NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

ANTJUAN SYDNOR, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
THIRD APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. In a criminal prosecution, if a trial court permits the prosecutor and counsel for a codefendant to present supplemental arguments to the jury during jury deliberations; and if the defendant and his counsel are both absent from the supplemental arguments because they were not given notice; and if the supplemental arguments address the defendant's guilt; has the defendant been denied his Sixth Amendment right to counsel at a critical stage of the proceedings?

QUESTIONS BASED ON THE SCENARIO IN QUESTION 1:

2. If the defendant's Sixth Amendment right to counsel at a critical stage of the proceedings has been violated, is the error structural, requiring reversal per se?

3. Has the defendant been denied his Sixth and Fourteenth Amendment right to be personally present during a critical stage of trial?

4. If the defendant's right to be personally present at a critical stage of the proceedings has been violated, is the error structural, requiring reversal per se?

5. Should this Court adopt the Ninth Circuit Court of Appeals' three-pronged test for determining whether a hearing conducted in a trial court amounts to a critical stage of the proceedings?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. Following is a list of all parties to the proceeding in the court whose judgment is the subject of this petition:

1. Petitioner Antjuan Sydnor
2. Codefendant Anthony Wayne Jacob

RELATED CASE

Antjuan Sydnor v, Matthew Atchley, Warden, on habeas corpus in the Superior Court of California, in and for the County of Sacramento Docket number 21HC00265

This case is currently pending. It involves a Fourth Amendment issue, which is outside the appellate record of the direct appeal.

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ANTJUAN SYDNOR, Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, THIRD APPELLATE DISTRICT

Petitioner Antjuan Sydnor respectfully petitions for a writ of certiorari to the California Court of Appeal, Third Appellate District, to review the judgment and unpublished opinion dated May 27, 2021.

OPINIONS BELOW

The California Court of Appeal, Third Appellate District, is the highest court to review the case on the merits. A copy of the opinion is attached as Appendix A. The opinion was not published.

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JURISDICTIONAL STATEMENT

The California Court of Appeal, Third Appellate District, is the highest state court to decide the case on the merits. It filed its opinion on May 27, 2021. A copy of the opinion appears at Appendix A.

This Court has jurisdiction under 28 U.S.C. § 1257(a). This petition is being filed within 90 days of the California Supreme Court's denial of discretionary review, under rules 13.1 and 29.2 of this Court. The California Supreme Court filed its order denying discretionary review on August 25, 2021. A copy of the order appears at Appendix B.

V. CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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United States Constitution, Amendment XIV:

> No State shall … deprive any person of life, liberty, or property, without due process of law …

STATEMENT OF THE CASE

A. Procedural history

Petitioner Antjuan Sydnor and codefendant Anthony Wayne Jacob were prosecuted jointly in Sacramento County Superior Court case 15F03945.[1] They each were convicted of first degree murder with a felony-murder special circumstance and robbery. The jury found petitioner personally discharged a firearm causing death (Opinion, Appendix A, pp. 1-2.) Petitioner was sentenced to life without parole plus 25 years to life. (*Ibid.*)

Appeals from the convictions were heard under different case numbers. Petitioner's appeal was heard as case C085040, while codefendant Jacob's appeal was heard as case C085760. The cases are consolidated in the Court of Appeal's opinion. (Opinion, Appendix A, p. 1.)

During deliberations, the jury requested additional arguments from counsel to help jurors determine whether codefendant Jacob was

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[1] The caption of the Court of Appeal opinion, Appendix A, p. 1, says Sydnor was prosecuted in case number 15F0394. The Court of Appeal inadvertently omitted the final digit of the case number, which is actually 15F03945.

the second person in the house when the homicide occurred, in order to resolve firearm allegations against Jacob. The court directed the clerk to notify counsel to come to court, and to inform petitioner's counsel that his presence was not necessary if he did not believe it was needed. (Opinion, Appendix A, p. 26.)

The prosecutor and Jacob's counsel presented additional arguments, after which the jury deliberated for about 30 minutes. Although both re-arguments mentioned petitioner, neither petitioner nor his counsel was present. (Opinion, Appendix A, p. 26.)

The supplemental arguments made by the prosecutor and counsel for Jacob included numerous references to petitioner. (Opinion p. 29, fn. 3.) The prosecutor argued the eyewitness to the homicide would not recognize petitioner because he wore a mask, and that the eyewitness was hesitant to identify Jacob because the other perpetrator, petitioner, had not yet been caught. (*Ibid.*) The prosecutor also argued that petitioner was in the van associated with the homicide because he was in the driver's seat on a surveillance video; the prosecutor made three other references to petitioner being in the van. In addition, the prosecutor noted the numerous calls between petitioner, Jacob and Jacob's ex-wife, noted that petitioner did not know anyone in California and

that it would be difficult for Jacob to find someone to accompany petitioner to the murder. The prosecutor also argued a hypothetical — that it would be nonsensical for petitioner to commit the murder with someone he did not know. (*Ibid.*) Jacob's counsel argued the robbery and murder "could as easily have been driven by [petitioner] on his own without Mr. Jacob's participation." (Opinion Appendix A, p. 29, fn. 3.)

The following morning, the trial court announced that petitioner's counsel had not been informed of re-argument because the e-mail intended for him had been sent to the wrong attorney. This error had led the trial court to mistakenly conclude that petitioner's counsel had not appeared for re-argument because he did not wish to appear for it. (Opinion, Appendix A, p. 26.) The court explained to the jury that, due to the court's error, petitioner's counsel was not given notice of the prior day's proceedings, and that petitioner should have been present even though the jury's question related only to Jacob. (*Ibid.*)

Petitioner moved for a mistrial. (*Ibid;* 3 R.T. pp. 1611, 1612, 1623.) The motion was denied, without prejudice to make a similar motion at sentencing, if petitioner was convicted. (Opinion, Appendix A, p. 26; 3 R.T. p. 1624.) In support of the motion for mistrial, petitioner's counsel said:

> [T]here was discussion of my client being the other person, being the driver; discussion of additional theories of guilt; and even new and novel factual scenarios advanced by co-counsel with respect to my client being out here from Philadelphia, acting on his own, doing something he wouldn't ordinarily do at home where there's absolutely no evidence in the record to support that line of argument.

(3 R.T. p. 1612.) In his argument supporting the mistrial motion, petitioner's counsel addressed a hypothetical posed to the jury by the prosecutor during the re-argument, wherein the prosecutor advanced a theory not previously argued to the jury, that petitioner acted alone during the homicide. Petitioner's trial counsel quoted the prosecutor's argument, saying,

> Mr. Sydnor, meet Mr. Joe Blow. You guys don't really know each other. Here's your two guns, the black semiautomatic that Anajee seen, [sic] take those two guns, here's my ex-wife's van, Mr. Sydnor, you drive it, the guy that I'm just introducing you to, you sit somewhere in the back and do something, here's this information I'm going to give you, go to his house.

(3 R.T. p. 1618.) Petitioner's counsel argued this hypothetical involved a direct discussion of petitioner's guilt. (3 R.T. p. 1619.) Counsel argued the problem caused by this argument was compounded by a subsequent argument made by Jacob's attorney, when he said,

> "Mr. Sydnor comes to town from Philadelphia. He's interested maybe in doing something that he wouldn't otherwise do back home. He wants to rip somebody off. He says: Hey, Ja-

> cob, how about that cat I met out here one time? What's his name? Hollywood or something? What's he up to?"

(3 R.T. p. 1619.)

After denying the motion for mistrial, the trial court allowed petitioner's counsel to make a supplemental argument addressing what the prosecutor and Jacob's counsel had argued the previous day. (Opinion, Appendix A, pp. 26-27; 3 R.T. pp. 1628-1630.)

Petitioner subsequently moved for a new trial, arguing his rights to counsel and to be personally present had been violated. (*Id*. p. 27; 3 C.T. p 615; 3 R.T. pp. 1687-1688.) At a hearing on that motion, the court said there was no dispute an error had occurred. (3 R.T. p. 1694.) The question was whether that error was harmless, or whether it required reversal per se. The court said it spent a great deal of time on this issue, and wrote two drafts of its tentative ruling. One draft would have granted a new trial, while the other found the error harmless. The court adopted the latter version and denied petitioner's motion for new trial, finding no structural error. The court noted the question of structural error is "largely a question of law that the Court of Appeal is going to address on its own." (3 R.T. p. 1694.)

The trial court's tentative ruling, which became its final ruling, says, "It is undisputed it was error for the People and Jacob's attorney

to present supplemental argument referring to [petitioner] in his absence. The question is whether it was structural error, requiring reversal per se? Or was the error harmless beyond a reasonable doubt given the compelling evidence against [petitioner]? (Appendix C, p. 009 [3 C.T. p. 736].) After discussing the difference between "trial error" and "structural error," the court concluded the error was subject to harmless error analysis and found it harmless beyond a reasonable doubt. (Appendix C, pp. 005, 009, 010, 014; [3 C.T. pp. 732, 736, 737, 741].)

The trial court's ruling notes that,

> This appears to be a case of first impression. The court has found no analogous case, and counsel cite none. After reviewing the case law generally on structural vs. harmless error, the facts here, and mindful of the reluctance of both the United States and California Supreme Court to create new categories of structural error, the court concludes the supplemental argument should be assessed under the harmless error standard. After reviewing all the evidence presented against [petitioner], the court concludes presentation of supplemental argument in his absence was harmless beyond a reasonable doubt.

(Appendix C p. 010 [3 C.T. p. 737].)

On direct appeal, petitioner argued in the Court of Appeal that the issue to be reviewed was whether the error was structural, requiring reversal per se, or whether it was subject to harmless error analysis

under *Chapman v. California,* 386 U.S. 18, 21 (1967). (Appellant's opening brief, p. 44.)

The Court of Appeal ruled that petitioner was neither deprived of the right to counsel nor the right to be personally present at a critical stage of the criminal proceedings. (Opinion, Appendix A, pp. 28-30.) The Court of Appeal explained its ruling, saying:

> Due to the trial court's inadvertent error, [petitioner] and his counsel were not present at stages critical to Jacob but not to him. Whether the jury could reach a verdict on Jacob's firearm enhancement allegations was obviously a critical stage to Jacob, but [petitioner's] substantial rights were not at stake and neither his nor his counsel's presence was necessary to ensure those proceedings or his trial's fairness. [Petitioner's] counsel essentially admitted this at the initial discussion of the jury's question, when counsel questioned whether he even had standing to question the court's response to the jury's inquiry. In addition, [petitioner's] counsel did not object to the court's reply to the jury question in which it gave the jury the option to ask for additional argument. Also, the court later ruled that any objection of [petitioner's] counsel to allowing additional argument would have been fruitless. Taken together, these facts show neither the presence of [petitioner] nor his counsel was necessary at these proceedings on a matter tangential to him.
>
> The only part of the actual re-argument relevant to [petitioner's] case was that he was mentioned by both Jacob's counsel and the prosecutor in their re-arguments. [Footnote omitted.] The trial court afforded [petitioner] an opportunity to respond once the error was discovered, explaining to the jury why [petitioner's] counsel did not participate in the re-argument and allowing [petitioner's] counsel to present additional argument. Although [petitioner] was mentioned by Jacob's counsel and the prosecutor in their re-arguments, the court instructed

> the jury it was to consider the re-argument only to the firearm enhancement allegations for Jacob, and that the arguments of counsel did not trump the facts adduced at trial. In the absence of evidence to the contrary, we presume the jury followed the instructions. (*People v. Letner and Tobin,* 50 Cal.4th 99, 152 (2010).)
>
> [Petitioner's] counsel may not have been present when Jacob's counsel and the prosecutor re-argued Jacob's gun enhancement allegations, but he was not deprived of counsel or the right to be present at a stage of the proceedings critical to him. The combination of allowing [petitioner's] counsel to present additional argument and the court's instructions limiting the additional argument to Jacob's firearm enhancements neutralized any possibility that [petitioner] had any interest that could be adversely affected by his and counsel's absence from the re-argument. While, as the trial court admitted, it is better practice to allow counsel and codefendant to be present at such a proceeding, this was not the deprivation of the right to counsel or personal presence at a critical stage of the proceedings. Accordingly, there is neither prejudice nor structural error.

(Opinion, Appendix A, pp. 28-30.)

