No.

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE A. MCKNIGHT,

Petitioner,

vs.

R. JOHNSON; TAMMY FOSS,

Respondent

APPENDIX

A. Opinion of the Ninth Circuit Court of Appeals in *McKnight v. Johnson*, CA 19-16631, filed December 28, 2020, 2020 WL 7694299

B. Order Denying Petition and Judgment of the District Court in *McKnight v. Johnson*, CV 18-01036-VC, filed August 1, 2019, 2019 WL 3503054

C. Order Denying Petition for Review by the California Supreme Court in *People v. McKnight*, S238530, filed January 11, 2017

D. Decision of the California Court of Appeal in *People v. McKnight*, A143997, filed October 20, 2016, 2016 WL 6124497

Appendix A

FILED

DEC 28 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRENCE A. MCKNIGHT, Petitioner-Appellant, v. R. JOHNSON; TAMMY FOSS, Respondents-Appellees.	No. 19-16631 D.C. No. 3:18-cv-01036-VC MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Argued and Submitted December 9, 2020
San Francisco, California

Before: MURGUIA and CHRISTEN, Circuit Judges, and SESSIONS,[**] District Judge.

Petitioner Terrence A. McKnight appeals the district court's order denying his petition for habeas corpus brought pursuant to 28 U.S.C. § 2254. The federal

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

district court issued a certificate of appealability on two issues. We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm.[1]

We review de novo a district court's denial of a § 2254 petition. *Balbuena v. Sullivan*, 980 F.3d 619, 628 (9th Cir. 2020). We review a § 2254 habeas petition under the "highly deferential standard for evaluating state court rulings." *Id.* (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). A federal court may only grant habeas relief if the state court's ruling was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). Where, as here, the state supreme court decision summarily denies the petition for review, we "look through" the unexplained decision to the last reasoned state decision. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

1. The prosecutor's repeated references to police broadcasts that described McKnight a/k/a "Tee Baby," while highly improper, did not render McKnight's trial fundamentally unfair. A defendant's due process rights are violated only when a prosecutor's improper comments before the jury "so infected the trial with

[1] We recount the facts only as necessary to resolve the issues on appeal.

unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

We have no trouble concluding the prosecutor committed misconduct by making repeated references to hearsay statements that identified Tee Baby as the shooter. Appellees do not contest this point. The trial court permitted the description of the shooter to be introduced for the limited purpose of its effect on the responding police officers' state of mind.[2] The court directed that the hearsay description was not to be used for the truth of the matter asserted, but the prosecutor used the hearsay description in his opening statement, elicited the description from testifying officers, and argued, in his closing argument, that "[t]his case was cracked within five minutes of [Officer] Gibbs arriving on that scene. Five minutes. Five minutes . . . . By 3:44 [Officer] Gibbs is given a description of the shooter that goes by the name of Tee Baby, a black male in all black." The prosecutor's comments were clearly calculated to encourage the jury

[2] The California Court of Appeal later held that the description was inadmissible because the officer's state of mind "had no relevance to the case: all the officers did as a result of the suspect description was look for the suspect in vain."

to draw an impermissible connection between the description of the suspect given to the police and McKnight's guilt.

Even though the prosecutor's comments were improper, the state court determined "the trial court's admonitions, as well as the prosecutor's own statement that he was relying solely on the identification of the three testifying eyewitnesses, rendered the error harmless." This conclusion was not unreasonable. In *Darden*, the Supreme Court held that prosecutorial misconduct did not render the trial fundamentally unfair because "[t]he trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence," and the "weight of the evidence against petitioner was heavy . . . [which] reduced the likelihood that the jury's decision was influenced by argument." 477 U.S. at 182.

Here, the trial court gave the jurors multiple curative instructions following the prosecutor's reference to the hearsay description of the suspect including (1) that "[n]othing counsel say is evidence," and that (2) the description was only offered "to show what the subsequent acts and what the police officers were looking, the intent of the police officers; not for the truth of the matter stated." The improper references to the hearsay description were presumptively cured by the trial court's instructions. *Donnelly*, 416 U.S. at 645; *Cheney v. Washington*, 614

F.3d 987, 997 (9th Cir. 2010) ("Jurors are presumed to follow the court's instructions." (internal citations omitted)). Moreover, the other evidence against McKnight was strong. Three eyewitnesses identified McKnight as the shooter, evidence showed that one of the victims was suspected of being involved in the killing of McKnight's associate, and evidence indicated McKnight fled the area following the shooting. Thus, the state court could have reasonably concluded that the prosecutor's remarks did not render McKnight's trial fundamentally unfair.

2. The trial court's murder instruction did not render McKnight's trial fundamentally unfair. To reject McKnight's challenge to the jury instructions, the California Court of Appeal relied on *People v. Kelly*, which applied the relevant federal standard. 1 Cal.4th 495, 525–26 (1992) (citing *Estelle v. McGuire*, 502 U.S. 62 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990)). We therefore must give due deference to the California Court of Appeal's conclusions under 28 U.S.C. § 2254(d).

A habeas petitioner must do more than prove that the jury instruction was "undesirable, erroneous, or even universally condemned" to show that he is entitled to relief. *Donnelly*, 416 U.S. at 643. Instead, he must show that the erroneous instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

Here, the trial court instructed the jury "[i]f you decide the defendant committed murder, you must then decide whether it is murder of the first degree or second degree." The court instructed the jury on the unique elements of first degree murder and explained "second degree murder based on express or implied malice are explained in instruction number 520, which is the one right before this." The court also instructed "[t]he People have the burden of proving beyond a reasonable doubt that the killing was the first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." From this, it is reasonable to expect the jury understood first and second degree murder had distinct elements and what those elements were. The state court could have reasonably concluded that the jury instructions in this case did not violate due process.

3. McKnight argues that the admission of the hearsay description of the suspect at trial violated the Confrontation Clause. U.S. Const. amend. VI. The district court rejected this argument as raised in McKnight's § 2254 petition, and declined to issue a certificate of appealability. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Sixth Amendment's Confrontation Clause provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "Testimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). If a statement is procured with the "primary purpose of creating an out-of-court substitute for trial testimony," the statement is testimonial hearsay and *Crawford* applies. *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). If, however, "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause." *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 823–24 (2006).

Here, the district court concluded that the circumstances under which the suspect's description was relayed to police was likely "chaotic" because there had been a shooting with one fatality. Police responded within minutes but the shooter, who could have remained armed, was at large in a residential community. Under these circumstances, the primary purpose of bystanders' description of the shooter was likely to enable police to resolve an "ongoing emergency" by apprehending an armed assailant. Such statements are not testimonial and their admission at trial

does not violate the Confrontation Clause. Accordingly, McKnight has failed to "[make] a substantial showing of the denial of a constitutional right" and we deny his request for a certificate of appealability as to this issue. 28 U.S.C. § 2253(c)(2).

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TERRENCE A. MCKNIGHT,

Petitioner,

v.

R. JOHNSON,

Respondent.

Case No. 18-cv-01036-VC (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; GRANTING, IN PART, CERTIFICATE OF APPEALABILITY

Terrence A. McKnight filed a pro se petition for a writ of habeas corpus challenging the validity of his state criminal conviction. On August 9, 2018, the respondent filed a memorandum of points and authorities in response to the order to show cause. McKnight's traverse was due on September 10, 2018. McKnight filed several motions for an extension of time, which the court granted. On January 22, 2019, McKnight filed a motion for appointment of counsel claiming he was being denied access to the prison law library. On February 6, 2019, the court issued an order denying the motion to appoint counsel but directed respondent's counsel to ensure McKnight had adequate access to the prison law library. The court stated it would entertain a further motion for an extension of time from McKnight if he needed more time to research materials in the law library. On February 8, 2019, the respondent filed a notification he was in compliance with the court's order, attaching a declaration from the senior law librarian stating McKnight had "PLU" status, meaning he could use the law library up to four hours per week. McKnight filed no further motions for an extension of time and has not filed a traverse. Therefore, the court reviews McKnight's claims based on his petition and the respondent's memorandum. The petition is denied, but a certificate of appealability is granted, in part.

PROCEDURAL BACKGROUND

On March 8, 2013, a jury found McKnight guilty of the May 17, 2002 first degree murder of 13-year old Keith Frazier and the attempted murder of Kevin Wortham and found the firearm allegations to be true. 2 Clerk's Transcript ("CT") 406-09; ECF No. 20-3 at 416-19. The court sentenced McKnight to 70 years to life in prison. 3 CT 710; ECF No. 20-4 at 228.

On October 20, 2016, the California Court of Appeal affirmed the judgment in a written opinion. *People v. McKnight*, 2016 WL 6124497 (Cal. Ct. App. Oct. 20, 2016) (unpublished). On January 11, 2017, the California Supreme Court denied McKnight's petition for review. Ex. 9. McKnight filed this timely federal petition.

BACKGROUND

Three eyewitnesses testified at McKnight's trial: Kevin Wortham, Eric Hoskins and Krystal Willingham. The Court of Appeal described their testimony as follows:

> **Kevin Wortham**
>
> On the afternoon of May 17, 2002, Wortham drove his approximately thirteen-year-old brother, Frazier, and his three-or four-year-old sister, Erica, to the Alemany housing project where they lived with their mother. Frazier was sitting in the front passenger seat and Erica was sitting behind Frazier. Wortham stopped to talk with Eric Hoskins, Erica's father, then drove a short distance up the street and parked. He started to open his door when a man began firing gunshots into the car. Wortham looked up and saw the shooter running away. The shooter was wearing black clothing and a ski mask covering his face.
>
> Hoskins ran up to the car and Wortham told him he thought the shooter was "Tee Baby." It was undisputed at trial that appellant's nickname was Tee Baby. Wortham met appellant about three or four months before the shooting and they occasionally played basketball or Playstation together. Wortham recognized appellant by his build, gait, and clothing.
>
> Wortham watched as Hoskins chased the shooter uphill. After running some distance, the shooter removed his ski mask. Wortham could see the shooter's face and recognized appellant. Hoskins appeared to be too tired to continue pursuing appellant and he returned to the car; appellant ran away. Frazier had been shot in the head and died; a bullet had grazed Wortham's stomach.
>
> Wortham told a police officer who arrived on the scene that he did not know who the shooter was. He did not identify appellant to the

officer because he was "full of anger" and "thought about taking actions into my own hands." During an ambulance ride taking Wortham to the hospital, he spoke to his mother on the phone and told her Tee Baby shot Frazier. FN3 When Wortham spoke to police officers at the hospital later that day, he told them Tee Baby was the shooter. FN4 Two days later, Wortham identified appellant in a photographic lineup.

