citation of authorities on the points made.'" (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*).) Specifically, as applied to Ali's claim that the prosecutor violated the obligation to provide discovery under *Brady*, Ali's inadequate briefing causes two fatal deficiencies in his legal argument.

First, as we have explained, *Brady* applies only to evidence that is "'favorable to the accused, either because it is exculpatory, or because it is impeaching.'" (*Salazar*, *supra*, 35 Cal.4th at p. 1043.) Because Ali does not, in the course of his argument, identify any *specific* discovery violations on which he premises his *Brady* argument, he has not attempted to establish, as required by *Brady*, that the items of withheld or delayed discovery were favorable to the accused.

Second, to establish a *Brady* violation, Ali must establish prejudice by showing "'"a reasonable probability of a different result."'" (*Salazar, supra*, 35 Cal.4th at p. 1043.) Ali has not attempted to explain how any specific discovery violation caused prejudice in this case. Indeed, Ali relies solely on generalized statements such as that "every item of withheld or delayed discovery impacted adversely and directly the ability of defense counsel to prepare for the preliminary hearing and trial, to challenge

prosecution witnesses' credibility, and to raise doubt about the reliability of the prosecution's case," and that he was "deprived of a reasonable time to analyze the evidence against him and mount a thorough, well prepared, cohesive defense."[6] Ali's "generalized statements are insufficient to demonstrate prejudice" (*People v. Verdugo* (2010) 50 Cal.4th 263, 281-282), and stand in sharp contrast to the case that Ali relies on, which discusses *specific* items of withheld discovery that were relevant to the defense. (*People v. Johnson* (2006) 142 Cal.App.4th 776, 782-786.)

We accordingly conclude that Ali has failed to establish that his constitutional rights were violated by the prosecutor's purported discovery violations during the course of this action.

B. *Ali's Arguments Related to the Introduction or Absence of Certain Witness Testimony at Trial Does Not Present a Meritorious Basis for Reversal of the Judgment*

We next consider Ali's arguments for reversal of the judgment arising from the introduction or absence of certain witness testimony at trial.

1. *Ali's Rights to Confront Witnesses and Due Process Were Not Violated by the Admission of Freeman's Preliminary Hearing Testimony*

As we have explained, Freeman testified at the preliminary hearing, describing Ali's admission to the two July 22, 2008 shootings. Freeman died eight days later, making him unavailable at trial. The trial court denied Ali's motions to exclude

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6 In his reply brief, Ali admits that he has discussed the discovery violations in "general terms," which he attempts to excuse with the explanation that "the discovery violations were so extensive and continuing."

Freeman's preliminary hearing testimony and allowed Freeman's testimony to be read to the jury. Ali contends that his constitutional rights to due process and to confront witnesses were violated by the admission at trial of Freeman's preliminary hearing testimony.[7]

The confrontation clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine the witnesses against him. (*Crawford v. Washington* (2004) 541 U.S. 36, 54 (*Crawford*).) Under *Crawford*, "[a]n exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant." (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) The United States Supreme Court has stated that when a witness is not available at trial, "preliminary hearing testimony is admissible only if the defendant had an *adequate* opportunity to cross-examine" the witness. (*Crawford*, at p. 57, italics added.) For example, in *California v. Green* (1970) 399 U.S. 149, 166, the high court noted that the preliminary hearing testimony of an unavailable witness was admissible, in part, because "counsel

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7 The opening brief's argument heading also states that admission of Freeman's testimony violated "the statutory proscription against hearsay." However, that argument is not mentioned or developed in the body of Ali's brief, which only discusses the constitutional issues, and we therefore do not address it. (*Stanley*, *supra*, 10 Cal.4th at p. 793 ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.'"].) Moreover, as the Attorney General points out, Ali did not object to the admission of Freeman's preliminary hearing testimony on the statutory basis of hearsay, and he therefore cannot pursue that argument on appeal. (See Evid. Code, § 353 [specific ground for objection to evidence required to be made in trial court to obtain appellate reversal based on the erroneous admission of evidence].)

does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness . . . at the preliminary hearing." The high court has explained, however, that "in all but . . . extraordinary cases, no inquiry into 'effectiveness' [of cross-examination] is required." (*Ohio v. Roberts* (1980) 448 U.S. 56, 73, fn. 12.) As described by the Supreme Court, an "extraordinary case" would be one in which defense counsel who conducted the prior cross-examination had already been determined to have provided ineffective assistance at that hearing. (*Ibid*.)

In California, "Evidence Code section 1291 codifies this traditional exception" to the confrontation clause described in *Crawford* for an unavailable witness who has been previously cross-examined. (*People v. Friend* (2009) 47 Cal.4th 1, 67.) "'Evidence Code section 1291, subdivision (a)(2) provides that former testimony is not rendered inadmissible as hearsay if the declarant is "unavailable as a witness," and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."'" (*Friend*, at p. 67.) "'When the requirements of Evidence Code section 1291 are met, "admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution."'" (*Ibid*.)

Here, defense counsel extensively cross-examined Freeman at the preliminary hearing, with the cross-examination consuming 57 pages of the reporter's transcript. According to our review of that transcript, the cross-examination was thorough and well-executed. Further, defense counsel had the same motivation in cross-examining Freeman

during the preliminary hearing as would have been the case at trial, namely to discredit Freeman's claim that Ali had admitted to the July 22, 2008 shootings. Defense counsel had an added incentive to perform a thorough cross-examination at the preliminary hearing because both defense counsel and the prosecutor acknowledged at the preliminary hearing that Freeman might not be available at trial, in that he was being threatened even while in protective custody and had a history of avoiding contact with the authorities who were trying to locate him.

Ali contends that defense counsel's cross-examination of Freeman was nevertheless inadequate to satisfy the confrontation clause because of the prosecution's failure to provide discovery that could have been used to cross-examine Freeman at the preliminary hearing. Specifically, Ali points to a statement given by Marcus House to the defense investigator and counsel in April 2010 — a year and a half *after* the preliminary hearing. According to House, who was in prison, Freeman had claimed that he committed the July 22, 2008 shooting at the College Avenue apartments, not Ali.