B. The underlying facts

On September 23, 2014, two men entered the home of Regina C. and Byron D. and demanded money. They eventually shot Byron in the head, killing him. (Appendix A, pp. 4-5.) Video surveillance from a nearby gas station depicted a van, which was consistent with a vehicle described by an eyewitness. A partial license plate number from the van led detectives to the wife of codefendant Anthony Jacob. (*Id.* p. 5.) Police used cell phone data to connect petitioner to the

murder. DNA on tape used to bind Byron's wrists was consistent with petitioner's DNA. (Appendix A, pp. 6-7.)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DECIDE IF A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDING ARE VIOLATED WHEN A TRIAL COURT PERMITS BOTH THE PROSECUTOR AND COUNSEL FOR A CODEFENDANT TO MAKE SUPPLEMENTAL ARGUMENTS TO THE JURY DURING DELIBERATIONS, WHILE BOTH THE DEFENDANT AND HIS TRIAL COUNSEL ARE ABSENT HAVING NOT RECEIVED NOTICE, AND THE ARGUMENTS MADE TO THE JURY ADDRESS THEORIES OF THE DEFENDANT'S GUILT.

A. Introduction.

Petitioner explains in the preceding section that the trial court permitted the prosecutor and counsel for the codefendant to present supplemental arguments to the jury during deliberations, in the absence of petitioner and his counsel, and without giving them notice that supplemental arguments would be made. The supplemental arguments included many references to petitioner. Those references went far beyond mention of petitioner's name, and included theories upon which the jury could find petitioner guilty. (Opinion, Appendix A, p. 29, fn. 3.)

After reading a transcript of re-argument, petitioner's trial counsel argued those references improperly addressed petitioner's guilt. (3 R.T. pp. 1596-1597.) Petitioner's counsel moved for a mistrial, saying:

> One, there was discussion of my client being the other person, being the driver; discussion of additional theories of guilt; and even new and novel factual scenarios advanced by co-counsel with respect to my client being out here from Philadelphia, acting on his own, doing something he wouldn't ordinarily do at home where there's absolutely no evidence in the record to support that line of argument.

(3 R.T. p. 1611.) Thus, re-arguments made by both the prosecutor and counsel for Jacob included direct discussion of petitioner's guilt, at a time when neither he nor his counsel was in the courtroom because they had not been given notice. For that reason, the supplemental arguments necessarily involved petitioner's substantial rights, making the re-argument a critical stage of the proceedings as to him.

B. <u>This is an issue of first impression; a grant of certiorari is needed to resolve whether events like those that occurred at petitioner's trial amount to denials of the rights to counsel and to be personally present at a critical stage of the proceedings</u>.

When the trial court ruled on petitioner's motion for new trial, it described his argument concerning denial of the right to counsel as, "a case of first impression. The court has found no analogous case, and counsel cite none." (Appendix C, p. 010 [3 C.T. p. 737].) That assessment appears to remain accurate.

The Court of Appeal opinion notes that a criminal defendant has the right under the federal Constitution to be personally present and to

be represented by counsel at all critical stages of the trial. (Appendix A, p. 28.) As to the right to counsel, the opinion correctly says a critical stage is one "in which the substantial rights of a defendant are at stake," and "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial," citing *People v. Bryant, Smith and Wheeler,* 60 Cal.4th 335, 465 (2014).[2] (Appendix A, p. 28.) This definition, while accurate, does not help a court analyze a claim that a denial of the right to counsel occurred during a critical stage of the proceedings, which requires reversal without engaging in harmless error analysis. (*United States v. Cronic,* 466 U.S. 648, 659, fn. 25 (1984) (*Cronic*).)

Case law relied upon by the Court of Appeal did not discuss factors that would help a court decide whether the re-argument was a critical stage of the proceedings as to petitioner. When the court explained why it believed the re-argument was a not a critical stage as to petitioner, most of the explanation dealt with matters that occurred before and after the re-argument. The court said:

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[2] This definition is from *Mempa v. Rhay,* 389 U.S. 128, 134 (1967).

> Whether the jury could reach a verdict on Jacob's firearm enhancement allegations was obviously a critical stage to Jacob, but [petitioner's] substantial rights were not at stake and neither his nor his counsel's presence was necessary to ensure those proceedings or his trial's fairness. [Petitioner's] counsel essentially admitted this at the initial discussion of the jury's question, when counsel questioned whether he even had standing to question the court's response to the jury's inquiry. In addition, [petitioner's] counsel did not object to the court's reply to the jury question in which it gave the jury the option to ask for additional argument. Also, the court later ruled that any objection of [petitioner's] counsel to allowing additional argument would have been fruitless. Taken together, these facts show neither the presence of [petitioner] nor his counsel was necessary at these proceedings on a matter tangential to him.

(Opinion, Appendix A pp. 28-29.)

In order to determine whether the re-argument amounted to a critical stage of the proceedings as to petitioner, the Court of Appeal should have focused its attention on what actually happened during the re-argument. That is because a critical stage is one "in which the substantial rights of a defendant are at stake," and "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial." (Appendix A, p. 28.) Thus, to determine whether the re-argument was a critical stage as to petitioner, the Court of Appeal should have looked at what happened <u>during</u> re-argument to evaluate whether those events impacted petitioner's substantial rights, and whether his counsel should have been present to protect his right to a fair trial.

That is not what the court did, however. The Court of Appeal's explanation, quoted above, shows the court concentrated on matters that occurred before and after the re-argument. Those matters included trial counsel's doubts about his "standing" to give additional argument, counsel's failure to object to re-argument before it occurred, and the trial court's expressed belief that it would have denied any objection to re-argument proffered by trial counsel. (Opinion, Appendix A pp. 28-29.) None of those reasons addressed whether the re-argument that actually occurred affected petitioner's substantial rights, or whether trial counsel's presence during the re-argument would have protected his right to a fair trial.

It is true that the initial purpose of the re-argument did not involve petitioner, but rather codefendant Jacob. The problem is that, during re-argument, the prosecutor and counsel for Jacob made arguments that went beyond the narrow purpose of re-arguing. The arguments dealt not only with Jacob, but also addressed petitioner's culpability. In analyzing this issue, the Court of Appeal should have focused on the arguments that were actually made, not the narrower arguments that were initially contemplated. Had the Court of Appeal properly evaluated the situation, it would have recognized that arguments

made by the prosecutor and counsel for Jacob, which addressed petitioner's guilt and included a new theory of guilt, necessarily implicated petitioner's substantial rights.

The ruling by the Court of Appeal illustrates the need for a grant of certiorari. California case law relied upon by the trial court failed to help the court evaluate whether the re-argument was a critical stage of the proceedings as to Sydnor. An opinion by this Court explaining factors that should be considered in ruling on this issue will help future courts facing similar issues to make correct rulings.

C. **This court should grant certiorari to consider whether it should adopt the Ninth Circuit Court of Appeal's test for determining if a hearing amounts to a critical stage of the proceedings.**

The ruling made by the California Court of Appeal in this case demonstrates the need for a test that will help trial courts evaluate whether a denial of counsel occurred at a critical stage of the proceedings. In *United States v. Benford,* 574 F.3d 1228 (9th Cir. 2009) (*Benford*), the Ninth Circuit Court of Appeals said that this Court has not provided a definitive list of "critical stages," as that term is used in *Cronic, supra*, 466 U.S. 648. (*Benford, supra,* 574 Fed.3d p. 1232.) That statement appears to remain true. In *Benford*, the Ninth Circuit used a three-factor test devised by that court to analyze whether counsel's

absence from a pretrial status conference amounted to denial of counsel at a critical stage. (*Id*. p. 1232.) *Benford* says:

> We consider whether: (1) failure to pursue strategies or remedies results in a loss of significant rights, (2) skilled counsel would be useful in helping the accused understand the legal confrontation, and (3) the proceeding tests the merits of the accused's case. The presence of any one of these factors may be sufficient to render a stage of the proceedings "critical."

(*Id*. p. 1232.)

In a petition for rehearing in the Court of Appeal, petitioner asked the court to consider using this test. (Petition for rehearing, pp. 5-6.) Prong number 3 of the test has direct application to petitioner's case. Had the Court of Appeal applied prong 3 to the events at petitioner's trial, it would have understood that it must focus on what actually occurred during the supplemental arguments, and not on the contemplated purpose of those argument before they were made.

Many arguments made by both the prosecutor and counsel for Jacob during the re-argument tested the merits of petitioner's case. Those arguments are discussed above at pages 10-13 of this petition. The trial court acknowledged at a hearing conducted after the re-argument occurred that it was inevitable the re-argument by the prosecutor and Jacob's counsel would implicate both petitioner and codefendant

Jacob. (3 R.T. p. 1625.) That acknowledgment recognizes that the re-argument tested the merits of petitioner's case; both the prosecutor and counsel for Jacob repeatedly told the jury during re-argument that petitioner was guilty. Those arguments included a new theory that Sydnor acted alone. (3 R.T. pp. 1596, 1616.) It is abundantly clear that arguments made by both the prosecutor and counsel for Jacob tested the merits of Sydnor's case. This single factor is sufficient to show the re-argument was a critical stage of the proceedings. (*Benford, supra*, 574 F.3d p. 1232.)

D. **Denial of the right to counsel at a critical stage of the proceedings is structural error, which requires reversal without engaging in harmless error analysis.**

Petitioner asks the Court to grant certiorari to consider whether an error like the one that occurred at petitioner's trial is structural, requiring reversal per se.

In *Chapman v. California*, this court held that many violations of the federal Constitution are subject to harmless error analysis. Reversal is required unless the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 21, 23.) Subsequently, in *Arizona v. Fulminante,* 499 U.S. 279 (1991) (*Fulminante*), this Court provided guidance on determining which errors are subject to the

harmless error rule and which are not. The Court explained that, "trial errors," which are subject to harmless error analysis, occur during the presentation of a case to the jury. (*Id.* p. 307.) In contrast, a structural error is a defect in the trial mechanism. Such errors tend to defy harmless error analysis because they affect the framework within which the trial proceeds, unlike an error that occurs during the trial. (*Ibid.*)

When there is a structural error, a criminal trial cannot reliably serve its function as a vehicle for determining the truth of the charge. (*Id.* p. 309.) The purpose of the structural error doctrine is to ensure insistence on certain basic constitutional guarantees that should define the framework of any criminal trial. (*Weaver v. Massachusetts,* 582 U.S. ___, 137 S.Ct. 1899, 1907 (2017) (*Weaver*).) By their very nature, structural errors defy analysis by harmless error standards. (*Id.*, *supra,* 137 S.Ct. pp. 1907-1908.)

In *United States v. Cronic, supra,* 466 U.S. p 659, fn. 25 (*Cronic*), this Court said it, "has uniformly found constitutional error without any showing of prejudice when counsel was totally absent or prevented from assisting the accused during a critical stage of the proceeding"].) Footnote 25 in *Cronic* cites seven of its prior decisions, which support that assertion. (*Ibid.*) Those seven cases, as well as *Cronic*, were all de-

cided before *Fulminante*. Since *Fulminante*, this Court has held that structural error includes denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt. (*United States v. Davila*, 569 U.S. 597, 611 (2013).)

Petitioner's counsel finds no case in which this Court has applied the teaching of *Fulminante* to an error like the one that occurred at petitioner's trial. When the trial court at petitioner's trial addressed whether the error required reversal *per se*, it said, "This appears to be a case of first impression. The court has found no analogous case, and counsel cite none." (3 C.T. p. 737.)

This Court should grant certiorari to provide guidance on this question. This will help lower courts faced with similar issues to make correct rulings.

CONCLUSION

Petitioner asks this Court to grant his petition for writ of certiorari for the reasons set forth above.

DATED: November 16, 2021

/s/ Jerome P. Wallingford

Jerome P. Wallingford
Attorney at Law
Representing petitioner Sydnor

INDEX TO APPENDICES

APPENDIX A

Opinion of the California Court of Appeal, Third

Appellate District, filed May 27, 2021

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTJUAN SYDNOR, Defendant and Appellant.	C085040 (Super. Ct. No. 15F0394)
THE PEOPLE, Plaintiff and Respondent, v. ANTHONY WAYNE JACOB, Defendant and Appellant.	C085760 (Super. Ct. No. 15F03945)

Defendants Anthony Wayne Jacob and Antjuan Sydnor entered the home of Jacob's friend Byron D., bound Byron and his girlfriend, and forced them to the floor. Defendants then beat Byron while repeatedly asking him for money. Byron was shot in the head and killed when he did not give them money.