FN3 A police officer accompanying appellant in the ambulance testified she overheard Wortham, while on his cell phone, say "Tee Baby did this."

FN4 Audio recordings of this interview, as well as a May 20, 2002 interview with Wortham, were played for the jury.

On cross-examination, Wortham admitted making false or inconsistent statements about the shooting. Wortham testified at the preliminary hearing that he saw a man named Andre Glaser with appellant at the time of the shooting. At trial, Wortham conceded this preliminary hearing testimony was false and based on a rumor that Andre Glaser and appellant wanted to kill him. Wortham did not tell investigators the shooter was wearing a mask until 2011. Wortham testified at the preliminary hearing that the shooter had been wearing gray sweats; at trial he testified the shooter's clothing was all black. In one of his 2002 police interviews, Wortham identified the shooter's location in a place the prosecution's trajectory expert testified was not possible in light of forensic trajectory evidence.

Eric Hoskins

Eric Hoskins is Wortham's godfather and Erica's father. On the day of the shooting, he started detailing cars around 9:00 a.m. He saw appellant driving up and down the street. Hoskins knew appellant: about three months before the shooting he began seeing appellant in the neighborhood, and appellant had come to Hoskins's house to see Wortham. About 15 minutes before the shooting, appellant and two other men—whom Hoskins knew as "Younger Dave" and "Taco"—approached Hoskins. Younger Dave started saying something "crazy" to Hoskins and appellant walked around appearing to come behind Hoskins. Taco broke up the confrontation and the three men drove up the street, parking nearby.

Shortly thereafter, Wortham drove up. After Hoskins and Wortham talked, Wortham drove forward about 30 yards and parked. Hoskins had returned to work when an acquaintance, Kevin Martin, cried out that there was a shooting. Hoskins saw a man firing gunshots at Wortham's car from a few feet away. The man was dressed in all black with a ski mask covering his face. Hoskins ran toward the car; the shooter stopped firing and ran up the street. When Hoskins reached the car, Wortham told him the shooter was Tee Baby.

> Hoskins ran after the shooter, up a hill. When the shooter reached the top of the hill, about 50 feet away from Hoskins, he took off his ski mask. Hoskins recognized the shooter as appellant. Hoskins was too tired to continue his pursuit and returned to Wortham's car. . . .
>
> Hoskins did not talk to the police about the shooting until November 2002, when police contacted him after learning he was in a vacant home. FN5 He testified he did not talk to the police earlier because he "wanted to take the law into my own hands." On cross-examination, Hoskins admitted prior false or inconsistent statements about the shooting. In November 2002, he told the police appellant got into a car after running up the hill, but at trial he said the basis of the statement was "street [ ] talk." He gave the police a conflicting account of his encounter with appellant, Younger Dave, and Taco prior to the shooting. He told police that he saw Taco's car driving up the hill before the shooting, but at trial testified he did not. He never told anyone prior to 2011 that he had been talking to Martin at the time of the shooting.
>
> FN5 An audio recording of Hoskins's November 2002 interview was admitted into evidence.
>
> Hoskins admitted prior felony convictions for residential burglary in 2004 and possession of an assault rifle in 2006, and admitted lying to the police about his identity in 1997.
>
> **Krystal Willingham**
>
> Willingham was a reluctant witness who testified at trial she had no memory of the shooting. In an interview with police on May 30, 2002, Willingham said she saw the shooting and identified appellant as the shooter in a photographic lineup. FN6 She told the police that, while she did not know appellant's name, she had seen him before at her neighbor's house. Willingham's preliminary hearing testimony was inconsistent with certain aspects of Wortham's and Hoskins's testimony: she testified at the preliminary hearing that the shooter was not wearing a mask, Frazier was outside the car when he was shot, FN7 appellant left in a car right after the shooting, and she did not see anyone chasing appellant's car as it drove away.
>
> FN6 An audio recording of Willingham's police interview was played for the jury.
>
> FN7 The parties stipulated that Frazier was inside the car when shot.

People v. McKnight, 2016 WL 6124497, at *1-2.

Jason Glaser, a member of a group known as the Freeway Boys, was killed a few days before the shooting of Wortham and Frazier. *Id.* at *3. Wortham testified that he was a member of a group called the Project Boys and McKnight was a member of the Freeway Boys. *Id.*

Wortham testified he was warned that other Freeway Boys believed he was involved in Glaser's murder and Wortham's family was worried about his safety. *Id.* Witnesses testified that, after the shooting of Wortham and Frazier, it appeared that McKnight left the area. *Id.* McKnight was in custody in Texas in June 2003. *Id.*

STANDARD OF REVIEW

A federal court may entertain a habeas petition from a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act, ("AEDPA"), a district court may not grant habeas relief unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). This is a highly deferential standard for evaluating state court rulings: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Additionally, habeas relief is warranted only if the constitutional error at issue "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

DISCUSSION

I. Admission of Evidence

McKnight argues the admission of a police broadcast identifying him as the shooter by unknown people violated his Confrontation rights under the Sixth and Fourteenth Amendments.

A. Relevant Background

Prior to trial, defense counsel moved to exclude testimony from officers about the

broadcast describing the identity of the shooter provided to them at the crime scene by unknown people, arguing it was inadmissible hearsay. The prosecutor argued the evidence was admissible to show the effect on the officers' state of mind and the trial court admitted it for that limited purpose. The Court of Appeal described the testimony as follows:

> Four police officers who responded to the shootings testified at trial. When the officers arrived at the scene, a crowd of onlookers had gathered and the officers asked for help identifying the shooter. Within minutes of the officers' arrival on the scene, multiple police radio broadcasts issued information about the shooter. One of these radio broadcasts identified the shooter as follows: "Black male, 5'11", all black clothing, goes by Tee Baby." None of the officers could remember talking to a specific person who provided the identifying information, but they testified the information must have come from one or more persons at the scene. The trial court admonished the jurors that the descriptions of the suspect "are being offered only for state of mind of the officers and what happened next, . . . not for the truth of what's in those statements."

McKnight, 2016 WL 6124497, at *4.

The California Court of Appeal determined the admission of the hearsay testimony was in error because the non-hearsay purpose for which it was admitted had no relevance to the case, but denied the claim because the admission of the testimony was not prejudicial. *McKnight*, 2016 WL 6124497, at *5, 7-8. It also held the Confrontation Clause did not apply because the challenged statements were nontestimonial. *Id.* at *6-7.

B. Confrontation Clause

McKnight argues the Court of Appeal was wrong because the police broadcasts based on statements from unidentified people were testimonial.

The Confrontation Clause of the Sixth Amendment provides that, in criminal cases, the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. The goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Id.* The Confrontation Clause only applies to

"testimonial" statements. *Id.* at 50-51. "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. It applies not only to in-court testimony but also to out-of-court statements introduced at trial, regardless of the admissibility of the statements under state laws of evidence. *Id.* at 50-51.

When the primary purpose of an out-of-court statement is to create an out-of-court substitute for trial testimony, the statement is testimonial hearsay and *Crawford* applies. *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). The formality of the interrogation, or the lack of it, may inform the court's inquiry as to its "primary purpose." *Id.* at 366. The primary purpose of a statement is determined objectively. *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1267 (9th Cir. 2013). Thus, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* (quoting *Bryant*, 562 U.S. at 360).

An important factor in determining the primary purpose of a police interrogation is whether an "ongoing emergency" existed at the time. *Bryant*, 562 U.S. at 366. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see id.* at 821-23, 826-29 (holding a victim's initial statements in response to a 911 operator's interrogation were not testimonial because the elicited statements, i.e., naming her assailant, were necessary to resolve the present emergency); *see also Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015) (teachers' questions and a 3-year-old's answers about his injuries were not testimonial because they were "primarily aimed at identifying and ending the threat" to the child rather than for the primary purpose of gathering evidence for a later prosecution).

The officers responding to the shooting of Frazier and Wortham were confronted with a situation like that in *Bryant*, where the police found a victim suffering from a fatal gunshot wound and a perpetrator whose location was unknown. *Bryant*, 562 U.S. at 359. In *Bryant*, the

Supreme Court found these circumstances created a potential threat to the responding police and the public, which constituted an ongoing emergency. It explained the significance of an ongoing emergency as follows:

> the existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution. . . . Rather, it focuses them on ending the threatening situation. . . because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

Id. at 361.

The Court held the victim's statements to the police about the identification and description of the shooter and the location of the shooting were not testimonial and the Confrontation Clause did not bar their admission at Bryant's trial. *Id.* at 378.

Here, the police were confronted with two shootings, and the shooter, most likely armed with a gun, was at large in the community, creating a threat to the public and the responding officers. The identification statements given to the police were not made during a police interrogation at the police station, but in a public location. The crime scene was likely chaotic, and the police could not even identify the people who made the statements. *See id.* at 360 (the circumstances in which an encounter occurs—e.g. at or near the scene of the crime versus a police station—are matters of objective fact to consider). An objective consideration of the individuals' statements and the circumstances in which they occurred leads to the conclusion that they were made to end the ongoing emergency and not made to prove past events at a trial. Therefore, the statements were non-testimonial, and their admission did not violate the Confrontation Clause.