Ali's argument is unpersuasive. First, the discovery that Ali contends the prosecution did not provide prior to Freeman's preliminary hearing testimony *did not yet exist*, and consisted of a witness statement elicited many months later by the *defense*, not by the prosecution. Second, the availability of new information to impeach a witness *after* cross-examination concludes does not render the cross-examination ineffective for the purposes of the confrontation clause. In *People v. Valencia* (2008) 43 Cal.4th 268, our Supreme Court rejected the argument that prior testimony of an unavailable witness was inadmissible because defense counsel's "cross-examination of [the witness] would

have been different had the impeaching information been known at the time he testified." (*Id*. at p. 293.) As our Supreme Court explained, "'"Both the United States Supreme Court and this court have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.'"'" (*Id*. at p. 294.) "Admission of the former testimony of an unavailable witness . . . does not offend the confrontation clauses of the federal or state Constitutions — not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Zapien* (1993) 4 Cal.4th 929, 975.)

In sum, there is no merit to Ali's contention that the trial court improperly admitted Freeman's preliminary hearing testimony.

2. *The Trial Court Did Not Err in Refusing to Grant Use Immunity to Marcus House or Hunter Porter*

Ali sought to call Marcus House and Hunter Porter as witnesses. However, both men invoked their Fifth Amendment right not to testify on the basis that their testimony might incriminate them. The trial court denied Ali's request that it grant use immunity to

House and Porter so that they could testify without danger of being prosecuted based on their testimony.[8] Ali contends that, in so doing, the trial court erred.[9]

Before analyzing Ali's argument, we provide an overview of House's and Porter's expected testimony.

Porter was a Lincoln Park gang member who was serving a 26-year term for attempted murder and was charged as a defendant in a prosecution for a series of bank robberies. He participated in an interview with district attorney investigators in June 2010, during which he made some statements about Freeman. Most significantly, according to Porter, Freeman had participated in bank robberies with him. Porter also stated that on one occasion Freeman had stolen some of the proceeds of the robberies from other participants. In seeking immunity for Porter, defense counsel argued that Porter's statement that Freeman committed bank robberies would have value in impeaching Freeman's credibility because Freeman had claimed in his interviews with

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8 "'Use immunity protects a witness only against the actual use of [the witness's] compelled testimony, as well as the use of evidence derived therefrom.'" (*People v. Vines* (2011) 51 Cal.4th 830, 882, fn. 24 (*Vines*).) In contrast, "'[t]ransactional immunity protects the witness against all later prosecutions relating to matters about which he testifies.'" (*Ibid*.)

9 Ali's opening brief asserts, without setting forth any legal argument, that his constitutional rights were also violated by *the prosecution's* failure to grant immunity to House and Porter. However, the body of Ali's argument solely addresses his contention that the *trial court* should have granted immunity. We need not address undeveloped arguments. (*Stanley*, *supra*, 10 Cal.4th at p. 793.) Further, our Supreme Court repeatedly and consistently has held that a "defendant has no power to force the prosecution to grant immunity to defense witnesses." (*People v. Lucas* (1995) 12 Cal.4th 415, 459 (*Lucas*); accord, *People v. Williams* (2008) 43 Cal.4th 584, 622; *People v. Samuels* (2005) 36 Cal.4th 96, 127 (*Samuels*); *In re Williams* (1994) 7 Cal.4th 572, 609.)

law enforcement that he did *not* participate in any of the Lincoln Park bank robberies. Further, if Freeman had stolen robbery proceeds from fellow gang members, that fact would suggest that Freeman was also willing to double-cross Ali by framing him for the July 22, 2008 shootings.

House, who was also a Lincoln Park gang member, was serving a 20-year prison sentence and had been charged with several bank robberies along with Porter. House spoke to defense counsel and defense counsel's investigator in April 2010, telling them that Freeman claimed to have committed the July 22, 2008 shooting at the College Avenue apartments, together with someone called "L." House also claimed to have given Freeman a gun used in the July 22, 2008 shooting.

We next turn to the legal principles applicable to Ali's contention that the trial court was required to grant use immunity to House and Porter. No California statute or case authorizes a trial court to grant immunity to a witness when not requested to do so by the prosecutor. Indeed, granting immunity to a witness "is an executive function." (*People v. Williams*, *supra*, 43 Cal.4th at p. 622.) "[T]he decision to seek immunity is an integral part of the *charging* process, and it is the prosecuting attorneys who are to decide what, if any, crime is to be charged." (*In re Weber* (1974) 11 Cal.3d 703, 720.) In accordance with this view, our Supreme Court has noted "the Courts of Appeal of this state have uniformly rejected the notion that a trial court has the inherent power . . . to confer use immunity upon a witness called by the defense." (*People v. Hunter* (1989) 49

Cal.3d 957, 973 (*Hunter*).)[10] Further, our Supreme Court has "'characterized as "doubtful" the "proposition that the trial court [possesses] inherent authority to grant immunity."'" (*Samuels, supra,* 36 Cal.4th at p. 127.) Indeed, it has "expressed reservations concerning [such] claims." (*People v. Williams, supra,* 43 Cal.4th at p. 622.)

As Ali points out, our Supreme Court has in dicta, on several occasions, acknowledged case law from the federal Third Circuit Court of Appeals (*Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964 (*Smith*)), which holds that a judicial grant of use immunity could be required to preserve the defendant's constitutional right to a fair trial and compulsory process in certain specific circumstances. (*Hunter, supra,* 49 Cal.3d at p. 974.)[11] In each case, our Supreme Court has discussed the factors described in *Smith* and, in each case, has concluded that *if* the factors were a correct statement of the law, they would *not* be satisfied. (*People v. Cudjo* (1993) 6 Cal.4th 585, 619; *In re Williams, supra,* 7 Cal.4th at p. 610; *Lucas, supra,* 12 Cal.4th at p. 459; *People v. Stewart*

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10 See, e.g., *People v. Cooke* (1993) 16 Cal.App.4th 1361, 1371 (*Cooke*); *People v. Estrada* (1986) 176 Cal.App.3d 410, 418; *People v. DeFreitas* (1983) 140 Cal.App.3d 835, 839-841; *People v. Sutter* (1982) 134 Cal.App.3d 806, 816.