Following a jury trial, Jacob was convicted of first degree murder with a felony-murder special circumstance (Pen. Code,[1] §§ 187, subd. (a), 190.2, subd. (a)(17)), robbery (§ 211), and felon in possession of a firearm (§ 29800, subd. (a)(1)) along with enhancements for personally using a firearm (§ 12022.53, subd. (b)). He was sentenced to life without parole plus 10 years. Sydnor was convicted of first degree murder with the robbery special circumstance, robbery, and personally discharging a firearm causing death. (§ 12022.53, subd. (d).) He was sentenced to life without parole plus 25 years to life.

Jacob contends on appeal: (1) there was insufficient evidence to support the firearm use enhancement; (2) insufficient evidence supports the felony-murder special circumstance; (3) improper lay opinion of his guilt was admitted; (4) a witness's testimony that Jacob was on parole warranted a mistrial; (5) prejudicial disparaging comments about him were erroneously admitted; (6) the suppression motion regarding the use of his cell phone tracking information to locate him was improperly denied; (7) allowing re-argument in response to a jury question mandates reversal; and (8) the prosecutor committed misconduct by misstating the evidence during re-argument. In supplemental briefs he contends the matter should be remanded for the trial court to determine whether to exercise its discretion to strike the firearm enhancements, and the restitution fine, court operations assessment, and conviction assessment should be stayed pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

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[1] Undesignated statutory references are to the Penal Code.

Sydnor contends allowing additional argument on the jury question violated his rights to counsel and to be present at a critical stage of the proceedings, the matter should be remanded to allow the trial court to exercise discretion over whether to strike the firearm enhancement, and his motion to suppress a search warrant executed in Philadelphia should have been granted.

The substantial evidence claims fail as they are based on taking a view of the evidence most favorable to the defendant. The trial court's admonishment cured any potential prejudice from the lay opinion evidence, and the statement that Jacob was on parole did not warrant a mistrial. Statements in a police interview showing the witness's anger at Jacobs were properly admitted as state of mind evidence. Using current GPS findings from Jacob's cell phone to find him did not warrant suppressing items seized pursuant to his arrest as Jacob had no reasonable expectation of privacy in his current location in public. Jacob's failure to object to the imposition of a $10,000 restitution fine forfeits any *Dueñas* issue. It was within the trial court's discretion to allow the additional argument requested by the jury to resolve an impasse regarding Jacob's firearm allegation, the prosecutor's supplemental arguments were not misconduct, and Sydnor was not deprived of his right to have counsel or be present at a critical stage of the proceeding. Finding substantial evidence supports denial of Sydnor's suppression motion, we shall remand for the trial court to exercise its discretion over the firearm enhancements and otherwise affirm.

BACKGROUND

The Crimes

On September 23, 2014, Regina C. was living in Sacramento with her boyfriend Byron D., her seven-year-old son, and her daughter. She was at home with her children that evening while Byron was in and out of the house running errands. Regina was in the master bedroom when she heard the alarm system beep as Byron opened the front door

upon returning home. She heard several voices talking with Byron in the living room; a voice she did not recognize called out to her, "Gina, Gina, Gina."

Suddenly, a skinny African-American man wearing a mask and all black clothing entered the bedroom and pointed a silver revolver at her. Regina complied with the man's order to get up and follow him. Walking down the hall, she saw a heavier set African-American man wearing all black clothes and a mask using duct tape to bind Byron's wrists behind his back. Both men wore white transparent latex gloves and appeared to be in their forties.

The thinner man duct taped Regina's hands behind her back, after which the two assailants ordered Byron and Regina to lie down. The men asked Byron, "Where's the money at?" Byron replied he did not have any money and did not know what they were talking about. After Byron told them he had $100 and his car keys in his pocket, the men took the money and started hitting him.

The men hit Byron for 10 minutes while repeatedly demanding, "Where's the money at?" One of the men left the room to check on Regina's daughter and to see if she had a cell phone. The men found her daughter in another room and threatened to put a gun down her throat. The men went to the garage for a while. Upon returning, they continued to ask Byron for money. They eventually shot Byron in the head.

The two men ran out of the house after they shot Byron. Regina loosened her restraints and went to check on her daughter. After moving her daughter into the bedroom, Regina heard the front door beep. Peeking out the door, she saw the skinnier man re-entering the house. Regina took her daughter and fled out of the bedroom window and ran to a neighbor's house.

Bresha D. called her father Byron that night. They conversed until Byron stopped talking to her and sounded like he was talking to somebody else. Bresha hung up after 30 seconds; the call lasted for two minutes 23 seconds. An hour and one half later, her Aunt called and said her father had been murdered.

In September 2014, Rosie Tamayo lived on the same street as Byron. On the 23rd at around 5:30 p.m., she saw two men run out of a house towards a van. The driver was an African-American man with a long white beard, who was taller than five foot nine inches and had a built frame. Both men wore black hooded sweatshirts with the hoods over their heads.

Deputies from the Sacramento County Sherriff's Department arrived at around 5:44 p.m. They found Byron in the living room, laying on his stomach with his hands duct taped behind his back. He was pronounced dead at the scene. Grocery bags and a roll of duct tape were found near his head, and a .45-caliber casing from a semiautomatic firearm was on the living room floor.

The Investigation

Video surveillance from a nearby gas station showed Byron's Ford Expedition driving towards his house at 4:49 p.m. on the night of September 23rd. A van consistent with the one described by Tamayo drove towards Byron's house at 4:51 p.m. The van pulled into a gas station at 5:02 p.m. and left two minutes later. The van next drove towards Byron's home at 5:12 p.m. Byron's Expedition arrived home at 5:15 p.m. The van subsequently left the neighborhood and returned around the time of the home invasion, then leaving around the time of the murder.

A partial license plate number from the van in the video surveillance allowed Sacramento County Sherriff's Detective Tony Turnbull to determine it was registered to Lisa Jacob. Lisa was Jacob's ex-wife and affirmed the van in the video was hers. She allowed defendant to drive the van and he had access to it in September 2014, as he was helping her move. Cell phone records showed that Lisa was calling Jacob at the time; there were also calls and text messages between Jacob and Sydnor within a week of the murder. A warranted search of the van found an envelope named "Tony Jacob" holding flight vouchers and a registration card with Jacob's name.

Using cell phone tracking information, Detective Turnbull was able to locate and arrest Jacob on October 2, 2014. Upon being arrested, Jacob called Lisa from jail and told her to have his sister sweep up the house. A warranted search of Jacob's residence found 21 ecstasy pills, 3.5 grams of methamphetamine, 28.33 grams of an undetermined tan powder, and a blue pill containing an undetermined substance. The search also found a medical marijuana application in Jacob's name listing the address as his, a large number of latex gloves, airline vouchers similar to the one found in the van, and several .45-caliber bullets that were a different brand and color than the one found at the murder scene.

Jacob and Sydnor both owned multiple cell phones under different accounts. On September 18 and 19, 2014, Jacob received text messages from Sydnor that he was traveling from Philadelphia to Sacramento.[2] On September 18, at 5:57 p.m., Sydnor texted Jacob informing him he was in Phoenix and had to see if a seat was available; at 9:43 p.m., he texted, "here." Cell tower information shows Sydnor's phone traveled from Philadelphia to Phoenix to Sacramento, with times consistent with his texts to Jacob. Cell tower information showed on September 20, Jacob's phone went from Sacramento through Woodland and Red Bluff to Redding. The phone returned from Redding to Sacramento the next day. Sydnor's phone was off during this time.

On September 21, 2014, Sydnor texted Jacob at 12:02 p.m., "Yo, Broah, Mya here laying ur driveway." Jacob responded a minute later, "she, her inquiring." Cell tower information placed both at Jacob's residence during this text conversation. Cell tower information placed Jacob's phone on the street of Byron's residence at the time of the murder. The phone then moved to another location. Jacob's phone contained deleted e-mails from Priceline on September 24 regarding his upcoming trip to Philadelphia on

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[2] Sydnor lived in Philadelphia.

September 24, the itinerary for the trip, and asking about his rental car experience at Sacramento International Airport.

Cell tower information showed Sydnor made calls from the area of Jacob's home around midnight on September 24, 2014. Sydnor's phone stayed around Jacob's residence until the day after the murder, when it returned to Philadelphia through Chicago. Sydnor's phone went to an area in Philadelphia consistent with his residence. Sydnor's phone account closed on the day Jacob was arrested.

Tamayo identified Sydnor as the driver of the van in a photographic lineup. Sydnor was on federal probation from 2011 to March 2, 2015. His probation officer identified him as the driver of the van from an enhanced photo taken from the surveillance footage.

A search warrant was executed on Sydnor's Philadelphia residence. The search found a cell phone with a text message sent to Sydnor on May 14, 2015, stating, "Anthony Jacob REG 38922-060," with an attached picture indicating an address to send correspondence to inmates at the jail where Jacob was incarcerated. Also on May 14, Sydnor texted a picture showing how to send money to an inmate, with the attached message, "Send it quick collect." On July 5, Sydnor sent a message to a "Boo" directing the recipient to send money to Jacob via Western Union. Flight records showed Sydnor booked a flight on September 18 from Philadelphia to Sacramento with a layover in Phoenix. Sydnor was scheduled to return to Philadelphia on September 25, but the ticket was never used. DNA from the duct tape on Byron's wrists matched Sydnor's.

Jacob's girlfriend Margarette Cleaves had met Sydnor once in the six years she knew Jacob. She knew Jacob and Sydnor were friends and Jacob was the godfather of Sydnor's child. After his arrest, Jacob called Cleaves on October 5, 2014, and had her call a number and let "him" know Jacob was in jail. Cleaves called Sydnor to help with money for bail and an attorney for Jacob; Sydnor sent money to her.

Cleaves called Sydnor's phone from October 3, 2014, to December 2, 2014. Sydnor sent a text message to Cleaves asking her to call him on April 4, 2015. Another text that day asked her to give Sydnor information so he could "put something on the wire for him." Cleaves texted Sydnor her bank account number the next day. Sydnor texted Cleaves on May 14, 2015, that he was "trying to send main man some paper but it keeps saying wrong account number, so can you please send me right one ASAP."

Anajee Gardner dated Jacob in September 2014. A search warrant was executed on her apartment on July 8, 2015; it found firearms. She claimed Jacob brought the guns for a hunting trip and left them at her apartment.

In a July 15, 2015 interview with Sacramento County Sheriff's Detective Kenneth Clark Gardner admitted sending a text message to Jacob stating, "Your guns are sitting on the front porch. I don't give a F*** about them. Whoever takes them. I don't care. Free rein since we're done." During the interview, she identified Byron as the victim of the homicide. Gardner identified a picture of Sydnor as Jacob's friend from Philadelphia who flew out to Sacramento to buy pounds of marijuana. Jacob told Gardner that Jacob was the only person Sydnor knew in Sacramento, and Sydnor was out in Sacramento "buying with me." She recognized the van in the picture and said Jacob told her he was helping Lisa move. Sydnor was staying at Jacob's home at the time.

Gardner went to Redding with Jacob and Sydnor a couple of days before the murder. Upon returning from Redding, Jacob told her about items that were stolen from his Sacramento residence while they were in Redding. Jacob said he knew Byron was responsible because he told Byron about the Redding trip. He told Gardner he was going to take care of Byron. Byron was murdered two days after they returned from Redding.

Gardner confronted Jacob the morning after the murder when she saw a news story about Byron's death. Jacob said, "We're not going to talk about it. Don't ever tell anyone that." She asked Jacob about Sydnor; he said, "Oh yeah, I had to get him out of

here." Gardner had seen Jacob with guns other than those found in the search warrant. She described a black semiautomatic gun and a silver revolver with a brown handle.

Gardner, who talked to Jacob after his arrest, testified that she lied during the interview to avoid getting into trouble.

Regina testified that Byron knew Jacob. They were friends; Byron had stayed the night at Jacob's house. Jacob lived near Byron and had sold him a truck that summer. Regina went with Byron to give him the money for the truck, but could not find his house. Byron eventually found the house and told Regina he had paid the money. Jacob was not one of the men who came into the house. The man who got her was dark-skinned with thick eyebrows.