In his petition, McKnight attempts to distinguish the Supreme Court cases from his case. For instance, he argues *Bryant* limited its holding to a dying declaration of the gunshot victim and *Davis* was limited to an excited utterance on a 911 recording. However, an ongoing emergency is objectively determined by the surrounding circumstances and whether the

statements are given to end a threat to the public or the police, rather than the subjective state-of-mind of the declarant. In this case, the circumstances clearly show the statements were given to the police to end the ongoing emergency caused by a shooter being at large in the neighborhood.

C. Admission of Prejudicial Testimony

1. Federal Authority

The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated, or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). The Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that trial court's admission of irrelevant pornographic materials was "fundamentally unfair" under Ninth Circuit precedent but not contrary to, or an unreasonable application of, clearly established Supreme Court precedent under § 2254(d)). Failure to comply with state rules of evidence is neither a necessary nor a sufficient basis for granting federal habeas relief on due process grounds. *Henry*, 197 F.3d at 1031; *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *Id.* at 920.

2. Identification of Shooter by Unidentified People

McKnight argues that, even if the statements about the identity of the shooter are not testimonial, their admission violated his right to a fair trial. The respondent argues this claim is unexhausted because McKnight argued to the state courts that the admission of hearsay testimony violated his state law rights. The Court does not address the exhaustion issue because the allegations do not rise to the level of a colorable habeas claim. *See Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (federal court may deny unexhausted claim on the merits when it is perfectly clear petitioner does not raise even a colorable federal claim).

First, the claim is not cognizable on federal habeas review because no Supreme Court

authority holds that the admission of prejudicial evidence is a constitutional violation. *See Henry*, 197 F.3d at 1031; *Zapien v. Davis*, 849 F.3d 787, 794 (9th Cir. 2015). Second, as the Court of Appeal reasonably found, there was strong evidence of McKnight's guilt: even if the three eyewitnesses were impeached by contradictory statements given before the trial, all three knew McKnight before the shooting and all three unequivocally identified him as the shooter. *McKnight*, 2016 WL 6124497, at *8. This was strong inculpatory evidence even though the witnesses varied their stories over time. Evidence that McKnight disappeared immediately after the shooting indicated a consciousness of guilt. *Id.* Finally, evidence that McKnight committed the shooting out of revenge for Wortham's alleged shooting of McKnight's associate provided a motive for the shooting. *Id.* Because the jury was presented with strong evidence against McKnight, the admission of the hearsay statements did not render the trial fundamentally unfair.

3. Freeway Boys "Gang-Type" Evidence

McKnight argues the admission of "gang-type" evidence in this "non-gang" case violated the California rules of evidence because it was more prejudicial than probative and deprived him of a fair trial. The respondent argues McKnight has failed to state a cognizable federal claim and, even if he has, it is unexhausted because the constitutional claim was not fairly presented to the California Supreme Court. The Court does not address the exhaustion issue because the allegations do not rise to the level of a colorable habeas claim. *See Cassett*, 406 F.3d at 624 (federal court may deny unexhausted claim on the merits when it is perfectly clear petitioner does not raise even a colorable federal claim).

The Court of Appeal summarized the relevant facts of this claim as follows:

> Wortham testified appellant, Andre Glaser, and Taco, among others, were members of the Freeway Boys. Officer Gibbs testified the Freeway Boys was "not a gang affiliation but more of a clique." Another law enforcement witness testified there were no validated street gangs in the Alemany projects in 2002.
>
> Officer Gibbs testified to seeing graffiti on the 500 block of Alemany saying, "Freeway Boys" and "RIP WB," which Gibbs explained was a reference to Jason Glaser, who had been known as "White Boy." Gibbs also saw a man on the 500 block of Alemany wearing a t-shirt saying, "Freeway Boys." Gibbs further testified

> that on March 20, 2002, on the 500 block of Alemany, he came into contact with appellant and Andre Glaser. At that time, Gibbs arrested appellant for a felony drug offense.
>
> In June 2003, appellant mailed a letter from Texas to Justin Wilson, identified by a law enforcement witness as a Freeway Boys member. The letter was written in conversational street slang and Sergeant Kevin Knoble provided a "translation." FN14 In the letter, appellant did not use the term "Freeway Boys," but asked Wilson to say "hi" to Taco and to tell Andre Glaser to contact appellant privately. FN15
>
> 14 The trial court designated Knoble as an expert in "the use and meaning of words, phrases and content of letters written in street terminology in . . . the Alemany projects."
>
> 15 The letter also included the line, "keep smashin and his foot on those Bustaz necc ya dig," which Knoble interpreted to mean, "keep your foot on our enemies' neck, . . . break the necks of those that aren't our friends."

McKnight, 2016 WL 6124497 at *8.

Because the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ," *see Henry*, 197 F.3d at 1031 and *Holley*, 568 F.3d at 1101, this claim must be denied since the admission of the Freeway Boys evidence was not contrary to, or an unreasonable application of clearly established Supreme Court. *See* 28 U.S.C. § 2254(d). Furthermore, the evidence was admissible under *Jammal*, 926 F.2d at 920, because it was relevant to show McKnight had a motive for the shooting, that is, to avenge the murder of another Freeway Boys member.

II. Prosecutorial Misconduct

McKnight argues the prosecutor committed misconduct by arguing in his rebuttal to the jury that the identification of Tee Baby in the police broadcast was evidence that McKnight was the shooter.[1]

A. Background

In his closing argument, defense counsel emphasized the limited purpose of the crime

[1]In his state appeal, McKnight asserted several grounds for prosecutorial misconduct. This is the only ground raised in his federal habeas petition.

scene identifications reminding the jurors that the judge ruled the evidence was admitted only to show what the police did, not for the truth of what was stated in the identifications. *See* ECF No. 20-8 at 180 (defense closing). In rebuttal, the prosecutor stated:

> By 3:40, Officer Lui is responding . . . . He arrives at 3:43. By 3:44 Gibbs is given a description of the shooter that goes by the name Tee Baby, a black male in all black.

ECF No. 20-8 at 237. The defense attorney objected, stating: "there is no evidence for the identity." *Id.* The court stated: "Okay. Ladies and gentlemen, as I have indicated before, statements of counsel are not evidence. If you need to verify something the court reporter will read that portion to you." *Id.* The prosecutor then stated:

> And understand, ladies and gentlemen, what I am telling you is that this is the person that they're looking for. This is the suspect description that they have. This is who they are patrolling around the area, trying to find, a black male in all-black that goes by the name of Tee Baby. At 3:45 Officer Liu describes the shooter, black male, all-black clothes, goes by Tee Baby.

Id.

Defense counsel again objected because the testimony was admitted only to show the effect on the listener, not as proof of identity. *Id.* at 237-38. The court again told the jury that statements of counsel are not evidence. *Id.* at 238.

The prosecutor then stated:

> What it shows is who they're looking for. That's what it shows. It doesn't show that he was the person who did it; what is shows is who they're looking for. That's why it's important in terms of their state of mind. This is who they are searching for.

Id.

Defense counsel asked for a continuing objection, which the court sustained. When the prosecutor continued to talk about the identifying information, defense counsel objected again. The court told the jury, "Ladies and gentlemen, again, this - - a lot of this information, it is up to you – was offered only for – to show that the subsequent acts and what the police officers were looking, the intent of the police officers; not for the truth of the matter stated." *Id.* at 239. The prosecutor then stated:

> So, again, what I'm trying to impress upon your minds as jurors is that this Tee Baby is who the cops were looking for, a black male adult, Tee Baby in all-black or in gray sweats, and that they are actively searching for that person. And the reason it's significant is because within five minutes, five minutes of Gibbs arriving on the scene, they're looking for a suspect that fits that description.
>
> And, in fact, the only thing that caused the case not to be made any sooner is the defendant's own conduct of leaving the state. But his case was made within that five-minute period of time. And then we have the identifications. And that's what I'm asking you to base your verdict on, is the identifications that were made by the three witnesses, by Mr. Hoskins, by Mr. Wortham, as well as Ms. Willingham.

Id. at 239.

The Court of Appeal acknowledged that some of the prosecutor's statements improperly relied on the evidence to support the truth of the identification but held that the trial court's admonitions to the jury and the prosecutor's own statement that he was relying on the identification of the three testifying witnesses rendered the error harmless. *McKnight*, 2016 WL 6124497 at *13.

B. Federal Authority

A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). Factors which a court may take into account in determining whether misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt, *see United States v. Young*, 470 U.S. 1, 19 (1985); (2) whether the misconduct was isolated or part of an ongoing pattern, *see Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987); (3) whether the misconduct relates to a critical part of the case, *see Giglio v. United States*, 405 U.S. 150, 154 (1972); and (4) whether a prosecutor's comment misstates or manipulates the evidence, *see Darden*, 477 U.S. at 182. When a curative instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and that no due process violation occurred. *Greer v. Miller*, 483 U.S. 756,

766 n.8 (1987). Even if prosecutorial misconduct occurs, relief cannot be granted unless the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 637-38.

C. Analysis

The challenged remarks can be characterized as prosecutorial misconduct because they meet the requirements set forth in *Darden*. First, the remarks were part of an ongoing pattern in that the prosecutor kept repeating the statements about the shooter's early identification even after defense counsel made several objections. Second, the misconduct relates to a critical part of the case because the main issue in the case was the identity of the shooter. Third, the prosecutor's comments misstated the evidence because he used them for the improper purpose of arguing the identity of the shooter was known moments after the shooting.