11 As described in *Hunter,* two different scenarios for granting immunity are described in *Smith*. Under the first approach, a court might confer use immunity when a witness's testimony is "'clearly exculpatory'" and "'essential'" and there are "'no strong governmental interests which countervail against a grant of immunity.'" (*Hunter, supra,* 49 Cal.3d at p. 974.) Immunity would be denied "'if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses.'" (*Ibid.*) Under the second approach, a court might confer use immunity when the prosecutor does not "administer the immunity power evenhandedly, with a view to ascertaining the truth," and instead "intentionally refuse[s] to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence." (*Id.* at pp. 974-975.)

(2004) 33 Cal.4th 425, 468; *Samuels*, *supra*, 36 Cal.4th at p. 128.) Our Supreme Court's discussion of the factors set forth in *Smith* was always presented as dicta and was unnecessary to the decision.

We join our colleagues in the First District in *Cooke* and "decline appellant's invitation to declare a doctrine of judicial use immunity for defense witnesses in criminal cases. . . . [N]o California Court of Appeal or Supreme Court case has ever granted such immunity to a defense witness, and we will not do so now. The relief which appellant here requests should be granted, if at all, by our state's highest court." (*Cooke*, *supra*, 16 Cal.App.4th at p. 1371.) We accordingly reject Ali's contention that the trial court was required to grant use immunity to House and Porter.

3. *The Trial Court Did Not Abuse Its Discretion in Excluding Testimony Describing House's and Porter's Statements*

Ali also attempted to introduce House's and Porter's statements by presenting testimony from the defense investigator or district attorney investigator who took the statements. The trial court ruled that House's and Porter's statements were made inadmissible by the hearsay rule.

Hearsay is generally inadmissible unless an exception applies. (Evid. Code, § 1200.) "The admission of multiple hearsay is permissible where each hearsay level falls within a hearsay exception." (*People v. Williams* (1997) 16 Cal.4th 153, 199, fn. 3, citing Evid. Code, § 1201.)[12]

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12 The statements by House that Ali sought to have admitted contained two levels of hearsay. At the first level was House's out-of-court statements to the defense

Ali argues that the hearsay exception for declarations against interest applies to House's and Porter's statements, making them admissible. Under that exception, "[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is *unavailable* as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230, italics added.)

Based on the statute, the first requirement for the application of the declaration against interest exception is the unavailability of the declarant. There is no dispute that the unavailability requirement of Evidence Code section 1230 is met here. House and Porter were both unavailable because they invoked their Fifth Amendment right not to testify. (Evid. Code, § 240, subd. (a)(1).) Further, to the extent that a second level of hearsay involving Freeman's statements is at issue, Freeman was unavailable because he was dead. (*Id*., § 240, subd. (a)(3).)

Turning to the remaining elements of the declaration against interest exception, the issue in dispute is whether the statements "so far subjected [the speaker] to the risk of . . .

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investigator. At the second level was Freeman's out-of-court statements to House that he committed one of the July 22, 2008 shootings. To the extent Porter recounted Freeman's admission to participating in bank robbery without Porter, that statement is double hearsay.

criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

Our Supreme Court has summarized the law applicable to the declaration against penal interest exception to the hearsay rule. As it explained, "'[t]he proponent of such evidence must show "that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character."' . . . 'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. . . . In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' . . . '[E]ven when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. . . . [I]n this context, assessing trustworthiness "'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.'"'" (*People v. Geier* (2007) 41 Cal.4th 555, 584, citations omitted.) "Courts applying [Evidence Code] section 1230 to determine the basic trustworthiness of a proffered declaration are . . . to 'consider all the surrounding circumstances to determine

if a reasonable person in [the declarant's] position would have made the statements if they weren't true.'" (*People v. Duarte* (2000) 24 Cal.4th 603, 618 (*Duarte*).)

"We review a trial court's decision as to whether a statement is against a defendant's penal interest for abuse of discretion." (*People v. Lawley* (2002) 27 Cal.4th 102, 153.)

a. *House's Statements*

House's statements to the defense investigator describing Freeman's admission to the July 22, 2008 shooting did not subject House to a risk of civil or criminal liability, as the statements did not implicate House in the shooting. According to the defense investigator, as House described the situation, he learned about the shooting from Freeman several weeks *after* it happened.

Ali argues that House made a statement against his penal interest because he told the defense investigator that he had given Freeman the gun that was used in the shooting. However, as the trial court reasonably concluded, that statement was not — under the circumstances — so far against House's penal interest that it rendered House's entire statement to the defense investigator sufficiently trustworthy to fall within the hearsay exception. Specifically, House did not state that he gave Freeman a gun with the knowledge that it would be used to commit a specific crime, which might subject House to aider and abettor liability. Further, at the time House made the statement, he was already serving a 20-year prison sentence and was charged with bank robberies. The trial court reasonably concluded that the risk that House might be prosecuted and punished for any crime possibly committed in supplying a firearm to Freeman would not have been

significant to House in light of the sentence he was already serving, or faced with serving, for the bank robberies.

In addition, the trustworthiness of House's statement must be viewed in the entire context of the gang-related environment in which it was made. House was a member of the Lincoln Park gang and could be expected to take actions to help other gang members in good standing. Ali was a fellow gang-member, giving House a motive to help him by implicating Freeman, who was a "snitch" against the gang and therefore out of favor. It is reasonable to infer, as did the trial court, that House's statements about Freeman may have been fabricated for the benefit of his fellow gang member Ali, and were therefore not trustworthy enough to qualify for admission as declarations against interest.[13] (*People v. Frierson* (1991) 53 Cal.3d 730, 745 ["The court could reasonably find [the witness] wanted to aid his friend at little risk to himself, and thus the statement was insufficiently trustworthy."].)

In sum, the trial court did not abuse its discretion in excluding evidence of House's statements to the defense investigator.

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13 Because the first level of hearsay — consisting of House's statements — did not qualify for an exception to the hearsay rule as a declaration against House's interest, we need not discuss the second level of hearsay.