Defense Evidence

Detective Turnbull was called by Jacob and testified that a crime lab can differentiate between a bullet fired from a polygonal-style handgun. The detective who interviewed Gardner did not tell him that Gardner used the term "Glock" in describing the handgun she saw at Jacob's house.

DISCUSSION

I

Sufficient Evidence of Firearm Use

Jacob contends there is insufficient evidence to support his firearm enhancements.

The standard for judicial review of a criminal conviction challenged as lacking evidentiary support is well established: "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We will not substitute our conclusions for those of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) A conviction will not be reversed for insufficient evidence unless it appears " 'that upon no

hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Enhancements are reviewed for substantial evidence under the same standard as for criminal convictions. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

Jacob sustained an enhancement for personally using a firearm. (§ 12022.53, subd. (b).) He asserts there is insufficient evidence he personally used a firearm because Regina testified Jacob was not in her home during the homicide. In support of this contention, Jacob notes no other witnesses placed him at the crime scene and there was no other direct evidence he was there such as DNA evidence or admissions by him to investigators.

Regina testified that Byron and Jacob knew each other, that two men participated in the attack, and both were armed. The jury could believe the parts of Regina's testimony describing the attack and Jacob's knowing Byron and disbelieve her claim that Jacob was not one of the assailants. (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830 [trier of fact may credit part of witness's testimony and reject other parts].) Evidence shows the attackers used the van belonging to Jacob's ex-wife, that he had her permission to use it, and items associated with him were found in the van. Sydnor's DNA was found on the duct tape at the scene and he was identified as the van's driver. There is also evidence that Jacob had a close personal and business relationship with Sydnor, had arranged for him to come from Philadelphia to Sacramento, and traveled with him and Gardner to Redding just before Byron's murder. Gardner's statement to law enforcement shows Jacob had motive to commit a home invasion robbery and murder against Byron, Jacob's belief that Byron stole from him while he was in Redding. While bullets found in Jacob's residence were of a different color than the one at the murder scene, it was the same caliber, supporting an inference that Jacob possessed a gun of the same caliber as was used to kill Byron. This inference is further supported by Gardner's statement that

Jacob possessed guns other than the ones found at her residence, including a silver semiautomatic handgun.

Jacob's contention can succeed only if we view the evidence in the light most favorable to the defense, which we cannot do. Viewed most favorably to the judgment, substantial evidence supports concluding Jacob participated in the attack and personally used and discharged a firearm, causing Byron's death. Substantial evidence supports the enhancement.

II

Substantial Evidence of Felony Murder

Jacob contends there is insufficient evidence that the murder was intended to facilitate the robbery to support the felony-murder special circumstance.

The felony-murder special circumstance applies if "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" an enumerated felony, here robbery. (§ 190.2, subd. (a)(17)(A).) Jacob's claim is based on a rule that has its origin in the cases of *People v. Green* (1980) 27 Cal.3d 1, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 234 and *People v. Thompson* (1980) 27 Cal.3d 303, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260. "*Green* and *Thompson* stand for the proposition that a murder is not committed during a felony for purposes of the special circumstance unless it is committed to carry out or advance the commission of the felony. In other words, as applied here, the jury could not find true the robbery or burglary special circumstances if the robbery or burglary was 'merely incidental to the commission of the murder.' [Citation.]" (*Garrison* (1989) 47 Cal.3d 746, 791 (*Garrison*).)

Jacob claims the intent behind the attack was murder and the robbery was merely incidental to the murder. There is evidence Jacob thought Byron stole items from him. Before Byron was shot, defendants repeatedly demanded he give them money as they

struck him. They demanded money after initially restraining him and placing him on the floor with Regina, and continued to make these demands after going into the garage for a while and then returning. They also took $100 and Byron's car keys from him before going to the garage. Byron was killed only after defendants returned from the garage and continued to demand money. From this, the jury could reasonably conclude that defendants formed an intent to rob Byron, and did not decide to kill him until they concluded he would not give them all the money they wanted.

Here, as in *Garrison*, there was no evidence that defendants' primary purpose was to kill rather than to steal (as in *People v. Green, supra*, 27 Cal.3d at p. 55), nor was there any serious question whether the perpetrators had any intent to steal at all (as in *People v. Thompson, supra*, 27 Cal.3d at p. 324), and "the record here establishes that the robbery was not merely incidental to the killings but was instead the primary purpose of the enterprise." (*Garrison, supra*, 47 Cal.3d at p. 791.) Substantial evidence supports the true finding on the special circumstance.

III

Lay Opinion of Guilt

A. *Background*

During cross-examination of Regina, Jacob's counsel elicited from her that her social media searches for possible suspects were not performed at the instigation of or on behalf of Jacob's counsel. Jacob's counsel then asked Regina if she had refused to talk to counsel before trial. She replied, "And the reason why I said that is because even though I believe Jacob wasn't in the house, I believe he is the one who set the whole situation up." Counsel immediately moved to strike. The trial court struck the comment, stating, "The question was a simple 'yes.' " Regina replied, "Please stop looking like you don't know."

The following day, the trial court reminded the jurors that Regina's comments had been stricken as unresponsive, and directed the jury not to consider, discuss, or be

influenced by stricken testimony. It further instructed the jury that a witness's testimony was limited to personal knowledge, and lay opinion or belief was inadmissible as it intruded on the jury's factfinding function as well as having no probative value.

B. *Analysis*

Jacob contends Regina's comments inflicted irreparable harm to him, and trial counsel should have requested a mistrial that the trial court was obligated to grant. Recognizing that trial counsel's failure to request a mistrial forfeits the issue (*People v. Harris* (2013) 57 Cal.4th 804, 849), Jacob claims the failure to raise a mistrial motion was ineffective assistance.

A witness cannot express an opinion concerning the guilt, innocence, or truthfulness of a defendant. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46.) While the statement was inadmissible, the trial court promptly struck it and subsequently reminded the jury it could not use the statement in any way and explained why the lay opinion evidence was inadmissible. There is no reason to believe the jury would not follow the court's instructions, which cured any potential prejudice from the improper lay opinion testimony.

"Counsel is not ineffective for failing to make frivolous or futile motions. [Citation.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 122.) Finding a mistrial motion here would be futile, we conclude Jacob's counsel was not ineffective in declining to move for a mistrial on this ground.

IV

Jacob's Parole Status

A. *Background*

During redirect, the prosecutor elicited from Lisa Jacob that she had a problem with Jacob borrowing her van because she was responsible for it. The prosecutor then asked why she had earlier testified that Jacob could use it if he needed the van. She

replied, "Well, yeah, because he was on parole. So there's been occasions when he used my car to go to the, you know, parole office, but not just take my — just take my stuff."

Jacob's counsel moved for a mistrial the next morning. Counsel recognized there would be a stipulation that Jacob had suffered a prior felony conviction, but since that conviction was in 1990, his parole status added a recency that interfered with Jacob's right to a fair trial, warranting a mistrial. The trial court stated it understood that counsel may have refrained from a contemporaneous objection to avoid highlighting the comment to the jury. It also said it would admonish the jury now or later as counsel preferred. Counsel asserted this comment, unlike Regina's comment about Jacob's guilt, was solicited. The court stated it would admonish the jurors only if requested, and the matter was not discussed or acted on any further.

Later, the jury was informed the parties stipulated to Jacob suffering a prior felony conviction on June 8, 1990, in Monterey County. The court instructed the jury to consider the stipulation for the sole purpose of Jacob's convicted felon status regarding his felon in possession of a firearm charge.

B. *Analysis*

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 372.)

Gratuitous testimony that a criminal defendant is on parole is improper. (*People v. Stinson* (1963) 214 Cal.App.2d 476, 481-482.) This situation is analogous to the erroneous admission of evidence, which does not require reversal unless it is reasonably probable that the appellant would have obtained a more favorable outcome had the evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) And, "[a]bsent fundamental unfairness," as here, the erroneous admission of evidence does not rise to a

constitutional violation involving due process or fair trial. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

The mention of Jacob's parole status was brief and was not further mentioned before the jury. As discussed in our analysis of Jacob's substantial evidence claims, there was considerable evidence of Jacob's guilt, and Jacob's status as a felon was not hidden from the jury for the purposes of the felon in possession charge. It was well within the court's discretion to conclude an admonition would cure any prejudice, and mistrial therefore was not warranted.

V

Disparaging Comments by a Witness

In her interview with law enforcement, Gardner said about Jacob, "Fucking Tony. Dumbass." During pretrial proceedings regarding Gardner's interview, Jacob objected to the statement, asserting Gardner's opinion regarding Jacob's character was irrelevant. The trial court overruled the objection, finding the statement an expression of concern that Jacob was going to get her prosecuted for having his guns at her house, making the statement sufficiently relevant to her state of mind to outweigh any prejudice.

Jacob contends this was inappropriate character evidence that should have been excluded under Evidence Code sections 1101 and 352, as a matter of due process. He finds the alleged error also deprived him of his Sixth Amendment right to a jury trial as the statement constituted lay opinion of his guilt.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." An appellate court reviews a trial court's rulings under Evidence Code section 352 for abuse of discretion, and will reverse only if the court " ' "exercised its discretion in an arbitrary,

capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 74.)

As the trial court correctly reasoned, the statement was relevant by explaining Gardner's state of mind when she made the statement. Gardner's anger at defendant at the time of her police statement gave an important context as to why she made it, which was particularly important where, as here, she recanted the statement in her trial testimony. An ex-girlfriend's statement of anger and exasperation at Jacobs for leaving his firearms at her home and thus subjecting her to police scrutiny was not evidence of his bad character or her lay opinion of his guilt. It was not an abuse of discretion for the trial court to conclude that whatever prejudicial effect of Gardner's statement was outweighed by its clear probative value.

Since the evidence was properly admitted, Jacob's constitutional claims fail as well. (See *People v. Harris* (2005) 37 Cal.4th 310, 336 ["the application of ordinary rules of evidence does not implicate the federal Constitution"].)

VI

CSLI Information

Jacob contends the trial court erred in denying his motion to suppress all items taken pursuant to his arrest on the ground that he was apprehended based on the use of cell site location information (CSLI) taken from his cell phone without a warrant. We disagree.

A. *Background*

Jacob filed a motion to suppress items seized pursuant to his arrest, asserting his location was discerned through the illegal use of CSLI information without a warrant. The following was presented at the suppression hearing.

During the initial investigation of the murder, Regina related to Detective Turnbull that she was afraid of being killed by the two people who committed the crimes. She moved out of the house shortly after the homicide and never returned.

On September 30, 2014, Detective Turnbull conducted a warranted search on the van suspected to have been involved in the murder and learned of a phone number that could be associated with Jacob. Jacob also had an outstanding federal arrest warrant. The following day, he learned Jacob had access to the van and had another phone number.

On October 2, 2014, Detective Scott Gurnaby filed emergency applications for pen register, trap and trace, location, and/or GPS position information on Jacob's phones with Sprint and T-Mobile. The T-Mobile application asserted Jacob was a strong person of interest in a murder, that the suspects knew an eyewitness to the murder, and they attempted to come back into the house, to get her, in the eyewitness's opinion. Although the T-Mobile application contained the assertion that the subject was an extreme threat to law enforcement and the general public, Detective Gurnaby knew of no information supporting this assertion other than the general nature of the crimes. Detective Turnbull believed Jacob posed an extreme threat to law enforcement and the public based on his criminal history and the nature of the current offenses. Detective Turnbull testified that the T-Mobile application included a statement that the suspect knew the surviving eyewitness to the murder because she said that the suspect had called out her name. He admitted Regina never told him that she knew the suspect. Detective Gurnaby was legally required to get a court order within 48 hours of submitting the application to the cell phone carrier. He took probable cause statements in support of the court orders when he made the request to the judge. The probable cause statement in support of the Sprint application related Jacob's federal arrest warrant and that he was wanted for questioning in a September 23, 2014 homicide. Jacob's sister Debra Jacob had him on her T-Mobile family plan. Only Jacob had access to the phone used on the account, and he paid his share of the bill.