Although the prosecutor committed misconduct by repeating the challenged statements, habeas relief is not available unless the misconduct had a substantial and injurious effect or influence in determining the jury's verdict. *See Brecht*, 507 U.S. at 637-38. For this analysis, the Court must determine the strength of the prosecutor's case against McKnight. As stated previously, the main evidence against McKnight was the testimony of the three eyewitnesses who identified McKnight as the shooter, but who gave inconsistent statements to the police and inconsistent testimony at the preliminary hearing. However, even with the inconsistencies, the fact that each of the eye-witnesses knew McKnight from previous encounters with him made their testimony compelling. The testimony of Willingham was particularly powerful because she did not know McKnight personally and, therefore, had no motive to implicate him. The additional evidence that the Freeway Boys, who McKnight was associated with, thought Wortham was involved in the killing of one of their members provided a likely motive for the shooting. And, the jury could reasonably have inferred consciousness of guilt from the evidence that McKnight left the area after the shooting. Therefore, the inculpatory evidence against McKnight was strong. Also, the fact that the trial court gave curative instructions presumably means the jury disregarded the improper statements. *See Greer*, 483 U.S. at 766 n.8 (jury is

presumed to follow court's instructions) and *Darden*, 477 U.S. at 182 (jury is presumed to follow instructions given to it).

Therefore, even if the challenged statements constituted prosecutorial misconduct, they did not have a substantial or injurious effect or influence on the jury's verdict.

III. Exclusion of One of Hoskins's Convictions

McKnight argues he was deprived of a fair trial by the exclusion of one of Hoskins's prior convictions for the sale of base cocaine because its exclusion limited defense counsel's ability to impeach an eye witness.

The trial court allowed the defense to impeach Hoskins with his convictions of a residential burglary in 2004 and possession of an assault rifle in 2006 and that he gave false information about his identity to a police officer in 1997. *McKnight*, 2016 WL 6124497, at *9. However, the court ruled that a 1995 conviction for sale of a controlled substance was too remote in time to be relevant. *Id.*

The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose "reasonable limits on cross-examinations based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). The Supreme "Court has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes." *Nevada v. Jackson*, 569 U.S. 505, 511 (2013).

To the extent McKnight argues the exclusion of the 1995 prior conviction was a violation of California law, his claim is denied because habeas proceedings only address violations of the Constitution and laws of the United States. To the extent that McKnight argues the exclusion of the prior conviction violates his confrontation rights, it is denied because the Supreme Court has not ruled that the Constitution entitles a defendant to the admission of extrinsic evidence to

impeach a witness. *See Jackson*, 569 U.S. at 511. Therefore, the state court's denial of this claim is not contrary to or an unreasonable application of Supreme Court authority.

IV. Second Degree Murder Jury Instruction

McKnight argues that the trial court's "failure to instruct on second degree murder deprived him of a fair trial and the right to jury determination of his guilt or innocence." Petition at 30. In particular, he argues that the court modified the CALCRIM instructions in such a way that it removed second degree murder as the default form of an unlawful killing committed with malice aforethought. McKnight argues the following revised jury instruction is the proper instruction: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree. . . .The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree." *McKnight*, 2016 WL 6124497 at *10.

A. Instructions Given to the Jury

The jury was instructed as follows on the murder charge:

> The Defendant is charged in count one with murder, in violation of Penal Code § 187. To prove the defendant is guilty of this crime, the People must prove, one, the defendant committed an act that caused the death of another person;
>
> And, two, when the defendant acted, he had a state of mind called malice aforethought.
>
> There are two kinds of malice aforethought: Express malice and implied malice. . . . Proof of either is sufficient to establish a state of mind required for murder.
>
> The Defendant acted with express malice if he unlawfully intended to kill.
>
> The Defendant acted with implied malice if he intentionally committed an act, the natural and probable consequences of the act were dangerous to human life. And at the time he acted he knew his act was dangerous to human life, and he deliberately acted with conscious disregard for human life.

> Malice aforethought does not require hatred or ill will towards the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.
>
> An act causes death if death is a direct, natural and probable consequence of the act, and the death would not have happened without the act.
>
> A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.
>
> In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.
>
> If you decide the defendant committed murder, you must then decide whether it is murder of the first degree or second degree.
>
> Defendant has been prosecuted for first degree murder under two theories: The murder was willful, deliberate and premediated;
>
> And, two, the murder was committed by lying in wait.
>
> Each theory of first degree murder has different requirements, and I will instruct you on both.
>
> You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.
>
> [Instructions on specific elements of premeditation and lying in wait]
>
> The requirements for second degree murder based on express or implied malice are explained in instruction number 520, which is the one right before this.
>
> For second degree murder with malice aforethought,
>
> The People have the burden of proving beyond a reasonable doubt that the killing was the first degree murder rather than a lesser crime.
>
> If the People have not met this burden, you must find the defendant not guilty of first degree murder.

ECF No. 20-8 at 137-40.

B. Federal Authority

To obtain federal habeas relief for errors in the jury charge, a petitioner must show that

the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. at 72; *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). The instruction may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record. *Estelle*, 502 U.S. at 72. In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982). In reviewing an ambiguous instruction, the inquiry is not how reasonable jurors could or would have understood the instruction as a whole; rather, the court must inquire whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle*, 502 U.S. at 72 & n.4; *Boyde v. California*, 494 U.S. 370, 380 (1990).

C. Analysis

Although the revised instructions McKnight submits would have told the jury more clearly how it was to determine whether the murder was in the first or second degree, there was not a reasonable likelihood that the jury applied the given instructions in a way that violated the Constitution. The jury was given all the elements of murder and told, if it found that murder was committed, it must decide whether it was first or second degree. The jury was also told that, if the prosecutor did not prove the elements of first degree murder beyond a reasonable doubt, it could not find McKnight guilty of first degree murder and directed the jury to the instruction for second degree murder based on express or implied malice. Thus, the jury was adequately, though rather inelegantly, told that if it found McKnight committed murder, it must find him guilty of second degree murder if the prosecutor did not prove the elements of first degree beyond a reasonable doubt.

V. Lying-in-Wait Instruction

The jury was instructed on two theories of first degree murder: premeditation and lying-in-wait. McKnight argues the first degree murder conviction must be reversed because there was insufficient evidence to support the lying-in-wait instruction.

The respondent argues that this claim is unexhausted because McKnight did not cite

Federal authority in his petition to the California Supreme Court. The Court does not address the exhaustion issue because the allegations do not rise to the level of a colorable habeas claim. *See Cassettt*, 406 F.3d at 624 (federal court may deny unexhausted claim on the merits when it is perfectly clear petitioner does not raise a colorable federal claim).

Where jurors have been given a factually inadequate theory of guilt, there is no constitutional error because they are well equipped to analyze the evidence; their own intelligence and expertise will prevent them from making that error. *Griffin v. United States*, 502 U.S. 46, 59 (1991); *see also Bolton v. McEwen*, 2011 WL 5599712, *9 (N.D. Cal. Nov. 17, 2011) (citing *Griffin* for proposition that giving an instruction which is not supported by the evidence is not a constitutional violation). Therefore, even if no evidence supported the lying-in-wait instruction, a constitutional violation did not occur.

CONCLUSION

For the foregoing reasons, the petition is denied. A certificate of appealability will issue on the claims of prosecutorial misconduct and the second degree murder instruction. *See* 28 U.S.C. § 2253(c). A certificate of appealability will not issue on the other claims because they are not ones where "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Clerk shall enter judgment in favor of the respondent and close the file.

IT IS SO ORDERED.

Dated: August 1, 2019

VINCE CHHABRIA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TERRENCE A. MCKNIGHT,

Petitioner,

v.

R. JOHNSON, et al.,

Respondents.

Case No. 18-cv-01036-VC (PR)

JUDGMENT

For the reasons set forth in this Court's Order Denying the Petition for a Writ of Habeas Corpus and Granting, In Part, Certificate of Appealability, judgment is entered in favor of the respondent. Each party shall bear its own costs.

IT IS SO ORDERED.

Dated: August 1, 2019

VINCE CHHABRIA
United States District Judge

Appendix C

Court of Appeal, First Appellate District, Division Five - No. A143997

S238530

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

TERRENCE MCKNIGHT, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix D

Filed 10/20/16 P. v. McKnight 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. TERRENCE MCKNIGHT, Defendant and Appellant.	A143997 (San Francisco County Super. Ct. No. SCN215148)

Terrence McKnight appeals his convictions, following a jury trial, for first degree murder and attempted murder. (Pen. Code, §§ 187, 664.) He argues prejudicial error in connection with certain evidentiary rulings, jury instructions, and prosecutorial misconduct. We affirm.

BACKGROUND

Appellant was charged with the murder of Keith Frazier and the attempted murder of Kevin Wortham and Erica Hoskins.[1] The evidence at trial was as follows.

Eyewitness Testimony

Kevin Wortham

On the afternoon of May 17, 2002, Wortham drove his approximately thirteen-year-old brother, Frazier, and his three- or four-year-old sister, Erica, to the Alemany housing project where they lived with their mother. Frazier was sitting in the front

[1] We refer to Erica Hoskins by her first name to avoid confusion with her father, Eric Hoskins. No disrespect is intended.

passenger seat and Erica was sitting behind Frazier. Wortham stopped to talk with Eric Hoskins, Erica's father, then drove a short distance up the street and parked. He started to open his door when a man began firing gunshots into the car. Wortham looked up and saw the shooter running away. The shooter was wearing black clothing and a ski mask covering his face.

Hoskins ran up to the car and Wortham told him he thought the shooter was "Tee Baby." It was undisputed at trial that appellant's nickname was Tee Baby. Wortham met appellant about three or four months before the shooting and they occasionally played basketball or Playstation together. Wortham recognized appellant by his build, gait, and clothing.