Further, we note that Ali has argued that House's statement was admissible as evidence of third party culpability. Ali's argument is misplaced. There is no dispute that Freeman's admission to the shooting at the College Avenue apartment complex, if not excluded under the hearsay rule, would be relevant and admissible as evidence of third party culpability. The reason that the evidence was excluded was because it is hearsay, not because it failed to qualify as third party culpability evidence.

b. *Porter's Statements*

Porter's statements consisted of (1) his description of Freeman taking part in bank robberies, based both on his commission of the robberies with Freeman and Freeman's claim to have committed another robbery; and (2) his description of Freeman having taken more than his share of the proceeds from a robbery. The trial court determined that the declaration against interest exception to the hearsay rule did not apply, and it therefore excluded evidence of Porter's statements.

The trial court was within its discretion in excluding Porter's statements. The statements were made as part of a "free talk" agreement with the district attorney that the statements would *not* be used in the prosecution's case-in-chief in the bank robbery case. Therefore, the adverse penal consequences to Porter of making the statements were significantly diminished. Further, the statements could be considered to be insufficiently trustworthy to fall within the declaration against interest exception because Porter was also a Lincoln Park gang member and, like House, had a motivation to help his fellow gang member Ali, while placing the blame on disfavored gang member Freeman.

Further, even if Porter's statements should have been admitted, their exclusion was not prejudicial. (See *Duarte*, *supra*, 24 Cal.4th at p. 619 [evaluating whether it is "'reasonably probable that a result more favorable to defendant would have been reached'" had evidence been admitted under the hearsay exception for a declaration against interest].) The value to the defense of Porter's statement about Freeman's participation in bank robberies was to call into question Freeman's credibility by showing that he lied to authorities when denying involvement in the robberies. However, the same

impeaching evidence was admitted during trial through another defense witness — Tiano Durham — who testified that Freeman committed a bank robbery with him. Because the excluded evidence was cumulative of other evidence, its admission would not have been reasonably probable to change the outcome of the trial. Ali also cannot demonstrate prejudice from exclusion of Porter's statement that Freeman took more than his share of the proceeds from a bank robbery. That evidence was not necessary to establish Freeman's disloyalty to fellow gang members as it was clear that Freeman had shown disloyalty to the gang by "snitching" to the police about Ali and the bank robberies.

C. *Ali Has Failed to Establish Instructional Error*

We now turn to Ali's argument that the trial court committed instructional error by refusing two pinpoint instructions requested by Ali and by instructing with CALCRIM No. 337. As our Supreme Court has explained, "'"in appropriate circumstances" a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case. . . . [Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation].'" (*People v. Hartsch* (2010) 49 Cal.4th 472, 500 (*Hartsch*).)

1. *The Trial Court Did Not Prejudicially Err by Refusing the Instruction on Third Party Culpability*

First, Ali contends that the trial court violated his right to due process and a jury trial when it refused to instruct the jury with a requested pinpoint instruction on third party culpability.

As the Attorney General acknowledges, there was arguably some evidence of third party culpability presented at trial. Accordingly, Ali requested the following pinpoint instruction on third party culpability: "You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person's guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendant's guilt. Such evidence may by itself raise a reasonable doubt as to the defendant's guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find [him][her] not guilty." The trial court denied the instruction.

On several occasions, our Supreme Court has considered and rejected arguments that a trial court prejudicially erred by not giving a requested pinpoint instruction on third party culpability. (*Hartsch*, *supra*, 49 Cal.4th at p. 504; *People v. Ledesma* (2006) 39 Cal.4th 641, 720-721; *People v. Earp* (1999) 20 Cal.4th 826, 887 (*Earp*).) In those cases, as here, the proposed instruction, would have stressed that the defendant was not required to *prove* third party culpability, and would have informed the jury that the inquiry remained whether the defendant raised a reasonable doubt as to his own guilt. (*Earp*, at p. 887; *Hartsch*, at p. 504.) Those cases were resolved on the basis that if error existed, it was not prejudicial. Third party culpability instructions "add little to the standard instruction on reasonable doubt." (*Hartsch*, at p. 504.) Moreover, "even if such instructions properly pinpoint the theory of third party liability, their omission is not

prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof." (*Ibid*.) "It is hardly a difficult concept for the jury to grasp that acquittal is required if there is reasonable doubt as to whether someone else committed the charged crimes," especially when, as in this case "[t]he closing arguments focused the jury's attention on that point." (*Ibid*.)

Ali argues that his proposed third party culpability instruction was required because "a juror's natural inclination would be to decide whether evidence proved a third party was guilty." Viewing the entire charge to the jury, however, we find no merit to this argument. The trial court instructed the jury pursuant to CALCRIM No. 220 that 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 unless I specifically tell you otherwise." The jury could not have understood from the instructions given that Ali was required to prove that someone else committed the crimes.

In light of the fact that the jury was instructed with the standard reasonable doubt instruction in this case, and that defense counsel stressed the concept of third party culpability during closing argument, we find the well-established approach of our Supreme Court to be applicable here. We therefore conclude that any error in not instructing the jury with Ali's requested third party culpability instruction was harmless.

2. *The Trial Court Did Not Err in Instructing With CALCRIM No. 373*

In a related argument, Ali contends that the trial court should not have instructed with CALCRIM No. 373. He contends that CALCRIM No. 373, in the context of this case, confused the jury regarding third party culpability concepts and therefore added to the purported prejudice created by the absence of Ali's requested pinpoint instruction on third party culpability.

CALCRIM No. 373 states, as given: "The evidence shows that another person may have been involved in the commission of the crimes charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged."

Ali contends that CALCRIM No. 373 should have not have been given because it is "intended for cases where the prosecution has not joined all the alleged perpetrators or accomplices." This argument fails because that is precisely the case here, namely the evidence pointed to two shooters for both of the July 22, 2008 shootings. Therefore, instead of serving to "certainly confuse[] the jury" regarding third party culpability concepts, as Ali contends, any reasonable juror would have understood that the instruction referred to the fact that the second shooter was absent from trial.

Ali also argues that CALCRIM No. 373 should have been modified by adding language stating that evidence regarding a coparticipant in the crime could be used to

e*xonerate* the defendant while establishing the *culpability* of the coparticipant.[14] We reject this argument because the evidence did not support a finding that only the second shooter, but not Ali, committed the shootings.