Information from T-Mobile initially placed defendant's phone near his residence. A second request was then made to T-Mobile. Information from T-Mobile placed Jacob

in the area of Florin Road and Stockton Boulevard; several officers, including Detective Gurnaby, were dispatched to the area and Jacob was arrested there. The T-Mobile phone used to track Jacob was found in the car he was in at the time. Jacob's Sprint phone was turned off and not providing tracking information at the time.

A judge signed the order on October 3, 2014, the day after Jacob's arrest. After Jacob's arrest, a search warrant for his residence was procured and served.

Relying on federal cases holding that a person does not have a reasonable expectation of privacy of location information obtained through a cell phone, the trial court denied the suppression motion.

B. *Analysis*

Jacob contends he had a reasonable expectation of privacy in his CSLI. He claims no exigency supported proceeding without a warrant because the case was nine days old when the cell phone information was used to find him, and there was no case-specific information to support the claim he was a threat to the public or law enforcement. He claims the relevant application presented materially inaccurate information to the cell phone providers and to the judge who ruled on the application. Asserting that a United States Supreme Court case decided after the initial briefing (*Carpenter v. United States* (2018) 585 U.S. __ [201 L.Ed.2d 507] (*Carpenter*)) is dispositive, he concludes the denial of his suppression motion was reversible error.

1. *General Principles*

"In reviewing the denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling and defer to its findings of historical fact, whether express or implied, if they are supported by substantial evidence. We then decide for ourselves what legal principles are relevant, independently apply them to the historical facts, and determine as a matter of law whether there has been an unreasonable search and/or seizure. [Citation.]" (*People v. Miranda* (1993) 17 Cal.App.4th 917, 922.)

"A search compromises the individual interest in privacy; a seizure deprives the

individual of dominion over his or her person or property. [Citation.]" (*Horton v. California* (1990) 496 U.S. 128, 133 [110 L.Ed.2d 112, 120].) Typically, "[a] 'search' occurs 'when an expectation of privacy that society is prepared to consider reasonable is infringed. [Citation.]" (*United States v. Karo* (1984) 468 U.S. 705, 712 [82 L.Ed.2d 530, 539].)

Even if the government does not intrude upon property, "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. [Citation.]" (*Kyllo v. United States* (2001) 533 U.S. 27, 33 [150 L.Ed.2d 94, 101].) Likewise, an intrusion on a protected area such as a home will not be deemed a search "unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' [Citation.]" (*Ibid*.)

The Fourth Amendment generally does not protect "[w]hat a person knowingly exposes to the public, even in his own home or office." (*Katz v. United States* (1967) 389 U.S. 347, 351 [19 L.Ed.2d 576, 511].) Accordingly, at the time the detectives used the cell phone information to locate Jacob, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. [Citations.]" (*Smith v. Maryland* (1979) 442 U.S. 735, 743-744 [61 L.Ed.2d 220, 229] (*Smith*).)

For example, a person being investigated for tax evasion and whose bank records had been subpoenaed, could "assert neither ownership nor possession" of those records because they were "the business records of the banks," not his private papers. (*United States v. Miller* (1976) 425 U.S. 435, 440 [48 L.Ed.2d 71, 77-78] (*Miller*).) Likewise, the Supreme Court held in *Smith* that is was not a search for the Government to use a pen register to record the outgoing calls because the defendant did not have a legitimate expectation of privacy in the numbers he dialed. (*Smith, supra*, 442 U.S. at pp. 742-743.) In essence, one assumed this risk of disclosure when dialing a number out. (*Id.* at p. 744.)

2. *Carpenter*

Carpenter addressed "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." (*Carpenter, supra,* 585 U.S. at p. __ [201 L.Ed.2d at p. 515].) It involved a suspect in a series of robberies who "identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies." (*Id*. at p. __ [201 L.Ed.2d at p. 515].) Pursuant to the Stored Communications Act (see 18 U.S.C. § 2703), the government obtained United States Magistrate orders directing Carpenter's wireless carriers to divulge 152 days of CSLI information from one carrier and two days of such information from the other. (*Carpenter*, at p. __ [201 L.Ed.2d. at pp. 515-516].) Carpenter's motion to suppress this information was denied before his trial on federal firearm and robbery charges. (*Id*. at p. __ [201 L.Ed.2d at p. 516].) Through expert testimony, the Government used the CSLI information to place Carpenter where the various robberies were at the time of each robbery. (*Id*. at p. __ [201 L.Ed.2d at p. 516].)

The Supreme Court declined to extend *Smith* and *Miller* "to the collection of CSLI." (*Carpenter, supra*, 585 U.S. at p. __ [201 L.Ed.2d at p. 525.) It found the "third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another," (*Id.* at p. __ [201 L.Ed.2d at pp. 523-524]) but voluntary exposure does not "hold up when it comes to CSLI." (*Id.* at p. __ [201 L.Ed.2d at p. 524].) In so holding, the Supreme Court relied on the pervasive, indispensable part cell phones played in everyday life, and on the fact that CSLI data was logged by the carrier without any affirmative act by the customer, who would have to turn the phone off to prevent the data from being recorded. (*Id.* at p. __ [201 L.Ed.2d at pp. 524-525].)

Whether a person had a reasonable expectation of privacy in CSLI data was governed by two cases. *United States v. Knotts* (1983) 460 U.S. 276 [75 L.Ed.2d 55] held the use of a beeper to track a vehicle through traffic was not a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." (*Id.* at p. 281; *Carpenter, supra*, 585 U.S. at p. __ [201 L.Ed.2d at pp. 518-519].) "Since the movements of the vehicle and its final destination had been 'voluntarily conveyed to anyone who wanted to look,' Knotts could not assert a privacy interest in the information obtained. [Citation.]" (*Carpenter*, at p. __ [201 L.Ed.2d at p. 519].)

In the second case, *United States. v. Jones* (2012) 565 U.S. 400 [181 L.Ed.2d 911], the Supreme Court held that attaching a GPS tracking device to a vehicle in order to remotely track it for 28 days constituted a search. (*Id.* at pp. 402, 404 [181 L.Ed.2d at pp. 916-917, 918]; see *Carpenter*, *supra*, 585 U.S. at p. __ [201 L.Ed.2d at p. 519].) The Supreme Court in *Carpenter* found that five Justices in *Jones* "agreed that related privacy concerns would be raised by, for example, 'surreptitiously activating a stolen vehicle detection system' in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. [*Jones,*] at 426, 428 (Alito, J., concurring in judgment); *id.*, at 415 (Sotomayor, J., concurring)." (*Carpenter,* at p. __ [201 L.Ed.2d at p. 519].) *Carpenter* also notes that these concurring opinions in *Jones* concluded that " 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy' — regardless whether those movements were disclosed to the public at large. *Id*., at 430 (opinion of Alito, J.); *id*., at 415 (opinion of Sotomayor, J.)." (*Carpenter, supra*, 585 U.S. at p. __ [201 L.Ed.2d at p. 519].)

The Supreme Court held in *Carpenter* that accessing seven days of CSLI information to get a record of Carpenter's movement at the time constituted a Fourth Amendment search. (*Carpenter, supra*, 585 U.S. at p. __ & fn. 3 [201 L.Ed.2d. at p. 521 & fn. 3].) This was in accordance with the reasonable expectation of privacy before the

pervasive use of cell phones and their tracking data. "Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.' [Citation.] For that reason, 'society's expectation has been that law enforcement agents and others would not — and indeed, in the main, simply could not — secretly monitor and catalogue every single movement of an individual's car for a very long period.' [Citation.]" (*Id*. at p. __ [201 L.Ed.2d at p. 521].) Since this use of CSLI information was a search, a warrant was necessary; the federal statutory procedure for obtaining CSLI data was insufficient to protect Carpenter's Fourth Amendment privacy interests. (*Carpenter,* at p. __ [201 L.Ed.2d at p. 525].)

There are limits to *Carpenter's* scope. The Supreme Court declined to "decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be." (*Carpenter, supra*, 585 U.S. at p. __, fn. 3 [201 L.Ed.2d. at p. 521, fn. 3].) *Carpenter* also did not change the rule exempting certain exigent circumstances from the warrant requirement; CSLI information could be obtained without a warrant under such exigencies. (*Id.* at p. __ [201 L.Ed.2d at p. 527].)

3. *Contemporaneous CSLI*

We decide Jacob's claim on narrow grounds. We do not determine here whether the exigent circumstances of his being a potentially armed suspect in a murder case who left a living eyewitness provides exigent circumstances justifying a warrantless search. Likewise, we do not determine whether Jacob's outstanding federal arrest warrant dissipates the taint of finding out his location through an unlawful search. (See *People v. Brendlin* (2006) 45 Cal.4th 262, 271 ["an arrest under a valid outstanding warrant — and a search incident to that arrest — is an intervening circumstance that tends to dissipate the taint caused by an illegal traffic stop"].) We also decline to determine whether the use of contemporaneous CSLI information to find someone is in general not a search.

Here, we hold only that Jacob did not have a reasonable expectation of privacy in determining his current location through the use of CSLI data, based on the particular facts of this case.

Although *Carpenter* informs our analysis, it does not govern here as this case involves the use of real-time CSLI information to find a suspected murderer with an outstanding arrest warrant. *Carpenter* was based in part on the traditional expectation of privacy in keeping one's long term movements from government observation. Using CSLI to find the current location of an individual does not implicate the same privacy interests underlying the analysis in *Carpenter*.

The CSLI data was used here to find a proximate location for Jacob, to which officers were dispatched and he was found in his automobile. Jacob had no reasonable expectation of privacy in his current location as he was traveling in public. "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both occupants and its contents are in plain view. [Citation.] 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' [Citations.]" (*Cardwell v. Lewis* (1974) 417 U.S. 583, 590-591 [41 L.Ed.2d 325, 335].) Whatever expectation of privacy society would be willing to accept in such circumstances is further diminished by the fact that he had an outstanding felony arrest warrant and was a suspect in an armed home invasion robbery-murder in which he and his accomplice left a living eyewitness.

Since Jacob did not have a reasonable expectation of privacy in his current location under these circumstances, the use of real-time CSLI data to track him did not require a warrant. We do not address whether obtaining real-time CSLI is ever a search or if real-time CSLI can be used to track a cell phone, and presumably its user, into a private home or business. (Cf. *United States v. Karo, supra,* 468 U.S. at p. 714 [82 L.Ed.2d 530, 541] [law enforcement's monitoring of a beeper, which had been installed on can of ether with the owner's consent before its transfer to a suspected drug trafficker,

inside "a private residence, a location not open to visual surveillance, violate[d] the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence"].) Nor do we hold that use of real-time CSLI to track a person over a more extended period would not constitute a search. We simply hold that under these facts, a warrant was not required to use real-time CSLI in order to find Jacob.

VII

Dueñas

The trial court imposed a $10,000 restitution fine (§ 1202.4) a $120 court operations assessment (§ 1465.8) and a $90 facilities assessment (Gov. Code, § 70373) on Jacob. Relying on *Dueñas*, he contends these should be stayed pending a hearing to determine his ability to pay them.

Dueñas held "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes [these] assessments." (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) With respect to the minimum restitution fine, the court held imposition of this fine without first determining ability to pay, while done in accordance with the statutory scheme, also violated due process; execution of such a fine "must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid*.)

Authority is presently split over whether a defendant who did not object to the trial court's imposition of mandatory fines and fees based on inability to pay, such as defendant failed to do for the restitution fine, forfeits a *Dueñas* claim. (Compare *People v. Frandsen* (2019) 33 Cal.App.5th 1126 [finding forfeiture] with *People v. Castellano* (2019) 33 Cal.App.5th 485 [no forfeiture].) We conclude Jacob's *Dueñas* challenge is forfeited.

Section 1202.4 expressly allows a trial court to consider a defendant's ability to pay when determining whether to increase the restitution fine above the statutory

minimum. (§ 1202.4, subd. (c).) That statutory minimum is $300. (§ 1202.4, subd. (b)(1).) Here, the trial court imposed a restitution fine in the amount of $10,000, far more than the statutory minimum. Thus, Jacob could have objected to this fine based on inability to pay but failed to do so, forfeiting his challenge to this fine on inability to pay grounds. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 [challenge to restitution fine based on inability to pay forfeited where trial court imposed maximum fine and the defendant did not object on that basis below]; *People v. Frandsen, supra*, 33 Cal.App.5th at p. 1153.)