Wortham watched as Hoskins chased the shooter uphill. After running some distance, the shooter removed his ski mask. Wortham could see the shooter's face and recognized appellant. Hoskins appeared to be too tired to continue pursuing appellant and he returned to the car; appellant ran away. Frazier had been shot in the head and died; a bullet had grazed Wortham's stomach.[2]

Wortham told a police officer who arrived on the scene that he did not know who the shooter was. He did not identify appellant to the officer because he was "full of anger" and "thought about taking actions into my own hands." During an ambulance ride taking Wortham to the hospital, he spoke to his mother on the phone and told her Tee Baby shot Frazier.[3] When Wortham spoke to police officers at the hospital later that day, he told them Tee Baby was the shooter.[4] Two days later, Wortham identified appellant in a photographic lineup.

---

[2] The defense presented a witness who lived in the Alemany projects at the time of the shooting and testified Frazier came to her house three times that day to see if her son could play. The last time was within five minutes of the shooting.

[3] A police officer accompanying appellant in the ambulance testified she overheard Wortham, while on his cell phone, say "Tee Baby did this."

[4] Audio recordings of this interview, as well as a May 20, 2002 interview with Wortham, were played for the jury.

On cross-examination, Wortham admitted making false or inconsistent statements about the shooting. Wortham testified at the preliminary hearing that he saw a man named Andre Glaser with appellant at the time of the shooting. At trial, Wortham conceded this preliminary hearing testimony was false and based on a rumor that Andre Glaser and appellant wanted to kill him. Wortham did not tell investigators the shooter was wearing a mask until 2011. Wortham testified at the preliminary hearing that the shooter had been wearing gray sweats; at trial he testified the shooter's clothing was all black. In one of his 2002 police interviews, Wortham identified the shooter's location in a place the prosecution's trajectory expert testified was not possible in light of forensic trajectory evidence.

Eric Hoskins

Eric Hoskins is Wortham's godfather and Erica's father. On the day of the shooting, he started detailing cars around 9:00 a.m. He saw appellant driving up and down the street. Hoskins knew appellant: about three months before the shooting he began seeing appellant in the neighborhood, and appellant had come to Hoskins's house to see Wortham. About 15 minutes before the shooting, appellant and two other men—whom Hoskins knew as "Younger Dave" and "Taco"—approached Hoskins. Younger Dave started saying something "crazy" to Hoskins and appellant walked around appearing to come behind Hoskins. Taco broke up the confrontation and the three men drove up the street, parking nearby.

Shortly thereafter, Wortham drove up. After Hoskins and Wortham talked, Wortham drove forward about 30 yards and parked. Hoskins had returned to work when an acquaintance, Kevin Martin, cried out that there was a shooting. Hoskins saw a man firing gunshots at Wortham's car from a few feet away. The man was dressed in all black with a ski mask covering his face. Hoskins ran toward the car; the shooter stopped firing and ran up the street. When Hoskins reached the car, Wortham told him the shooter was Tee Baby.

Hoskins ran after the shooter, up a hill. When the shooter reached the top of the hill, about 50 feet away from Hoskins, he took off his ski mask. Hoskins recognized the

shooter as appellant. Hoskins was too tired to continue his pursuit and returned to Wortham's car. As he came down the hill, Hoskins saw Taco driving by and tried to flag him down in the hopes of chasing appellant by car, but Taco did not stop.

Hoskins did not talk to the police about the shooting until November 2002, when police contacted him after learning he was in a vacant home.[5] He testified he did not talk to the police earlier because he "wanted to take the law into my own hands." On cross-examination, Hoskins admitted prior false or inconsistent statements about the shooting. In November 2002, he told the police appellant got into a car after running up the hill, but at trial he said the basis of the statement was "street[] talk." He gave the police a conflicting account of his encounter with appellant, Younger Dave, and Taco prior to the shooting. He told police that he saw Taco's car driving up the hill before the shooting, but at trial testified he did not. He never told anyone prior to 2011 that he had been talking to Martin at the time of the shooting.

Hoskins admitted prior felony convictions for residential burglary in 2004 and possession of an assault rifle in 2006, and admitted lying to the police about his identity in 1997.

Krystal Willingham

Willingham was a reluctant witness who testified at trial she had no memory of the shooting. In an interview with police on May 30, 2002, Willingham said she saw the shooting and identified appellant as the shooter in a photographic lineup.[6] She told the police that, while she did not know appellant's name, she had seen him before at her neighbor's house. Willingham's preliminary hearing testimony was inconsistent with certain aspects of Wortham's and Hoskins's testimony: she testified at the preliminary hearing that the shooter was not wearing a mask, Frazier was outside the car when he was

[5] An audio recording of Hoskins's November 2002 interview was admitted into evidence.

[6] An audio recording of Willingham's police interview was played for the jury.

shot,[7] appellant left in a car right after the shooting, and she did not see anyone chasing appellant's car as it drove away.

Initial Police Investigation

Police officer Daniel Gibbs was the first officer on the scene. Gibbs asked Wortham who shot them and Wortham responded that he did not know. Gibbs and other police officers testified that a police radio report issued within minutes of the officers' arrival on the scene identified the suspect as going by the name "Tee Baby." The trial court admonished the jurors that the description of the suspect was offered only to show the officers' state of mind.[8]

Defense counsel elicited testimony that other police radio reports stated the shooter wore his hair in cornrows and identified the getaway car as a Trans Am with a specific license plate number. Wortham testified he had never seen appellant with cornrows and police officers testified the license plate number was not registered to appellant or a Trans Am, but rather to a rental car.

The Freeway Boys and Jason Glaser

Wortham testified he was part of a group known as the Project Boys who socialized on a basketball court in the Alemany project, while appellant was part of a group known as the Freeway Boys, who "hung out on the freeway." Wortham identified other Freeway Boys as brothers Jason and Andre Glaser, Taco, and Younger Dave. Law enforcement witnesses also testified about the Freeway Boys. Their testimony will be discussed in detail in part II, *post*.

Jason Glaser was killed a few days before the shooting. Wortham testified he had been warned that other Freeway Boys believed he was involved in Jason Glaser's homicide. Hoskins also testified there were rumors that Wortham was responsible for Jason Glaser's death and Wortham's family was worried about his safety.

Appellant's Absence After the Shooting

---

[7] The parties stipulated that Frazier was inside the car when shot.

[8] Additional background on this issue is discussed in part I, *post*.

Lateika Irving was romantically involved with appellant in May 2002. Irving saw appellant within a week prior to the shooting but did not see him again afterwards. Prior to his disappearance, appellant never gave Irving any indication that he planned to leave the area.

Batanya Gonzales met appellant in September or October of 2001 and subsequently became pregnant with his child. When Gonzales told appellant about the pregnancy, he was excited. Gonzales saw appellant about four days before the shooting. Appellant was not present when their child was born on June 24, 2002.

Appellant failed to appear at a court hearing for a drug diversion case on May 30, 2002. Appellant was in custody in Texas in June 2003.

Verdict and Sentence

The jury convicted appellant of first degree murder of Frazier (§ 187) and attempted murder of Wortham (§§ 187, 664), and found true allegations as to both counts that he personally used a firearm (§ 12022.53, subds. (c) & (d)). The jury acquitted appellant of the attempted murder of Erica Hoskins.[9] The trial court sentenced appellant to state prison for an aggregate term of 70 years to life.

DISCUSSION

I. *Admission of Evidence Identifying Appellant as a Suspect at the Crime Scene*

Appellant challenges the admission of evidence that unidentified bystanders told police officers at the crime scene that appellant was the shooter.

A. Background

Prior to trial, appellant moved in limine to exclude testimony about the identity of the shooter where the testimony is based on inadmissible hearsay. At issue was identifying information about the shooter provided to police officers at the crime scene. The prosecutor argued the testimony was admissible to show the effect on the officers' state of mind, and the trial court held it admissible for that limited purpose.

[9] The prosecutor argued for conviction on this charge under the kill zone theory.

In his opening statement, the prosecutor told the jurors "you will have evidence that law enforcement is actively looking for Tee Baby, black male, dark complected. That they are actively looking for him within the first eight minutes of this case." Defense counsel objected and the court admonished the jury: "Nothing counsel say is evidence." The prosecutor then clarified, "the reason that you will hear the information [about the suspect descriptions] is because it shows what the officers did."

Four police officers who responded to the shooting testified at trial. When the officers arrived at the scene, a crowd of onlookers had gathered and the officers asked for help identifying the shooter. Within minutes of the officers' arrival on the scene, multiple police radio broadcasts issued information about the shooter. One of these radio broadcasts identified the shooter as follows: "Black male, 5'11", all black clothing, goes by Tee Baby." None of the officers could remember talking to a specific person who provided the identifying information, but they testified the information must have come from one or more persons at the scene. The trial court admonished the jurors that the descriptions of the suspect "are being offered only for state of mind of the officers and what happened next, . . . not for the truth of what's in those statements." The prosecutor reiterated this limited purpose, telling the jury the evidence "is only offered for the purpose of explaining the officer's subsequent conduct" and "is not being offered for the truth; it's merely being offered for the effect of the person who heard that information."

At the close of evidence the jury was instructed: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

During closing arguments, defense counsel emphasized the limited purpose of the crime scene identification: "whenever they tried to bring in a suspect description from the rumors that don't have a source, I would object saying hearsay, and the judge would say, yes, and it's only to be -- to show what the person did, not the truth of what's stated therein. [¶] And it's important in our case because, what it tells you is the only suspect descriptions that may be legally used as proof of the shooter's identity come from the testimony of Kevin Wortham, Eric Hoskins or Krystal Willingham. That is it. Those are

the only places you can look to. [¶] And if somebody during deliberations . . . tries to base the shooter's identification from a source outside that testimony of Kevin, Eric or Krystal, you should immediately send a note out to the judge, informing her of that illegal use of evidence and ask for guidance [on] what to do next, because it's going outside what we believe is the law and the parameters of your deliberations."