Finally, Ali contends that CALCRIM No. 373 should not have been given because it purportedly tells jurors "that another person's culpability was not of any importance, and instead jurors should focus on only appellant's culpability, and not speculate about whether another was culpable." We disagree with Ali's characterization of the instruction. CALCRIM No. 373 addresses the issue of whether the jury should speculate on the absence of a *second* defendant from the trial. It does not state that the jury should find the defendant guilty even if a different person — *instead of* the defendant — might have committed the crime.

3. *The Trial Court Did Not Err by Declining to Give an Instruction on Benefits Provided to Certain Prosecution Witnesses*

Ali contends that the trial court erred by failing to give a requested pinpoint instruction informing the jury that in assessing the testimony of certain witnesses, it should consider the benefits that those witnesses received from the prosecution.

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14 Those proposed modifications state: (1) "This does not preclude you from considering any evidence that the uncharged person[s], rather than the defendant, committed the crime charged. If, in light of such evidence, as well as the other evidence presented, you have a reasonable doubt whether the defendant committed the crime, you must give the defendant the benefit of that doubt and find [him][her] not guilty"; and (2) "However, in fulfilling this duty you are not precluded from considering evidence that a person not on trial is the guilty party. To the contrary, if such evidence leaves you with a reasonable doubt as to the defendant's guilt you must give [him][her] the benefit of that doubt and return a verdict of not guilty."

As necessary factual background, we observe that Ali's request for the jury instruction related to the testimony of four witnesses. The first witness, Ahmed Omar, was Ali's neighbor, who described how Ali had given him bullets to keep in his apartment. The jury heard evidence that Omar received threats and was relocated by the district attorney to a different state, receiving monthly payments for his living expenses. The second witness was Freeman (presented through his preliminary hearing testimony), who was relocated by authorities to Arizona, receiving benefits totaling $2,409 before his death. The final two witnesses were the teenage boy (James Gomez), who saw Ali at the College Avenue apartments during the shooting; and his mother (Yvonne Gomez), who testified about what her son had told her about his identification of Ali. Evidence was presented at trial that a district attorney investigator had assisted Yvonne Gomez by checking on the status of a police investigation concerning another of her sons.

The CALCRIM instructions do not contain a specific instruction addressing how the jury should view witnesses who receive benefits from the prosecution. Ali accordingly requested that the trial court give an instruction based on a model instruction from the federal Ninth Circuit Court of Appeals, which stated: "You have heard testimony that [the witness] has received benefits, compensation, favored treatment, from the government in connection with this case. You should examine [the witness's] testimony with greater caution than that of other witnesses. In evaluating that testimony, you should consider the extent to which it may have been influenced by the receipt of benefits from the government." The trial court declined to give the instruction, explaining (1) that the substance of the requested instruction was covered by other

instructions; and (2) as to the Gomez family, there was no evidence of any benefit received.

As we have explained, "'a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation].'" (*Hartsch*, *supra*, 49 Cal.4th at p. 500.) All three considerations are relevant here.

First, we agree with the trial court's conclusion that the evidence did not support a finding that the Gomezes received any benefit from the prosecution, as the evidence is that the district attorney investigator merely provided information about the status of a police investigation but did not influence the investigation in any way. Therefore, substantial evidence did not support an instruction with regard to the Gomezes.

Second, with respect to the requested instruction being duplicative, the jury was instructed with CALCRIM No. 226, which states: "In evaluating a witnesses testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors you may consider are: [¶] . . . [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided." As the trial court pointed out, this instruction sufficiently instructed the jury to consider a witness's bias and allowed defense counsel to argue that the witnesses were biased because of benefits they received from the prosecution.

Third, the instruction proposed by defense counsel was improperly argumentative in that it *required* an inference not supported by law. Specifically, the instruction would

have directed the jury that it *must* view the witness's testimony in a specific way, i.e., *with greater caution.* However, there is no legal authority for such a requirement. Ali points to authority requiring greater caution when considering the testimony of accomplices or in-custody informants. (§§ 1111, 1127a.) However, no such authority exists for witnesses provided relocation services, just as no authority exists for an instruction requiring a juror to view the testimony of an immunized witness with greater caution. (*Hunter, supra*, 49 Cal.3d at pp. 977-978.) As our Supreme Court has explained in that context, "[t]he general rule, of course, is that the jury decides all questions of fact, including the credibility of a witness. . . . A cautionary instruction, by obligating the jury to view with skepticism the testimony of an immunized witness, impinges on the jury's otherwise unfettered power to determine the witness's credibility." (*Vines, supra*, 51 Cal.4th at p. 883, citations omitted.) The instruction therefore fails as unduly argumentative because without legal basis, it "'invite[d] the jury to draw inferences favorable to one of the parties from specified items of evidence.'" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.)

In sum, we reject Ali's argument that the trial court erred by refusing to instruct the jury on benefits received from the prosecution by certain witnesses.

D. *Ali's Claims of Prosecutorial Misconduct Are Without Merit*

Ali contends that the prosecutor committed misconduct during closing argument and by engaging in the alleged discovery violations that we have discussed above. Prosecutorial misconduct exists "'under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*Earp,*

*supra*, 20 Cal.4th at p. 858.) Further, a defendant's federal due process rights are violated when prosecutor's misconduct "'"'infects the trial with unfairness,'"'" making it fundamentally unfair. (*Ibid.*) A showing of bad faith on the part of the prosecutor is not required to establish misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822 (*Hill*).) However, "'[t]o preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition. . . .'" (*Earp*, at p. 858.) As an exception to this rule, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."'" (*Hill*, at p. 820.)

First, we address Ali's contention that the prosecutor's alleged discovery violations rose to the level of prosecutorial misconduct. It is well settled that "in the absence of prejudice to the fairness of a trial, prosecutor misconduct will not trigger reversal." (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) Here, to support his argument, Ali simply refers back to the argument concerning discovery violations that we have already addressed above. As we explained in our earlier discussion, Ali failed to establish the prejudice necessary to show a violation of his constitutional rights based on purported discovery violations. That failure to establish prejudice is also fatal to Ali's attempt to obtain reversal based on prosecutorial misconduct arising from the same purported discovery violations.