Although there is no similar implicit finding of ability to pay for the two assessments, the trial court's implicit determination Jacob could pay a $10,000 restitution fine likewise encompasses a finding Jacob has the ability to pay the two much smaller assessments. The *Dueñas* contention is forfeited.

VIII

Re-argument

Jacob and Sydnor both raise contentions regarding the trial court's decision to allow re-argument in response to the jury's inquiry regarding its inability to reach a verdict on Jacob's firearm enhancements.

A. *Background*

During deliberations, the jury asked the trial court what it should do if the jurors agreed on a verdict for the murder and robbery charges against Jacob in counts one and two, but could not agree regarding the use of firearm allegations for those charges. After conferring with counsel, the court told the jury it could let the court know if it believed additional instruction or argument on the firearm allegation would be helpful in reaching a unanimous agreement, or, if the jury did not believe additional instruction or argument would be helpful, then complete the verdict forms for the charges and special circumstances the jury agreed upon, and inform the court about the inability to agree on the firearm allegations. While conferring regarding the response to the jury's inquiry,

counsel for Sydnor stated, "I'm, not sure I have standing to argue co-defendant's enhancement issues."

The following day, the jury asked for additional arguments to help them determine whether Jacob was the second person in the house in order to resolve the firearm allegations. The trial court directed that all counsel be notified to come to court, and to inform Sydnor's counsel that his presence was not necessary if he did not believe it was needed.

The prosecutor and Jacob's counsel presented additional arguments, after which the jury deliberated for about 30 minutes. Although both arguments mentioned Sydnor, neither Sydnor nor his counsel was present. The jury went home early and was subsequently put on hold.

The following morning, the trial court announced that Sydnor's counsel had not been informed of re-argument because the e-mail intended for him was sent to another attorney. This led the court to mistakenly conclude Sydnor's counsel did not wish to appear for re-argument. The court asked Sydnor's counsel to come in, gave Sydnor's counsel a copy of the prior day's proceedings, and informed counsel of the mistake. It apologized to counsel and explained why it thought counsel did not want to appear because counsel had sent no response.

The court next told the jury that due to the court's error, Sydnor's counsel was not given notice of the prior day's proceedings, and that Sydnor should have been there even though the jury's question related only to Jacob. Sydnor moved for a mistrial, which the court denied, finding Sydnor's counsel agreed to the court's response to the jury question, any additional objection counsel could have made to reopening argument would have been denied, and the references to Sydnor in the re-arguments were inevitable and fair, given the nature of the case.

After the court reminded the jury that these problems were the court's fault, Sydnor's counsel was allowed to make a supplemental argument addressing what the

prosecutor and Jacob's counsel had argued the day before. The trial court subsequently instructed the jury that the arguments from the last two days were in response to the request for additional argument regarding the Jacob firearm enhancements, and it was not to consider this argument on any other issue, "particularly any other issue that would relate to Mr. Sydnor." The court also re-instructed the jury what the attorneys say is not evidence, and if any of the original arguments or re-arguments differ from how it remembers the evidence, the jury can ask for a readback of that part of the evidence.

Sydnor subsequently moved for a new trial based on the lack of his and his counsel's presence at critical stages during the re-argument proceedings. The trial court denied the motion.

B. *Jacob: Re-Argument Unauthorized*

Jacob contends the trial court erred in allowing re-argument without determining whether an impasse existed. We disagree.

"After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict." (Cal. Rules of Court, rule 2.1036(a).) If the court determines further action may assist the jury in reaching a verdict, it may avail itself of several options including permitting the attorneys to present additional argument. (Cal. Rules of Court, rule 2.1036(b)(3).)

We review a court's determination under rule 2.1036 of the California Rules of Court for abuse of discretion. (*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1087-1088.)

The jury here informed the court it could not reach a verdict on Jacob's firearm enhancements. The court, with the assent of counsel, asked the jury if it needed further instruction or argument, or whether such would not help it reach a verdict. It allowed

further argument only after the jury asked for it in response to the court's answer. Under these facts, the court was within its discretion to determine the jury was at an impasse regarding the firearm enhancements and additional argument on that subject was the appropriate means for addressing the impasse.

C. *Sydnor: Right to Counsel and Personal Presence*

Sydnor contends the trial court erred in denying his motion for a new trial because has was deprived of his rights to be personally present and have counsel at a critical stage of the proceedings.

"A criminal defendant has the right under the state and federal Constitutions to be personally present and represented by counsel at all critical stages of the trial. For purposes of the right to be present, a critical stage is 'one in which a defendant's " 'absence might frustrate the fairness of the proceedings' [citation], or 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' " ' [Citation.] As to the right to counsel, a critical stage is one 'in which the substantial rights of a defendant are at stake' [citation], and 'the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial' [citation]." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 465.)

Due to the trial court's inadvertent error, Sydnor and his counsel were not present at stages critical to Jacob but not to him. Whether the jury could reach a verdict on Jacob's firearm enhancement allegations was obviously a critical stage to Jacob, but Sydnor's substantial rights were not at stake and neither his nor his counsel's presence was necessary to ensure those proceedings or his trial's fairness. Sydnor's counsel essentially admitted this at the initial discussion of the jury's question, when counsel questioned whether he even had standing to question the court's response to the jury's inquiry. In addition, Sydnor's counsel did not object to the court's reply to the jury question in which it gave the jury the option to ask for additional argument. Also, the court later ruled that any objection of Sydnor's counsel to allowing additional argument

would have been fruitless. Taken together, these facts show neither the presence of Sydnor nor his counsel was necessary at these proceedings on a matter tangential to him.

The only part of the actual re-argument relevant to Sydnor's case was that he was mentioned by both Jacob's counsel and the prosecutor in their re-arguments.[3] The trial court afforded Sydnor an opportunity to respond once the error was discovered, explaining to the jury why Sydnor's counsel did not participate in the re-argument and allowing Sydnor's counsel to present additional argument. Although Sydnor was mentioned by Jacob's counsel and the prosecutor in their re-arguments, the court instructed the jury it was to consider the re-argument only to the firearm enhancement allegations for Jacob, and that the arguments of counsel did not trump the facts adduced at trial. In the absence of evidence to the contrary, we presume the jury followed the instructions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152.)

Snydor's counsel may not have been present when Jacob's counsel and the prosecutor re-argued Jacob's gun enhancement allegations, but he was not deprived of counsel or the right to be present at a stage of the proceedings critical to him. The combination of allowing Sydnor's counsel to present additional argument and the court's instructions limiting the additional argument to Jacob's firearm enhancements neutralized any possibility that Sydnor had any interest that could be adversely affected by his and counsel's absence from the re-argument. While, as the trial court admitted, it is better

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[3] The prosecutor's re-argument made numerous references to Sydnor, stating Regina would not recognize Sydnor because he wore a mask, she was hesitant to identify Jacob because the other perpetrator, Sydnor, had not been caught yet, Sydnor was in the van because he was in the driver's seat surveillance, made three other references to Sydnor being in the van, noted the numerous calls between Sydnor, Jacob, and Lisa, noted Sydnor did not know anyone in California and it would be difficult for Jacob to find someone to accompany Sydnor to the murder, and related a hypothetical showing it would be nonsensical for Sydnor to commit the murder with someone he did not know. Jacob's counsel argued the crimes "could as easily have been driven by Mr. Sydnor on his own without Mr. Jacob's participation."

practice to allow counsel and codefendant to be present at such a proceeding, this was not the deprivation of the right to counsel or personal presence at a critical stage of the proceedings. Accordingly, there is neither prejudice nor structural error.

D. *Jacob: Prosecutorial Misconduct During Re-Argument*

1. *Background*

During re-argument, the prosecutor argued, regarding Regina's testimony, that she:

"[T]akes the stand and says, I know Mr. Jacob, albeit briefly from some interactions with Byron, that if she knows him and says that person in the courtroom is not him due to bushy eyebrows and complexion, that would be reasonable doubt. She knows him. She says it's not him.

"The flip side is if you look at the circumstance of this case, if she knows him and knows what he just did, albeit come in with a mask, killed Byron and then fled, and someone, this person, opened the door back up and saw her going out the back bedroom, and thought he was coming back in to kill her, from that point on, she knows what that person is capable of.

"So put that in, when we think about this, on whether if you look at it, she knows him and says it's not him, or she knows him and does not want to say it's him, let's see which one makes more sense."

The prosecutor asserted regarding Regina's failure to identify Jacob in a lineup: "Her description at the time with the patrol officer at the scene, she didn't give a description of bushy eyebrows of the person, dark complexion. They're not going to put Anthony Jacobs in a lineup with no eyebrows and the skin complexion he has. The evidence shows that that came through her multiple interviews later on." The prosecutor then claimed that Regina was motivated by a fear of the not yet identified second assailant during this time, and explains why she now said, "the person had darker complexion than Anthony Jacob."

The next day, after the prosecutor's and Jacob's re-argument had concluded, Jacob's counsel asserted the prosecutor misrepresented the facts during re-argument by claiming Regina's description of the assailant at trial differed from her initial description of the man. Counsel argued that the prosecutor's initial assertion regarding bushy eyebrows and dark complexion was "absolutely false," as an officer's summary of Regina's statement states she said the assailants were "both black men with dark complexion." Jacob's counsel characterized the prosecutor's statement that Regina now says the person had a darker complexion than Jacob was also wrong as Regina initially told law enforcement the first guy was tall and dark, kind of like her son, which tracked her testimony. Jacob's counsel asked for additional argument or a mistrial in the alternative. When the trial court asked Jacob's counsel why the prosecutor's statements, to the extent they could be prejudicial, "cannot be cured with a repetition of the instruction that what the attorneys say is not evidence," Jacob's counsel replied, "that's a method of curing this issue. I think a more direct and appropriate method is to allow additional brief argument in response to these comments." The trial court denied the motion for mistrial or additional argument. The court then addressed the failure to inform Sydnor's counsel of re-argument and, after Sydnor's counsel gave his additional argument, reinstructed the jury that the attorney's arguments were not evidence.

2. *Analysis*

It is misconduct for the prosecutor to misstate the facts of the case. (*People v. Boyette* (2002) 29 Cal.4th 381, 435.) A failure to object to misconduct during argument is forfeited unless the misconduct is so egregious it could not be cured through admonition. (*People v. Collins* (2010) 49 Cal.4th 175, 233.)

To the extent Jacob's claim was not forfeited by raising a contemporaneous objection during the prosecutor's argument, it was cured by the trial court's subsequent reminder to the jury that the attorney's arguments were not evidence. The alleged misstatements were made regarding evidentiary details, whether the eyewitness's

description of one of the assailants to law enforcement and at trial conflicted and what description she made. Even if we were to characterize this as misconduct, it is not of the type that was not cured by the court's admonition.

IX

Sydnor's Suppression Motion

Sydnor filed a motion to suppress evidence seized pursuant to a search warrant issued by a magistrate in Philadelphia. The motion alleged that, on July 7, 2015, several detectives from the Sacramento County Sherriff's Department were in Philadelphia and enlisted the aid of the Philadelphia Police Department in obtaining the warrant. Attached to the motion and the prosecution's opposition were the search warrant and documents upon which it was based.

At the hearing on the motion, Detective Turnbull testified that he prepared an affidavit that was presented to the magistrate in Philadelphia, but did not recall whether he signed it. He was sworn in at the Philadelphia proceeding and knew the magistrate there reviewed the affidavit. The original affidavit should be in Pennsylvania.

Sydnor's counsel argued that he wanted to determine whether "there's anything sworn or any documentation from the Philadelphia courts, either sealing the affidavit or anything indeed shows it's relied upon beyond just the testimony from Detective Turnbull." The trial court denied the motion without prejudice.

Sydnor's counsel subsequently made several requests for the trial court's help in obtaining documents in Philadelphia relating to the warrant. After the first request, Sydnor's counsel later told the court, "What is in the court file is three warrants, the continuing probable cause, which was penned by the Philadelphia detective. There does not appear to be what we had in the motions as Exhibit B, the Turnbull affidavit. That does not appear to be in the Philadelphia file." Counsel told the court he was continuing his efforts to obtain information from Philadelphia, and he believed the absence of the California affidavit was telling with respect to what the magistrate considered.