In rebuttal, the prosecutor stated one of the suspect descriptions identified the shooter as Tee Baby and defense counsel objected that "[t]here's no evidence for the identity." The trial court admonished the jury, "statements of counsel are not evidence," and the prosecutor continued, "what I am telling you is that this is the person that they're looking for." The prosecutor returned to the identification of the suspect as Tee Baby and defense counsel objected again: "There's no evidence. This is only admitted to show the effect on the listener, not as proof of the identity." The trial court again admonished the jury that "statements of counsel are not evidence" and the prosecutor stated: "What it shows is who they're looking for. That's what it shows. It doesn't show that he was the person who did it; what it shows is who they're looking for. [¶] That's why it's important in terms of their state of mind." Defense counsel objected a third time when the prosecutor returned to the specific suspect description. The trial court admonished the jury: "Ladies and gentlemen, again, this -- a lot of this information, it is up to you -- was offered only for -- to show what the subsequent acts and what the police officers were looking [sic], the intent of the police officers; not for the truth of the matter stated." The prosecutor reiterated the identifications show the police "are actively searching for that person. [¶] And the reason it's significant is because within five minutes, five minutes of [the police] arriving on the scene, they're looking for a suspect that fits that description. [¶] And, in fact, the only thing that caused the case not to be made any sooner than that is the defendant's own conduct of leaving the state. But this case was made within that five-minute period of time.[10] And then we have the identifications. And that's what I'm

[10] The prosecutor repeated this sentiment at other times during his rebuttal: "This case was cracked within five minutes of [the police] arriving on that scene"; "within the first

asking you to base your verdict on, is the identifications that were made by the three witnesses, by Mr. Hoskins, by Mr. Wortham, as well as Ms. Willingham."

B. Admissibility Under State Law

Appellant argues the statements apparently made by bystanders to the police at the crime scene identifying appellant as a suspect were inadmissible because the nonhearsay purpose for which they were admitted was irrelevant. We agree.

" '[A] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.' [Citation.] Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' [Citation.] We review a trial court's relevance determination under the deferential abuse of discretion standard." (*People v. Jablonski* (2006) 37 Cal.4th 774, 820–821.)

The nonhearsay purpose the hearsay statements were admitted for was identified by the trial court and the parties as the effect on the officers' states of mind and subsequent actions.[11] This issue had no relevance to the case: all the officers did as a result of the suspect description was look for the suspect in vain. (See *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110 [nonhearsay purpose of declarant's statement to police irrelevant where "the jury was not asked to determine whether the police had probable cause to arrest [the defendant]" and the statement "had no tendency in reason to prove any disputed issues of fact"]; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 ["[the police officer's] *reaction* or state of mind after the telephone conversation and any actions he took based thereon shed no light on any issues presented in the case"].) Later that day, Wortham told police appellant was the shooter; the crime scene identifications

---

five minutes everyone knew that [appellant] was the person who was responsible for this murder."

[11] Although the parties' briefs do not address this issue, it appears appellant did not object on relevance grounds below. We need not decide whether he has forfeited this challenge because, as discussed below, we conclude any error was harmless.

were unnecessary to explain any relevant police actions taken after that. The cases cited by the People, in which a police officer's state of mind or actions were relevant, are inapposite. (See *People v. Ervine* (2009) 47 Cal.4th 745, 774–775 (*Ervine*) [nonhearsay purpose of statement to police relevant to special circumstance allegation that officers were engaged in the lawful performance of their duties]; *People v. Mayfield* (1997) 14 Cal.4th 668, 750–751 [nonhearsay purpose of statement to police relevant to issue of whether officer used excessive force], abrogated on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

The People argue "evidence that appellant was an immediate focus of the police investigation was admissible to prove that appellant's sudden flight from the Bay Area reflected his consciousness of guilt." The People reason that, without testimony about the suspect identification, "[t]he jurors might have speculated that there was no evidence that appellant had been aware that the police were looking for him"; but with the testimony, the jurors could infer that (1) the suspect description was broadcast, via the police radios, to the assembled onlookers; (2) news that appellant was a suspect spread through the community; and (3) this news would have spread to appellant. We need not decide whether this attenuated theory is sufficient because we have found no point in the record where the jury was told this was a purpose for which they could consider the evidence.

C. Confrontation Clause

Appellant also argues admission of the statements violated his confrontation clause rights. As an initial matter, "[t]he confrontation clause '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 (*Sanchez*).) The challenged statements were not offered for the truth. Even assuming, as appellant contends, the

evidence was nonetheless used for the truth, we conclude the statements were nontestimonial and therefore find no confrontation clause violation.[12]

"In *Crawford v. Washington* (2004) 541 U.S. 36, (*Crawford*), the United States Supreme Court held, with exceptions not relevant here, that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses." (*Sanchez, supra,* 63 Cal.4th at p. 670.) "As the *Crawford* doctrine evolved, the court concluded that not all statements made in response to police questioning would constitute testimonial hearsay. . . . [T]he high court articulated a test based on the 'primary purpose' for which the statements are made. 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' " (*Sanchez,* at pp. 687–688.)

In *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*), the primary purpose test was applied to statements made to police officers responding to a shooting. In that case, as our Supreme Court recounted, "in response to a dispatch, officers came upon a badly injured shooting victim lying in a parking lot. The victim answered questions about the circumstances, location, and perpetrator of the shooting. The victim died and Bryant was charged with his murder. The parking lot statements were admitted and the high court ruled they were not testimonial." (*Sanchez, supra,* 63 Cal.4th at p. 688.) The *Bryant* court first found "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." (*Bryant, supra,* at p. 374.) The *Bryant* court then turned to "the ultimate

[12] The People contend appellant forfeited this challenge. We need not decide the forfeiture issue because we reject the challenge on the merits.

inquiry[,] . . . whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.' " (*Bryant, supra,* at p. 374.)

Our Supreme Court summarized Bryant's analysis: "*Bryant* refined the 'primary purpose' standard by emphasizing the test is objective and takes into account the perspective of both questioner and interviewee: '[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.' [Citation.] In concluding the shooting victim's statements to police were nontestimonial, *Bryant* observed that the officers' questioning of the victim was objectively aimed at meeting an ongoing emergency. [Citation.] The victim's responses indicated the shooter's whereabouts were unknown and there was 'no reason to think that the shooter would not shoot again if he arrived on the scene.' [Citation.] Finally, the court observed that the circumstances in which the statements were made were far from formal. The scene was chaotic; the victim was in distress; no signed statement was produced." (*Sanchez, supra,* at pp. 688–689.)

There can be little dispute that there was an ongoing emergency at the time the statements challenged here were made. As in *Bryant,* a fatal shooting had just taken place and the location of the armed shooter was unknown. Also like *Bryant,* the circumstances indicate the primary purpose of the statement was to respond to the emergency. There was a chaotic scene, a dead child in the street, and the statements were not memorialized in writing. Gibbs testified the dispatches containing the identification information were made for purposes of officer safety; it is reasonable to conclude the underlying inquiries were as well.

We reject appellant's arguments to the contrary. Appellant contends *Bryant* is distinguishable because the declarant in that case was a "credible source[]" for identifying the perpetrator. We see no relevance to the critical issue of determining the primary purpose for which the statement was made. Appellant notes officer safety was no longer an issue at the time of trial, but fails to explain how this impacts the primary

purpose at the time the statements were made. Appellant contends there can be no analysis of the circumstances in which the statement was made if the declarant is unknown. While we are unable to consider the declarant's specific statements and actions, we are persuaded that the record provides us with sufficient information to determine that the primary purpose of the statement was not testimonial.

D. Prejudice

Because there was no confrontation clause violation, we review the error for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162–1163 [error in admitting out of court statement for irrelevant nonhearsay purpose reviewed for prejudice under *Watson* standard].) We conclude it is not reasonably likely the result would have been more favorable absent the error.

To be sure, appellant correctly contends that the prosecution's three eyewitnesses—Wortham, Hoskins, and Willingham—all had substantial weaknesses. Wortham and Hoskins both made inconsistent prior statements, and significant aspects of Willingham's testimony differed from that of Wortham and Hoskins. We do not minimize the potential significance, in such a case, of the admission of an out-of-court statement corroborating the identification made by such witnesses. However, in this case, we are persuaded the error was not prejudicial.

First, the jury was repeatedly admonished by the trial court about the limited nature of the evidence: during the trial testimony, the prosecutor's closing argument, and the jury charge. It is well established that "we presume the jury faithfully followed the court's limiting instruction." (*Ervine, supra,* 47 Cal.4th at p. 776.) As appellant notes, at times during the trial testimony the limited purpose was expressed by counsel rather than the court. However, we see no basis to conclude that counsel's statement of the limitation impeded the jury's understanding of the evidence's limited purpose or undermined the trial court's instructions. During closing arguments, both defense counsel and the prosecutor specifically underscored the limitation. Defense counsel told the jury, "the only suspect descriptions that may be legally used as proof of the shooter's

identity come from the testimony of Kevin Wortham, Eric Hoskins or Krystal Willingham." The prosecutor similarly said, "what I'm asking you to base your verdict on, is the identifications that were made by the three witnesses, by Mr. Hoskins, by Mr. Wortham, as well as Ms. Willingham."

Appellant points to the statements in the prosecutor's rebuttal argument that "[t]his case was cracked within five minutes of [the police] arriving on that scene," and "within the first five minutes everyone knew that [appellant] was the person who was responsible for this murder." We agree the statements appear to rest on the truth of the out-of-court identification and were not appropriate argument. However, considering the record as a whole, the statements do not negate the repeated admonishments to the jury regarding the limited purpose of the evidence. We note nothing in the eight jury notes sent during deliberations suggests the jury ignored the admonition or focused on the crime scene identification evidence.