Next, we turn to Ali's contention that the prosecutor committed misconduct during closing argument because "[t]he lack of direct evidentiary references in the prosecutor's initial closing argument deprived [Ali] of the ability to make effective argument relating to the prosecution's position on specific evidence." Ali argues that "it is misconduct for the prosecutor to structure closing argument in a manner designed to preclude an effective defense reply. He relies on *People v. Robinson* (1995) 31 Cal.App.4th 494 (*Robinson*), in which the prosecutor improperly gave a three and one-half page closing argument followed by a much longer rebuttal argument of 35 pages, in which many issues were raised for the first time. (*Id.* at p. 505 ["Section 1093, subdivision (e) permits the prosecutor to open the argument and to close the argument. It does *not* permit the prosecutor to give a perfunctory (three and one-half reporter's transcript pages) opening argument designed to preclude effective defense reply, and then give a 'rebuttal' argument — immune from defense reply — 10 times longer (35 reporter's transcript pages) than his opening argument."].)

We note initially that Ali has not preserved this claim of prosecutorial misconduct because he did not object in the trial court, and an objection would not have been futile. (*Hill, supra*, 17 Cal.4th at p. 820; *Earp, supra*, 20 Cal.4th at p. 858.) Indeed, Ali could have asked for the trial court to remedy any unfairness by allowing defense counsel an additional opportunity for surrebuttal.

The substance of Ali's argument fails as well. The prosecutor's closing argument in this case was nothing like the perfunctory closing argument in *Robinson* and did not preclude an effective defense reply. On the contrary, the prosecutor's closing argument

consumed 38 pages of the reporter's transcript and — in a detailed manner — covered the evidence presented at trial that the prosecutor viewed as establishing Ali's guilt. Defense counsel's closing was a similar length, consuming 47 pages of the reporter's transcript. The prosecutor's rebuttal argument was much shorter — at 20 pages, and was directed at responding to issues raised during defense counsel's argument. We accordingly perceive no misconduct in the way that the prosecutor handled closing argument.

E. *The Trial Court Properly Denied the Motion to Hold a Hearing on Disclosing Juror Information*

After trial, Ali filed a petition for release of the jurors' personal identifying information so that he could develop a motion for a new trial. The trial court ruled that Ali had failed to establish good cause to hold a hearing to determine whether the juror information should be released. Ali contends that the trial court erred.

As applicable here, the law provides that after the recordation of a jury's verdict in a criminal jury proceeding, the court's record is sealed, with all personal juror identifying information of trial jurors removed from the court record. (Code Civ. Proc., § 237, subds. (a)(2)-(3).) Under Code of Civil Procedure section 206, subdivision (g), "a defendant or defendant's counsel may . . . petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose."

Code of Civil Procedure section 237, subdivision (b) sets forth the standard by which a petition for release of juror information is evaluated. "The petition shall be

supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm." (Code Civ. Proc., § 237, subd. (b).) The statute further provides that "[i]f the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure." (*Ibid*.) A trial court's decision that a defendant has not made a prima facie showing of good cause is reviewed for abuse of discretion. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

In his petition, Ali identified four possible grounds for a prima facie showing of good cause for release of the juror identifying information, each of which focused on certain items of possible juror misconduct that he wanted to investigate: (1) jurors may have felt that they were under time pressure to complete their deliberations due to the possibility of losing certain members of jury, to be replaced by alternates, because of schedule conflicts; (2) jurors may have misunderstood the prosecution's burden of proof; (3) jurors may have relied on evidence that had been stricken from the record during trial; and (4) jurors may not have been comfortable with the verdict, as evidenced by their body language when being polled. As sole support for the motion, Ali submitted a

declaration from Juror No. 1, which stated that she "felt that [Ali] was innocent, but did not see the evidence to prove it"; she and another juror felt pressured to reach a verdict because other jurors had upcoming vacations; she believed the juror deliberation process was "unfair"; eight out of 12 jurors, all of whom were White males, "began deliberations with their minds already made up"; and racism influenced the verdict as one of the jurors described Freeman as a "'lazy loser,'" to which another juror responded, "'Aren't they all.'"

The trial court determined that Ali failed to carry his burden to establish a prima facie case for release of juror identifying information. Specifically, it explained that Ali sought to develop information on the mental processes of the jurors, which would be excluded by Evidence Code 1150 in any motion seeking to impeach the verdict *even if* Ali succeeded in uncovering such information after obtaining juror contact information. Therefore, Ali had not established good cause for the release of the juror identifying information.[15] As we will explain, the trial court acted well within its discretion in reaching that conclusion.

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15 As one ground for challenging the trial court's denial of the motion for juror information, Ali seizes upon the fact that, in making its decision, the trial court stated that Ali had failed to show good cause instead of more exactly stating that Ali had failed to make a prima facie showing of good cause in accordance with Code of Civil Procedure section 237, subdivision (b). Based on this semantic distinction, Ali contends that the trial court misunderstood the legal standard that it was supposed to be applying. We reject Ali's argument. The parties' briefing in the trial court fully set forth the applicable standards and cited the applicable statutes, and, according to our review of the trial court's extensive comments during the hearing, there is no indication that the trial court's ruling was premised on an erroneous legal standard.

Evidence Code section 1150 states: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (*Id.*, subd. (a).) "This statute distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . .' [Citation.] '. . . The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.'" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261 (*Steele*).) "This distinction serves a number of important policy goals. It prevents a juror from impugning one or more jurors' reasoning processes. It excludes unreliable proof of thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by the losing side seeking to discover defects in the deliberative process and reduces the risk of postverdict jury tampering. It also assures the privacy of jury deliberations. [Citations.] Not all thoughts 'by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such [thoughts] cannot impeach a unanimous verdict; a jury verdict is not so fragile.'" (*Id.* at pp. 1261-1262.)