Following the verdict, Sydnor's counsel moved for a new trial based on the absence of Detective Turnbull's affidavit from the Philadelphia file. According to counsel, it appeared the supporting documentary basis for the search warrant was the affidavit from the Philadelphia detective.

The trial court denied the motion, finding the request for the warrant by the Philadelphia officer referred to an affidavit by Sacramento officers detailing the evidence establishing probable cause, Detective Turnbull testified that he was present when the Philadelphia magistrate had issued the search warrant, the magistrate had his affidavit, and he was sworn by the magistrate.

Sydnor claims the trial court erred as the Philadelphia magistrate improperly relied on unsworn evidence to issue the search warrant.

Although Sydnor presents no authority that the warrant was improper under Pennsylvania law or any authority supporting the proposition that a search warrant issued by a court in another state must follow California procedure, we shall assume for this case that the warrant here was bound by California law.

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched." (§ 1525.)

Although Detective Turnbull's signed affidavit was missing, the trial court was presented by the signed affidavit from a Philadelphia Detective relating that Sacramento detectives told him about the murder, Regina's description of two gunmen with their physical descriptions, the surveillance video of the van, and Sydnor being identified as the driver. This affidavit also describes additional investigation of the Philadelphia detective tying Sydnor to the residence to be searched. It also specifically referred to the Sacramento affidavit.

As noted in our discussion of Jacob's suppression motion, we defer to the trial court's factfindings in ruling on the suppression motion so long as they are supported by

substantial evidence. In addition, the defendant bears the burden in attacking the legality of a warrant. (*People v. Fish* (2018) 29 Cal.App.5th 462, 468.)

Detective Turnbull testified that the Philadelphia magistrate considered his affidavit, and that he was present and sworn in when it was considered. The signed affidavit by the Philadelphia detective related some of the Sacramento investigation and referred to Detective Trunbull's affidavit. The hearsay statements in this affidavit may support a probable cause finding. (*Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 576.) Substantial evidence supports the trial court's finding that the Philadelphia warrant was issued based on affidavits establishing probable cause, and we find Sydnor failed to carry his burden of establishing the contrary.

X

Senate Bill No. 620

Both defendants contend the matter should be remanded to allow the trial court to exercise its discretion on whether to strike the firearm enhancements. The Attorney General concedes the point.

On October 11, 2017, the Governor signed Senate Bill No. 620. As relevant here, Senate Bill No. 620 provides that effective January 1, 2018, sections 12022.53 and 12022.5 are amended to permit the trial court to strike an enhancement in the interests of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) Prior to this amendment, an enhancement under sections 12022.53 and 12022.5 was mandatory and could not be stricken in the interests of justice. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

The amendment to sections 12022.53 and 12022.5 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) When a trial court is unaware of sentencing discretion, the appropriate remedy is to remand for the court to exercise its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) In the case of Senate

Bill No. 620, a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.)

Since the trial court did not indicate in any way remand would be futile, we shall remand for the trial court to exercise its discretion over the enhancements.

DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike defendants' firearm enhancements. The judgment is otherwise affirmed.

BLEASE, Acting P. J.

I concur:

HULL, J.

ROBIE, J., Concurring and Dissenting.

I concur fully in all parts of the Discussion except part VII addressing defendant's argument that *Dueñas* calls into question the imposition of the $10,000 restitution fine, the $120 court operations assessment, and the $90 court facilities assessment without a determination of his ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157.)

As to part VII, I concur and dissent. I concur in the majority's conclusion that defendant's challenge to the restitution fine is forfeited because an objection must be made in the trial court to preserve a challenge to the imposition of a restitution fine in excess of the mandatory minimum on appeal, and defendant failed to do so. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) I dissent to the majority's conclusion that defendant's *Dueñas* claim as to the assessments was forfeited. I agree that, as stated in *Castellano*, a trial court is required to determine a defendant's ability to pay only if the defendant raises the issue, and the defendant bears the burden of proving an inability to pay. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490.) In the absence of authority invalidating the challenged mandatory assessments on inability to pay at the time the trial court imposed it, however, defendant could not have reasonably been expected to challenge the trial court's imposition thereof. (*People v. Welch* (1993) 5 Cal.4th 228, 237 ["[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

I believe a limited remand under *Dueñas* is appropriate to permit a hearing on defendant's ability to pay the challenged mandatory assessments because his conviction and sentence are not yet final. (See *People v. Castellano*, *supra*, 33 Cal.App.5th at pp. 490-491.)

Robie, J.

APPENDIX B

Order of the California Supreme Court

Filed August 25, 2021

Court of Appeal, Third Appellate District - No. C085040, C085760

S269626

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ANTJUAN SYDNOR, Defendant and Appellant.

THE PEOPLE, Plaintiff and Respondent,

v.

ANTHNOY WAYNE JACOB, Defendant and Appellant.

The petitions for review are denied.

Cantil-Sakauye, C.J., was absent and did not participate.

KRUGER

Acting Chief Justice

APPENDIX C

Order of the Sacramento County Superior Court,

denying motion for new trial.

(From clerk's transcript pages 3 C.T. pp. 728-753.)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME : June 14, 2017		DEPT. NO : 42	
JUDGE : Allen Sumner		CLERK : M. Garcia	
REPORTER : N/A		BAILIFF : N/A	

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS. Case No.: 15F03945

ANJUAN SYDNOR,
Defendant.

Nature of Proceedings: TENTATIVE RULING ON ANTJUAN SYDNOR MOTION FOR NEW TRIAL

The following is the court's tentative decision denying the motion for new trial.

Defendant Antjuan Sydnor's motion for new trial is denied.

Sydnor and his co-defendant Anthony Jacob were convicted of murder committed during the commission of a robbery. The jury found Sydnor personally discharged a firearm causing death.

Sydnor raises two arguments in his motion for new trial: The court erred in:

1) denying his motion to suppress evidence, including Sydnor's DNA, seized by officers in Philadelphia pursuant to a warrant issued by a Pennsylvania magistrate; and
2) allowing the district attorney and counsel for Jacob to present supplemental argument to the jury in the absence of Sydnor and his counsel.

The challenge to the Philadelphia search warrant is without merit. The supplemental argument presented in Sydnor's absence presents a closer issue, but the court concludes it was harmless error.

BOOK : 42
PAGE :
DATE : June 14, 2017
CASE NO. : 15F03945
CASE TITLE : PEOPLE v SYDNOR

Superior Court of California,
County of Sacramento

BY: M. GARCIA,
Deputy Clerk

Background

Byron Darbonne was killed during a home invasion robbery. A van belonging to Jacob's ex-wife was observed at the scene. Investigation of Jacob's telephone records eventually led officers to his friend Sydnor. From surveillance video Sydnor's probation officer in Philadelphia identified him as the van's driver. Based on this information, Sacramento detectives requested officers in Philadelphia obtain a search warrant for Sydnor's residence and DNA.

Sydnor and Jacob were charged with murder committed during a robbery. One jury heard the case against both defendants, involving seven days of testimony from 13 witnesses. Both defendants maintained they were not involved in the crime.

The evidence against Sydnor was compelling: His DNA was found on the duct tape binding the victim; an eyewitness picked him out of a photo lineup as similar to one of the two men she saw running from the house to a van; video surveillance in the neighborhood and nearby shopping center showed the driver of the van similar to, and identified as, Sydnor; and Sydnor's phone records showed he was in close proximity to the shooting, and then left California shortly thereafter.

The evidence against Jacob was also substantial: He was acquainted with the Darbonne, who lived down the street. Jacob believed Darbonne stole his drugs when Darbonne knew Jacob would be out of town. Jacob told his girlfriend he would "take care" of Darbonne. Following the killing, Jacob told his girlfriend no witnesses could have seen him because the van was parked around the corner from Darbonne's house. He also told his

girlfriend to never tell anyone about their discussion regarding the killing.

Sydnor and Jacob were friends, transacting drug deals together. Sydnor, who lived in Philadelphia, was staying with Jacob at the time of the murder. Following the shooting, Jacob told his girlfriend he needed to get Sydnor out of town. And Sydnor changed his flight schedule back to Philadelphia, returning hours after the shooting.

1. Sydnor's motion to suppress evidence seized pursuant to the search warrant issued by a magistrate in Philadelphia was properly denied.

Prior to trial Sydnor moved to suppress evidence seized pursuant to a search warrant issued by a magistrate in Philadelphia - primarily Sydnor's DNA and phone records. Sydnor argued the affidavit submitted by Pennsylvania officers in support of their request for the warrant was insufficient in simply stating Sydnor was sought by California officials.

However, the request by the Philadelphia officer referred to an affidavit by Sacramento officers detailing the evidence California officials had establishing probable cause to believe Sydnor was involved in the murder. This included the fact Sydnor's Philadelphia probation officer had identified him in the video driving a van following the victim prior to the shooting and then leaving the scene after the shooting.

At a pre-trial hearing on Sydnor's motion to suppress, Sacramento Police Sergeant Tony Turnbull testified he was present in Philadelphia when the magistrate issued the search warrant. Sergeant Turnbull testified the magistrate had his affidavit in deciding whether to issue the warrant, and Sergeant Turnbull was sworn by the magistrate. (Reporter's Transcript ["RT"]: 200-201.)

Sydnor argues Sergeant Turnbull's affidavit was not included in the documents Sydnor later obtained from the file on the search in Philadelphia. This may be explained by Sergeant Turnbull's testimony that when the warrant was issued, the supporting materials were ordered sealed because the investigation was in progress and Sydnor had not been arrested.

In any event, the facts in Sergeant Turnbull's affidavit regarding Sacramento's investigation were undisputed and provided ample probable cause for the magistrate in Philadelphia to issue the search warrant. (*People v. Carrington* (2009) 47 Cal. 4th 145, 161; *People v. Kraft* (2000) 23 Cal.4th 978, 1040, citing *Illinois v. Gates* (1983) 462 U.S. 213, 238-239 [76 L. Ed. 2d 527, 103 S. Ct. 2317].)

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates, supra*, 462 U.S. at p. 238.) The magistrate's determination of probable cause is entitled to deferential review. (*People v. Kraft, supra*, 23 Cal.4th at p. 1041, citing *Illinois v. Gates, supra*, 462 U.S. at p. 236.) The Pennsylvania magistrate was bound to the same standard of probable cause. (Penn. Rules Crim. Proc. 203.)

Accordingly, Sydnor's motion for a new trial on the grounds the evidence seized pursuant to the search warrant issued by a magistrate in Philadelphia is denied.

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2. Presentation of supplemental argument by the People and counsel for co-defendant Jacob in Sydnor's absence was error, but harmless beyond a reasonable doubt

Background

Notwithstanding Jacob's motive, threats against Darbonne and the use of his ex-wife's van in the crime, there was evidence Jacob was not present during the robbery: Darbonne's wife testified Jacob was not one of the two men who came into their house.

Although the evidence showed two perpetrators committed the robbery/murder and each was armed, only one shot was fired. The People alleged Sydnor was the shooter, charging him with discharge of a firearm causing death. (Pen. Code § 12022.53(d).) The People alleged Jacob was the other perpetrator present, and charged him with personally using a firearm. (Pen. Code § 12022.53(b).) Alternatively, the People argued even if Jacob was not present, he was an aider and abettor who could be found guilty of the murder and robbery, if not the personal use allegation.

The jury was apparently divided as to whether Jacob was present. After five days of deliberation, on February 14, 2017, the jury asked: "On Count One [murder] and Two [robbery] for Anthony Jacob, if we agree on guilty/not guilty and special circumstance [murder during the commission of a robbery] true/not true but we cannot agree on the use of firearm charge, what do we do?"

The court informed counsel it proposed advising the jury:

> If you have reached unanimous agreement on the underlying charge of murder in court 1 and/or robbery in count 2, and

unanimous agreement on the special circumstance alleged for that count, but are unable to reach unanimous agreement on the allegation Anthony Jacob personally used a firearm for that count:

a) Let the court know if you believe additional instruction or argument on the firearm allegation would be helpful in reaching unanimous agreement on the firearm allegation; or

b) If you do not believe additional instruction or argument on the firearm allegation would be helpful in reaching unanimous agreement on the firearm allegation, then complete the verdict form for the charges and special circumstances upon which you have reached unanimous agreement, and inform the court you are unable to reach agreement on the firearm allegation for that count.