Second, the evidence implicating appellant was not insubstantial. All three of the testifying eyewitnesses knew appellant before the shooting and all unequivocally identified him as the shooter, even if other elements of their stories varied over time and among themselves. Notably, Willingham had no apparent motive to lie about being present at the shooting or about the identity of the shooter. There was evidence of appellant's flight immediately after the shooting indicating consciousness of guilt; this evidence was not rebutted and the defense suggested no alternative reason for his departure. There was evidence of a motive for appellant to commit the shooting.

Accordingly, it is not reasonably probable that, absent the error in admitting the out-of-court statements identifying appellant as a suspect at the crime scene, a more favorable verdict would have issued.

II. *Admission of Freeway Boys Evidence*

Appellant argues evidence about the Freeway Boys should have been excluded under Evidence Code section 352. We find no prejudicial error.

A. Background

As discussed above, Wortham testified appellant, Andre Glaser, and Taco, among others, were members of the Freeway Boys. Officer Gibbs testified the Freeway Boys was a "not a gang affiliation but more of a clique." Another law enforcement witness testified there were no validated street gangs in the Alemany projects in 2002.

Officer Gibbs testified to seeing graffiti on the 500 block of Alemany saying, "Freeway Boys" and "RIP WB," which Gibbs explained was a reference to Jason Glaser, who had been known as "White Boy." Gibbs also saw a man on the 500 block of Alemany wearing a t-shirt saying, "Freeway Boys." Gibbs further testified that on March 20, 2002, on the 500 block of Alemany, he came into contact with appellant and Andre Glaser. At that time, Gibbs arrested appellant for a felony drug offense.[13] The case was later dismissed by the district attorney.

In June 2003, appellant mailed a letter from Texas to Justin Wilson, identified by a law enforcement witness as a Freeway Boys member. The letter was written in conversational street slang and Sergeant Kevin Knoble provided a "translation."[14] In the letter, appellant did not use the term "Freeway Boys," but asked Wilson to say "hi" to Taco and to tell Andre Glaser to contact appellant privately.[15]

B. Analysis

Appellant argues admission of evidence about the Freeway Boys was error under Evidence Code section 352 because it was minimally probative, as evidence appellant

---

[13] The trial court ruled the evidence of appellant's arrest for a felony drug offense was admissible because the arrest resulted in the June 2002 court date, which appellant missed, evidencing his flight from the area. More specific testimony about appellant's illegal activity in connection with this arrest was elicited on cross-examination and, after the court ruled appellant opened the door, on redirect.

[14] The trial court designated Knoble as an expert in "the use and meaning of words, phrases and content of letters written in street terminology in . . . the Alemany projects."

[15] The letter also included the line, "keep smashin and his foot on those Bustaz necc ya dig," which Knoble interpreted to mean, "keep your foot on our enemies' neck, . . . break the necks of those that aren't our friends."

was a friend or associate of Jason Glaser was sufficient to show motive, and highly prejudicial, being "introduced as gang evidence in all but name."

"The trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence. [Citation.] 'The exercise of discretion is not grounds for reversal unless " 'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

We do not understand appellant to be challenging the evidence that he was a member of a group known as the Freeway Boys—setting aside for the moment the additional evidence introduced about the Freeway Boys—as Wortham testified and as suggested by the references to Taco and Andre Glaser in appellant's letter to Wilson. To the extent he is, we reject the challenge. As appellant argues, his association with the Freeway Boys may not have been substantially more probative of motive than evidence demonstrating his friendship with Jason Glaser. However, neither was this evidence alone particularly prejudicial.

The additional evidence about the Freeway Boys—the graffiti and appellant's drug arrest in the presence of another Freeway Boys member and in a location associated with the Freeway Boys—presents a closer question. As appellant contends, this evidence arguably suggests the Freeway Boys was a criminal gang and the additional probative value was not substantial.[16] We need not decide whether admission of this evidence was error because any error was harmless.

The danger of prejudice from gang evidence is the "risk the jury will impermissibly infer a defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Montes* (2014) 58 Cal.4th 809, 859.) As an initial matter, it is unlikely the jury in fact considered the Freeway Boys a gang. As noted above, Officer

[16] The defense did not dispute the existence of the Freeway Boys at trial; defense counsel offered to stipulate to the group's existence to avoid admission of some of this evidence.

Gibbs testified the Freeway Boys was not a gang and another prosecution law enforcement witness testified there were no validated street gangs in the Alemany projects at the time of the shooting. Moreover, the trial court specifically admonished the jury, "in this case there [are] no allegations that there's been any street gang activity, nor, again, that [the prosecutor] has indicated, that the Freeway Boys or the Project Boys were street gangs."

To the extent that, despite this testimony and admonition, the jury considered the Freeway Boys a gang, *People v. McKinnon* (2011) 52 Cal.4th 610 is instructive. The court found the admission of gang evidence proper, noting factors that reduced the risk of prejudice: "the gang evidence was a relatively minor component of the prosecution's case, and was not unduly inflammatory. It did not emphasize the general violent nature of gang activity or suggest that defendant's gang membership predisposed him to violent crimes, but instead focused narrowly on the prosecution's theory for why defendant might have had a specific reason to kill [the victim]." (*Id.* at p. 656.) As in *McKinnon*, there was no evidence the Freeway Boys engaged in violence[17] and the prosecution used the Freeway Boys evidence solely to explain appellant's motive for shooting Wortham. Any error was harmless.

III. *Exclusion of One of* Hoskins' *s Convictions*

As noted above, impeachment evidence was produced at trial that Hoskins was convicted of residential burglary in 2004 and possession of an assault rifle in 2006, and that he gave false information about his identity to a police officer in 1997. The trial court ruled appellant could not introduce evidence of a 1995 conviction for sale of a controlled substance, finding it too remote. Appellant argues the exclusion of the 1995 conviction was error. We disagree.

---

[17] Appellant notes the prosecutor's opening statement referenced the Freeway Boys possessed guns. Upon defense counsel's objection, the trial court remarked the prosecutor was only saying "what he thinks his evidence is going to show." No such evidence was produced at trial, and the court admonished the jury multiple times that statements of counsel were not evidence.

" '[T]rial courts retain their discretion under Evidence Code section 352 to bar impeachment with [felony] convictions [involving moral turpitude] when their probative value is substantially outweighed by their prejudicial effect. [Citation.] . . . When the witness subject to impeachment is not the defendant, those factors [considered by the trial court] prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654 (*Clair*).) "A ruling of this sort is reviewed for abuse of discretion." (*Id.* at p. 655.)

Appellant argues the 1995 conviction was non-prejudicial, relevant impeachment evidence. We agree with appellant that the 1995 conviction held little risk of unfairly prejudicing the prosecution's case: the jury already knew of two of Hoskins's felony convictions, and a conviction for drug sales was not likely to be inflammatory. However, the 1995 conviction was 17 years old at the time of trial and arguably of minimal probative value.[18] The trial court's exclusion of the 1995 conviction was not an abuse of discretion. That "another court might have concluded otherwise . . . does not establish that the court here 'exceed[ed] the bounds of reason.' " (*Clair, supra,* 2 Cal.4th at p. 655.)

Appellant also suggests the 1995 conviction was probative of Hoskins's employment status at the time of the shooting. Appellant contends the prosecutor portrayed Hoskins as gainfully employed in contrast to appellant's lack of employment, and appears to argue the 1995 drug sales conviction gives rise to an inference that Hoskins was still engaged in illegal activity in 2002 when the shooting took place. Assuming such an inference is reasonable, and even if appellant could have overcome the limitation on character evidence imposed by Evidence Code section 1101, subdivision (a), appellant has not demonstrated he argued this ground for the admission of the

[18] Although appellant suggests the age of the conviction should be measured from the time of the crime, he cites no authority to this effect. (See *People v. Mickle* (1991) 54 Cal.3d 140, 172 [measuring from time of trial]; *People v. Morris* (1991) 53 Cal.3d 152, 195 [same], disapproved of on another ground by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

conviction below. He cannot raise it now. (*Clair, supra,* 2 Cal.4th at pp. 655–656 [where the defendant sought below to use a witness's conviction generally to challenge his character, but "never sought permission for a specific attack [to show a motive to lie] . . . [h]e may not now raise any complaints in this regard"].)

IV. *Second Degree Murder Instruction*

Appellant challenges the trial court's jury instruction on second degree murder. We reject the challenge.

The jury was instructed on the elements of murder and on express and implied malice. The jury was then instructed: "If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree." Next, the jury was instructed on the theories of first degree murder and directed: "The requirements for second degree murder based on express or implied malice are explained in No. 520 [the previous instruction on the elements of murder]. . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Appellant argues the instructions "did not provide a path to second degree [murder] or provide the jury with a meaningful instruction on degree." Appellant points to revised CALCRIM instructions as providing the missing information.[19] The revised

---

[19] The People note the trial court instructions conformed to a previous version of the CALCRIM instructions (see CALCRIM Nos. 520 & 521 (Oct. 2010 rev.)); appellant notes this version had recently been revised at the time the jury was charged. Neither fact is dispositive: CALCRIM instructions can be incorrect, and the revision of a CALCRIM instruction does not necessarily mean the prior version was defective. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 ["CALJIC No. 14.54 as presently drafted is an incorrect statement of the law"]; *People v. Lucas* (2014) 60 Cal.4th 153, 294 ["The fact that the commission ultimately drafted the newer CALCRIM instructions, which the Judicial Council subsequently adopted [citation], does not establish that the prior CALJIC instructions were constitutionally defective. ' "Nor did their wording become inadequate to inform the jury of the relevant legal principles or too confusing to be understood by jurors." ' "], disapproved of on another ground by *People v. Romero* (2015) 62 Cal.4th 1, 53 fn. 19.)

CALCRIM No. 520 provides: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree . . . ." (CALCRIM No. 520 (Feb. 2013 rev.).) The revised CALCRIM No. 521 provides: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." (CALCRIM No. 521 (Feb. 2013 rev.).)