Upon examination, each issue that Ali sought to develop by contacting the jurors centered on the mental process by which the verdict was determined. As we will explain, any evidence obtained on those issues through contacting jurors would not be admissible under Evidence Code section 1150 to impeach the verdict.[16]

First, Ali sought to develop evidence that jurors felt time pressure. However, evidence that jurors felt rushed to reach a verdict would not be admissible to impeach a verdict because it focuses on jurors' subjective thought processes. (*People v. Cox* (1991) 53 Cal.3d 618, 695 (*Cox*) [under Evid. Code, § 1150, "while the *conduct* of jurors . . . complaining about the pace of deliberations may be scrutinized, the *effect* of this conduct on subsequent votes may not be"].)

Next, Ali's contentions that the jurors misunderstood the prosecution's burden of proof, that they considered evidence that had been stricken from the record during trial, and that they felt uncomfortable with the verdict are all unambiguous attempts to develop evidence of the jurors' mental processes of deliberating, which would not be admissible to impeach a verdict. "'"[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror 'felt' or how he understood the trial court's instructions is not competent."'" (*Steele*, *supra*, 27 Cal.4th at p. 1261.)

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16 Ali also contends, in an otherwise undeveloped argument, that the trial court improperly made a credibility determination in assessing the evidence presented in support of the motion. We disagree. The trial court explained its reasoning at length, and it did not rely on a credibility determination regarding Juror No. 1's declaration but instead relied on the legal analysis required by Evidence Code section 1150.

Finally, as to the allegations by Juror No. 1 that some of the jurors may have referred to racial stereotypes during their discussion of the evidence, even had the trial court allowed Ali to contact jurors to try to find out if their assessment of the evidence was influenced by stereotypes related to race, the information gathered would have concerned the jurors' thought processes and would not have been admissible in a motion to impeach the verdict. (*In re Hamilton* (1999) 20 Cal.4th 273, 294 ["with narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict"].)[17]

In sum, the trial court did not abuse its discretion in denying the motion for release of juror information.

F. *The Trial Court Properly Denied the Motion for a New Trial*

Ali moved for a new trial on several grounds, two of which he continues to advance on appeal: juror misconduct and prosecutorial misconduct.

1. *Motion for New Trial Based on Prosecutorial Misconduct*

We first consider the portion of the motion for a new trial based on prosecutorial misconduct. Although Ali set forth several theories of prosecutorial misconduct in the

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17 Although some authority exists — despite Evidence Code section 1150 — to allow admission of a juror's statement showing that he has prejudged the defendant's guilt because of racial bias (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 788; but see *People v. Allen* (2011) 53 Cal.4th 60, 72 [distinguishing *Grobeson* because it concerned juror expression of bias before deliberations began]), this is not such a case. Juror No. 1 presented no evidence suggesting that members of the jury relied on racist views to prejudge Ali's guilt.

motion for a new trial, on appeal he discusses only two theories. We accordingly limit our discussion to those theories.

First, Ali's appellate brief argues that the trial court should have granted a new trial based on the prosecutor's purported misconduct during closing argument, incorporating by reference the argument we have already considered and rejected in part II.D., *ante*. This argument fails. As we have explained, the prosecutor did not commit misconduct during closing argument because the prosecutor did not, as Ali claims, wait until the rebuttal to discuss the evidence presented at trial. In addition, Ali did not identify the prosecutor's purportedly belated reference to evidence during closing argument as one of the bases for his new trial motion, and he therefore cannot complain on appeal that the motion was not granted on that basis. (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508 ["A motion for new trial may be granted only upon a ground raised in the motion . . . ," and a defendant "'waives his right to a new trial upon all [statutory] grounds . . . unless he specifies the grounds upon which he relies in his application therefor'" (citation omitted)].)

Second, Ali argues that he should have been granted a new trial because of the prosecutor's alleged misconduct during discovery. However, as we have discussed, Ali has failed to establish any discovery violations amounting to prosecutorial misconduct. Based on that conclusion, we also reject his argument that the trial court should have granted a new trial based on the prosecutor's purported discovery-related misconduct. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1188 [court cites lack of merit to

prosecutorial misconduct argument as a ground for rejecting appeal of ruling on new trial motion based on the same assertion of prosecutorial misconduct].)

2. *Motion for New Trial Based on Juror Misconduct*

Next we consider Ali's argument that the trial court should have granted the motion for a new trial based on juror misconduct.

In support of his juror misconduct argument, Ali submitted a new declaration from Juror No. 1, similar to the declaration we have already discussed above, along with declarations from Juror No. 2 and Juror No. 5.[18]

Juror No. 2's declaration made three points: (1) he was "unaware that [he] could find [Ali] not guilty without having a reason to justify [his] decision"; (2) he felt time pressure to finish deliberating because some of the jurors would have to be replaced by alternates if deliberations continued into the next week; and (3) two jurors were "pressured" into voting guilty by other jurors who "no longer had the patience to deliberate."

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18 Ali also submitted a declaration from the defense investigator, who described statements made by Juror No. 9 when talking to defense counsel after the verdict. According to the defense investigator, Juror No. 9 stated that, due to the wounds on Freeman's hands, he was unsure whether Freeman committed suicide. The totality of the statement by Juror No. 9 — as described by the defense investigator — constitutes hearsay and was accordingly not admissible in connection with the motion for a new trial. (*People v. Williams* (1988) 45 Cal.3d 1268, 1318 ["It is settled . . . that 'a jury verdict may not be impeached by hearsay affidavits.'"].) Moreover, to the extent Juror No. 9 was describing his thought process during jury deliberations, that statement is inadmissible under Evidence Code section 1150.

Juror No. 5 stated: (1) Juror No. 6 seemed "sleepy" and "dazed" and seemed to not be paying attention during the trial; (2) at the beginning of deliberations Juror No. 6 said he was voting guilty because the District Attorney knew what he was doing, and "if [the District Attorney] had enough evidence to say he was guilty, then he must be guilty," and then Juror No. 6 didn't say anything else during deliberations; and (3) jurors felt under time pressure because if deliberations continued into the next week, deliberations would have to start over with alternates.

Juror No. 1's declaration was similar to the declaration filed to support the motion for release of juror contact information. Juror No. 1 stated: (1) she felt Ali was innocent "but did not see the evidence to prove it"; (2) she felt time pressure because if deliberations continued into the next week, alternates would have to be called in; (3) eight jurors seemed to have their minds made up at the beginning of deliberations although "[t]hey discussed other possibilities"; (4) Juror No. 4 was "scoffed at" by other jurors when he carefully reviewed the telephone records; and (5) two jurors had a conversation, with one describing Freeman as a "'lazy loser,'" and the other saying "'Aren't they all,'" which Juror No. 1 took to refer either to Black men or gang members.