Our inquiry is "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts. [Citations.] 'In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly.' " (*People v. Kelly* (1992) 1 Cal.4th 495, 525–526.) The jury was instructed on the elements of murder and told if they decided appellant committed murder, they must decide whether the murder was first or second degree. The jury was then instructed on first degree murder, told they must acquit on first degree murder if the People did not prove beyond a reasonable doubt the murder was first degree, and directed to the instruction providing the elements of murder for "[t]he requirements for second degree murder based on express or implied malice . . . ." With these instructions, it is reasonably likely the jury understood that if they found the People proved appellant committed murder but did not prove he committed first degree murder, then they should convict him of second degree murder. We note appellant has pointed to no jury notes suggesting any confusion on this issue and no argument by either counsel creating any possible confusion.[20]

V. *Lying in Wait Instruction*

---

[20] To the contrary, the prosecutor argued to the jury when "the act of the killing as well as the malice" are both proven, "[t]hat would be simply second degree murder. [¶] But there is something that happened in this case that moves it beyond second degree murder."

The jury was instructed on two theories of first degree murder: premeditation and lying in wait. Appellant argues there was insufficient evidence to support a first degree murder conviction based on lying in wait and the jury should not have been instructed on this theory.[21] We need not decide this issue because any error was harmless.

Appellant argues the first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt the asserted error did not contribute to the verdict. Appellant is mistaken. "The nature of th[e] harmless error analysis depends on whether a jury has been presented with a legally invalid or a factually invalid theory. When one of the theories presented to a jury is legally inadequate, such as a theory which ' "fails to come within the statutory definition of the crime" ' [citation], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.' [Citation.] [¶] In contrast, when one of the theories presented to a jury is factually inadequate, such as a theory that, while legally correct, has no application to the facts of the case, we apply a different standard. [Citation.] In that instance, we must assess the entire record, 'including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.' [Citation.] We will affirm 'unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' " (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

The asserted error here is factual, not legal. Accordingly, we affirm unless the record demonstrates a reasonable probability the jury found appellant guilty based on

---

[21] "Lying-in-wait murder consists of three elements: ' " '(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.' " ' " (*People v. Russell* (2010) 50 Cal.4th 1228, 1244, fn. omitted.)

lying in wait. There is no basis in the record for such a conclusion. The prosecutor's closing arguments argued both theories and there were no jury notes about the issue. The other verdicts provide no insight into the basis of the first degree murder conviction. Appellant does not dispute there was substantial evidence to support the conviction based on the premeditation theory. Any error in instructing the jury on lying in wait was harmless. (See *People v. Poindexter* (2006) 144 Cal.App.4th 572, 586–587 [no reasonable probability jury found the defendant guilty solely on lying in wait theory where prosecutor argued both theories, there were no jury notes on the issue, and there was sufficient evidence to support first degree murder conviction based on premeditation and deliberation].)

VI. *Prosecutorial Misconduct*

Appellant argues the prosecutor committed prejudicial misconduct during his opening statement, witness examination, and closing argument. We reject the claim.

" 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, as all of defendant's claims are, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' [Citation.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305 (*Gonzales*).)

A. Opening Statement

Appellant challenges three statements in the prosecutor's opening argument as unsupported by the evidence at trial: that "among the activities that the Freeway Boys engaged in were possession of guns as well as the selling of drugs"; that the police

investigated Wortham as a suspect in the Jason Glaser homicide but he "was neither arrested, nor was he charged"; and that appellant has never seen the child he had with Gonzales.

Appellant failed to object below to the third statement and has therefore forfeited the challenge (*Gonzales, supra,* 52 Cal.4th at p. 305), although we would reject it in any event. " '[R]emarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor "was 'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.' " ' " (*People v. Dykes* (2009) 46 Cal.4th 731, 762.) Appellant has made no such showing with respect to any of the challenged statements. Moreover, any prejudice was addressed by the trial court's instruction—before opening statements, upon defense counsel's objection during the prosecutor's opening statement, and at the close of evidence—that the attorneys' remarks did not constitute evidence. (*People v. Hinton* (2006) 37 Cal.4th 839, 863 ["the trial court's instructions before opening statement and again before closing argument that the attorneys' statements were not evidence would have dispelled any prejudice"].)

B. Witness Questioning

Appellant argues the prosecutor's elicitation of testimony about the crime scene identifications of appellant was misconduct. In part I, *ante*, we concluded the admission of this evidence was error, but harmless. Appellant's characterization of the error as prosecutorial misconduct does not alter our conclusion that he was not prejudiced by the evidence.[22]

Appellant next argues the prosecutor committed misconduct by eliciting testimony that appellant was not employed and not attending school. Appellant contends this

---

[22] Appellant emphasizes the prosecutor's use, during the police officers' testimony, of a "big board" containing a printout of the suspect identification broadcasts. Appellant has not demonstrated this board was published to the jury and the record indicates it was not: the trial court ruled before trial the information should not be published to the jury; during the officers' testimony the trial court commented, in response to defense counsel's query apparently about the board, that "it's not being publish[ed] to the jury"; and the boards were not admitted into evidence.

questioning was inappropriate, relying on *People v. Criscione* (1981) 125 Cal.App.3d 275 (*Criscione*). We assume without deciding appellant did not forfeit this challenge, and find it meritless. In *Criscione,* the defendant pled not guilty by reason of insanity to a murder charge. (*Id.* at p. 280.) During trial, the prosecutor "insinuated by his questions that half of all mental illness is feigned" and asked questions "foreshadow[ing]" his theory, which he argued in closing, "that appellant's violent attitudes and conduct toward the [female] victim, and women in general, were not symptomatic of mental disease, but merely the normal responses of a man raised in a traditional Italian culture." (*Id.* at pp. 286–287, 289.) The Court of Appeal concluded the prosecutor engaged in misconduct, finding the "most invidious" aspect was "the palpably false nature of the information argued, which can only have been intended to divert the jury from a rational consideration of the grave question of appellant's sanity." (*Id.* at p. 290.) Appellant's reliance on *Criscione* is misplaced. The prosecutor's questions about appellant's employment status did not improperly inject the prosecutor's opinion, but elicited witness testimony about a factual matter. There is no basis to conclude the testimony appellant was unemployed was "palpably false." Appellant has identified no portion of the record in which the prosecutor made any improper argument based on appellant's employment status. The prosecutor's conduct in this line of questioning was proper.

C. Closing Statement

Appellant argues the prosecutor improperly relied on the evidence of the crime scene identification of appellant—which was admitted for the limited purpose of the effect on the officers—for the truth of the matter. As noted in part I, *ante,* we agree that some of the prosecutor's comments appear to have improperly relied on the truth of the identification. However, as also discussed in part I, the trial court's admonitions, as well as the prosecutor's own statement that he was relying solely on the identification of the three testifying eyewitnesses, rendered the error harmless.[23]

[23] Appellant argues the trial court's responses to his objections below defeats the presumption that the jury follows instructions. Appellant points to the trial court's admonishment, in response to one objection, that statements of counsel are not evidence.

Appellant also argues no evidence supported the prosecutor's statement that "of all the Freeway Boys that we know of, only one took off and left our fair city of San Francisco." Appellant failed to object to the statement and has forfeited his challenge. (*Gonzales, supra,* 52 Cal.4th at p. 305.)

Finally, appellant argues the prosecutor improperly denigrated defense counsel's function. In the prosecutor's rebuttal argument, he said defense counsel "has done an outstanding job. . . . [¶] In terms of job, though, what you really have to appreciate is what the Defense's job is, okay. [¶] And that is, regardless of whether or not your client did it, you defend him. And you use the D's of Defense: Decontextualize." The prosecutor then argued defense counsel had taken one of Wortham's statements to the police out of context. The prosecutor continued: "Another D is that you delay," noting appellant's flight from the jurisdiction. The prosecutor concluded: "One of the other D's of Defense is you divert attention," arguing defense counsel highlighted an innocuous line in appellant's letter to Justin Wilson and ignored what the prosecutor argued was an incriminating line in the same letter.

As an initial matter, appellant did not object below and forfeited this challenge. We would reject it in any event. " 'A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.' " (*People v. Redd* (2010) 48 Cal.4th 691, 734.) However, " '[t]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account.' " (*Id.* at

---

However, in response to a later objection, the court stated the evidence "was offered only . . . to show what the subsequent acts and what the police officers were looking [for], the intent of the police officers; not for the truth of the matter stated." Moreover, the prosecutor informed the jury he was relying on the identification solely of the three eyewitnesses. *People v. Lloyd* (2015) 236 Cal.App.4th 49, in which "the prosecutor misstated the law with the effect of lightening her burden of proof, defense counsel objected, and the court overruled the objection," is inapposite. (*Id.* at p. 63; see also *ibid.* ["In failing to cure the misstatement of law, the court placed its considerable weight behind the misstatement. In such a situation the court gives the jury two conflicting legal interpretations. Under these circumstances, we may not presume the jury followed the court's instruction when the court also signaled to the jury the prosecutor's misstatements of law were correct."].)

p. 735.) Where the prosecutor's argument "would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel," the claim will be rejected. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*).) Our Supreme Court has rejected prosecutorial misconduct claims targeting statements that the defense counsel's " 'job is to create straw men . . . . [and] put up smoke, red herrings"' (*Cunningham, supra,* at p. 1002); " 'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something' " (*People v. Medina* (1995) 11 Cal.4th 694, 759); and a " 'heavy, heavy smokescreen . . . has been laid down [by the defense] to hide the truth from you' " (*People v. Marquez* (1992) 1 Cal.4th 553, 575). As in these cases, the challenged argument here would not be understood by the jury as a personal attack on defense counsel, but rather an exhortation to focus on the evidence at trial. The comments were well within the "wide latitude" afforded the prosecutor and did not constitute misconduct.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.