The trial court denied the motion for a new trial based on juror misconduct. As in connection with the motion to release juror information, the trial court explained that many of Ali's juror misconduct allegations were based on evidence made inadmissible by Evidence Code section 1150, and that the admissible evidence did not establish juror misconduct. Ali contends the trial court erred.

In evaluating a motion for a new trial based on juror misconduct, "[t]he trial court must undertake a three-step process . . . . The trial court must first 'determine whether the affidavits supporting the motion are admissible. (Evid. Code, § 1150.)' . . . [¶] Second, 'If the evidence is admissible, the trial court must determine whether the facts establish misconduct. . . .' . . . [¶] '"Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial.'" (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345, citations omitted.) "'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] '"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."'" (*People v. Thompson* (2010) 49 Cal.4th 79, 140 (*Thompson*).)

Applying the first step of the analysis, we agree with the trial court that many of the statements in the three jurors' declarations submitted in support of the new trial motion were inadmissible under Evidence Code section 1150. First, all three declarations describe the feeling of being under time pressure to reach a verdict because of impatience from other jurors or because alternates would have to be substituted if deliberations carried into the next week. Those statements plainly describe the jurors' mental state during deliberations and are inadmissible under Evidence Code section 1150. (*Cox*, *supra*, 53 Cal.3d at p. 695 [statements regarding effect on some jurors from complaints about slow pace of deliberations is inadmissible under Evid. Code, § 1150].) Second, Juror No. 5's and Juror No. 1's statements suggesting that they wanted to find Ali not guilty but did not do so because they couldn't support that verdict with evidence is clearly

a description of their thought processes. Third, the statement by Juror No. 6 — as reported by Juror No. 5 — that he was voting guilty because the District Attorney knew what he was doing, is a statement of the mental process by which Juror No. 6 reached a verdict, and is not admissible. Therefore, the trial court properly excluded these statements from its consideration of the new trial motion. (See *Steele, supra*, 27 Cal.4th at p. 1264 ["The trial court correctly refused to consider evidence of the jurors' subjective thought processes. Accordingly, it did not abuse its discretion in denying the new trial motion to the extent it was based on this evidence."].)

The remaining issue is whether the trial court was within its discretion to determine that the *admissible* evidence in the three jurors' declarations was insufficient to establish juror misconduct for the purpose of the motion for a new trial.

The first admissible evidence we consider is the possibly racially-directed comments that Juror No. 1 heard from two other jurors (i.e., Freeman was a "'lazy loser,'" with the response "'Aren't they all'"). As the trial court correctly pointed out, Juror No.1's interpretation that her fellow jurors harbored racial bias was speculative and subjective. The statements that she described were ambiguous, and she admitted in her declaration that the comments could have been referring to the gang members with whom Ali associated rather than constituting racially-biased comments. Further, as we have explained, even if the comments were directed at Freeman's race, there is no indication that racial stereotypes entered into any prejudgment of Ali's guilt. Therefore, we agree with the trial court that no juror misconduct was established by the portion of Juror No. 1's declaration describing possible racially-biased comments.

Next, we consider whether Juror No. 5's description of Juror No. 6's inattention during trial established misconduct. Although our Supreme Court has held that *extreme* inattentiveness during trial will constitute misconduct, it has recognized that "[e]ven the most diligent juror may reach the end of his attention span at some point during a trial and allow his mind to wander temporarily from the matter at hand." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 418.) Thus, only inattentiveness rising to the level of actually sleeping during trial or diverting one's complete attention by activities such as reading a novel or doing crossword puzzles constitutes misconduct. (*Id*. at pp. 411-412 [holding crossword puzzle working and novel reading constituted misconduct and observing that, in general, cases "decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial"].) Here, the inattentiveness described by Juror No. 5 did not rise to that level. Moreover, the trial court expressly stated that it had closely watched the jurors during the trial, and it had observed nothing except normal periodic wandering of attention in Juror No. 6's demeanor. Accordingly, the trial court was well within its discretion to deny the portion of the new trial motion premised on supposed juror inattention.

Finally, we consider the statements by Juror No. 1 and Juror No. 5 that some of the other jurors refused to engage in meaningful deliberations because they made up their minds at the beginning of the discussion. A perception by one juror that another juror has refused to deliberate will establish juror misconduct only if there has been an "objective failure to deliberate, such as jurors who turned their backs or otherwise objectively segregated themselves from the deliberations." (*Thompson, supra,* 49 Cal.4th at p. 141.)

That is not what is described in the declarations. On the contrary, Juror No. 5's comments about what Juror No. 6 said during deliberations shows that he *was* participating in the deliberative process by stating the reasons for his views. Further, although Juror No. 1 claimed that other jurors had already made up their minds at the beginning of deliberations, she also stated that they "discussed other possibilities with us" and discussed that they believed the evidence "pointed to guilt." Those comments show that the other jurors *did* participate in the deliberations.[19]

In sum, the trial court was well within its discretion to conclude that much of the jurors' statements supporting the motion for a new trial were inadmissible and that the balance of the statements did not establish misconduct. The trial court thus did not abuse its discretion in denying the motion for a new trial.

G. *Cumulative Error*

Ali contends that the errors he has identified combined to cumulatively violate his constitutional rights to due process and a fair trial and created the prejudice necessary to reverse the judgment.

A series of errors, although independently harmless, may in some circumstances rise to the level of reversible and prejudicial error. (*Hill*, *supra*, 17 Cal.4th at p. 844.) However, in light of our conclusion that none of Ali's claims of error, considered

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19 It is unclear what sort of misconduct Juror No. 1 meant to indicate by stating that other jurors "scoffed" when Juror No. 4 went carefully through the telephone records. If the incident is supposed to show a failure to deliberate, it does not succeed in doing so and instead demonstrates a dialogue and expression of opinion between jurors during deliberations.

separately, has merit, we reject his contention that cumulative error requires reversal. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.