Sydnor's counsel replied he had no objection to the proposed response, adding "Not sure I have standing to argue Co def's enhancement issues."

Taking up the court's offer, the next day, February 15, 2017, the jury requested: "Additional arguments that may help us reach an agreement on whether or not Anthony Jacob was the 2nd man in the [victim's] house during the event. (For the use of firearm portion of the charges.)"

The court directed all counsel be advised, "Please see attached jury question #3. Please come to department 42 at 1:30 to discuss. Mr. Knapp [Sydnor's counsel] - your appearance is optional." When the district attorney and counsel for Jacob appeared at 1:30 to discuss the jury's request for further argument on Jacob's presence at the scene, the court was given to understand Sydnor's counsel had elected not to attend. In fact Sydnor's attorney never received the court's email and was thus unaware of the jury's request for further argument. As a result, neither Sydnor nor his attorney was present.

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In response to the jury's request, the court allowed the People and Jacob's counsel to provide supplemental argument addressing the jury's question: Was Jacob the second man at the scene?[1]

In the course of their arguments both counsel addressed Sydnor's involvement: The People argued Jacob's presence could be inferred from Sydnor's participation, since Sydnor had no reason to commit the murder other than on behalf of Jacob. Jacob's counsel countered if Sydnor committed the murder he was acting on his own, not at Jacob's behest.

Following this supplemental argument, the jury resumed deliberations for a little over an hour before breaking for the day.

When the court learned its email to Sydnor's counsel was not received, it met with all counsel and defendants the following morning, keeping the jury on break from further deliberations. Sydnor's counsel was provided the transcript of the supplemental argument the jury heard the day before. The court and counsel then had an extensive discussion how to proceed. (RT: 1589-1623.)

Sydnor moved for a mistrial, arguing the supplemental argument in his absence while the jury was deliberating the charges against him was prejudicial error which could not be cured. Asked what objections he would have raised had he been present, Sydnor's counsel argued:

1) There should have been no supplemental argument;

2) The supplemental arguments given by the People and Jacob's counsel went beyond the scope of the jury's request in addressing

[1] The court may allow additional argument to assist the jury in reaching a verdict. (Cal. Rule of Court, rule 2.1036; See generally *People v. Salazar* (2014) 227 Cal. App. 4th 1078.)

the evidence and inferences as to Sydnor's guilt - not just Jacob's presence at the scene; and

3) Some of the supplemental argument went beyond the evidence in the record. (RT: 1614-1622.)

The court found none of these objections would have been sustained. (RT: 1624-1625.) The motion for mistrial was denied, without prejudice to a subsequent motion for new trial on the same grounds. The jury was brought back in.

The jury was informed that, through the court's error, Sydnor's counsel had not received notice of yesterday's hearing. He was therefore now going to provide his supplemental argument. Sydnor's attorney then argued the supplemental arguments given in response to the jury's request addressed only whether Jacob was present at the scene, explaining in part:

> … I need to address what was said yesterday because a lot of things were said about my client that could be deemed by you to be fact or fodder in analysis of his guilt or innocence.
>
> So in looking at that point, there were arguments made and foisted upon you with respect to hypothetical conversations or why he was here from Philadelphia or what he was doing or what actually happened in the nature of phone calls and other things that beget, one, my original argument on the things you had to decide with respect to him being involved at all; and two, it's incumbent upon you to look at these two people separately to the point that my client's role or what he did, if any, in this thing, you must still look at the identifications, you must look at the evidence, and you must have decided things.

(RT:1628-1629.)

Following Sydnor's argument, the court instructed the jury the supplemental arguments by all counsel were limited to the jury's question: Was Jacob present at the scene? The court admonished: "You are not to consider those arguments on any other issue, particularly any other issue that would relate to Mr. Sydnor. And I am going to re-emphasize the general instruction that what the attorneys say is not evidence." (RT:1630.)

The jury then resumed its deliberations. Within 15 minutes the jury convicted both defendants on all counts, finding the special circumstance true as well as the firearm allegations as to each defendant.

This motion by Sydnor for new trial followed.

The court may grant a new trial when, inter alia, trial was impermissibly held in the defendant's absence. (Pen. Code § 1181(1).) The court may also grant a new trial for nonstatutory reasons: If an error occurred denying defendant his right to a fair trial and he had no earlier opportunity to raise the issue. (*People v. Mayorga* (1985) 171 Cal.App.3d 929, 940.)

Discussion

A. Presenting supplemental argument in the absence of Sydnor and his attorney was not structural error requiring reversal per se.

It is undisputed it was error for the People and Jacob's attorney to present supplemental argument referring to Sydnor in his absence. The question is was it structural error, requiring reversal per se? Or was the error harmless beyond a reasonable doubt given the compelling evidence against Sydnor?

This appears to be a case of first impression. The court has found no analogous case, and counsel cite none. After reviewing the case law generally on structural vs. harmless error, the facts here, and mindful of the reluctance of both the United States and California Supreme Courts to create new categories of structural error, the court concludes the supplemental argument should be assessed under the harmless error standard. After reviewing all the evidence presented against Sydnor, the court concludes presentation of supplemental argument in his absence was harmless beyond a reasonable doubt.

The Constitution entitles Sydnor to a fair trial - not a perfect one. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) Given the human fallibility of the participants, there can never be an error-free, perfect trial. Nor does the Constitution demand one. (*United States v. Hasting* (1983) 461 U.S. 499, 508.)

In *Chapman v. California* (1967) 386 U.S. 18 the Supreme Court recognized some constitutional errors may be "harmless" in their effect on the fact-finding process. As the Court later explained:

> Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. [Citation.] The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

(*Van Arsdall, supra,* 75 U.S. at 681.)

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However, the Court also recognized some constitutional errors are so "fundamental and pervasive" they require reversal without regard to the facts or circumstances of the case. (*Chapman, supra,* 386 U.S. at 23; *Van Arsdall, supra,* 75 U.S. at 681.)

The Court in *Arizona v. Fulminante* (1991) 499 U.S. 279 elaborated on *Chapman's* distinction between "trial error" and "structural error." It explained trial error occurs during presentation of the case to the jury. The effect of such error thus may be "… quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at 307.) In contrast, a structural defect in "the constitution of the trial mechanism" defies harmless-error analysis because it affects "… the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.* at 309.) When there is structural error "… a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence …." (*Id.* at 309.)

The United States Supreme Court recently reaffirmed, "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that is `affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'[Citation.]" (*Weaver v. Massachusetts* (June 22, 2017, No. 16-240) __ U.S. __ [2017 U.S. LEXIS 4043] Slip. Opn. at 14.)

Distinguishing between "trial error" which may be assessed under the harmless-error test vs. "structural error" requiring reversal per se has spawned much litigation and debate. (See, e.g., McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless* (1997) 45

Kan. L. Rev. 1401; Edwards, *Madison Lecture: To Err is Human, But Not Always Harmless: When Should Legal Error be Tolerated?* (1995) 70 N.Y.U.L. Rev. 1167; and Tisdale, *A New Look at Constitutional Errors in a Criminal Trial* (2016) 48 Conn. L. Rev. 1665.)[2]

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[2] *Chapman's* distinction between trial vs. structural error involving federal constitutional rights mirrors California's own legal history.

As early as 1851 California statutes provided: "After hearing the appeal, the Court shall give judgment without regard to technical error or defect, which does not affect the ***substantial rights*** of the parties." (Stats. 1851, c. 29 § 267 [Emphasis added.]; See *People v. Cahill* (1993) 5 Cal.4th 478, 524.) Thus, in 1872 our Supreme Court denied a motion for new trial when it did not appear the alleged error affected defendant's "substantial rights." (*People v. Brotherton* (1874) 47 Cal. 388, 407.)

In 1911 the voters enacted the precursor to what is now article VI, section 13, of our Constitution, declaring: "No judgment shall be set aside, or new trial granted … unless, after examination of the entire cause … the court shall be of the opinion that the error complained of has resulted in a ***miscarriage of justice***." (Art. VI, § 4 ½ [Emphasis added.].)

Two years later our Supreme Court addressed what the voters meant by a "miscarriage of justice," explaining in terms presaging *Chapman* and *Fulminante*: "When we speak of administering 'justice' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which substantial rights belonging to the defendant shall be respected." (*People v. O'Bryan* (1913) 165 Cal. 55, 65.)

Our Supreme Court eventually held a "miscarriage of justice" should only be declared when, after examination of the entire case, the court finds it is reasonably probable a more favorable result would have been reached in the absence of error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The Court later characterized the *Watson* test as the "harmless-error test" generally applicable under California law. (*People v. Cahill* (1993) 5 Cal.4th 478, 492.)

But the Court noted even under *Watson* some errors, by their nature, result in a "miscarriage of justice" within the meaning of the California's harmless-error provision requiring reversal without regard to the evidence at trial. Our Court explained:

> …just as the United States Supreme Court recognized in its recent *Fulminante* decision that certain federal constitutional errors representing 'structural defects in the constitution of the trial mechanism' are not amendable to harmless error analysis

In Weaver Justice Kennedy explained structural errors generally fall into three categories. First, when the right is not designed to protect the defendant from erroneous conviction, but instead protects some other interest such as the defendant's right to conduct his own defense. (*Weaver, supra*, slip opn. at 15; See also *Waller v. Georgia* (1984) 467 U.S. 39 [right to a public trial]; and *Vasquez v. Hillery* (1986) 474 U.S. 254 [right to a grand jury free of racial discrimination.].)

Second, when the effects of the error "are simply too hard to measure, such as denying the defendant the right to conduct his own defense. (*Weaver, supra*, slip opn. at 15.)

Third, an error is deemed structural if it "always results in fundamental unfairness," such as denying defendant counsel or failure to give a reasonable-doubt instruction. (*Weaver, supra*, slip opn. at 16.) Such errors affect the very ***structure of a criminal trial*** such that the trial "… cannot reliably serve its function as a vehicle for the determination of guilt or innocence." (*Rose v. Clark* (1986) 478 U.S. 570, 577-578.) These include the right to an unbiased judge (*Tumey v. Ohio* (1927) 273 U.S. 273), an unbiased jury (*Sheppard v. Maxwell* (1966) 384 U.S. 333) and the right to counsel. (*Gideon v. Wainwright* (1963) 372 U.S. 335.)

Structural errors deny the defendant the "basic protections" of our criminal trials. (*Neder v. United States* (1999) 527 U.S. 1, 8.) They create the risk the jury will convict the defendant even if the State has

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> [citation], under the California harmless-error provision some errors similarly are not susceptible to the 'ordinary' or 'generally applicable' harmless-error analysis - i.e., the *Watson* 'reasonably probable' standard - and may require reversal if the judgment notwithstanding the strength if evidence contained in the record in a particular case.

(*Cahill* at 493.)

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not met its burden of proof (*Fulminante, supra,* 499 U.S. at 291), such that no criminal punishment may be regarded as fundamentally fair. (*Id.* at 309.)

Regardless how characterized, a structural error requires reversal without attempting to assess its effect on the jury's determination. Some structural errors, such as denying defendant counsel, are so "fundamental and pervasive" they require reversal without regard to the facts. (*Van Arsdall, supra,* 475 U.S. at 681.) For other structural errors, such as denying the defendant a public trial, it is simply impossible to assess the effect of the error. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140,149; *People v. Scott* (2017) 10 Cal.App.5th 524, 532.)

While it was error for the People and counsel for co-defendant Jacob to present supplemental argument in the absence of Sydnor and his attorney, the error did not affect the very structure of his trial such that the trial "cannot reliably serve its function as a vehicle for the determination of guilt or innocence." The error is thus not structural, requiring reversal per se.

Instead, the error should be evaluated under the harmless error test. Given the extensive evidence of Sydnor's guilt, the court finds the error was harmless beyond a reasonable doubt.

B. Sydnor was not denied his right to counsel

Sydnor's motion raises two separate claims as to his right to counsel: (1) the right to have counsel give argument; and (2) the right to have counsel present at a critical stage. Neither theory establishes a structural error requiring reversal per se.

i) Sydnor was not denied his right to argue

Sydnor notes the Sixth Amendment right to counsel includes the right of counsel to make closing argument. (*Herring v. New York* (1975) 422 U.S. 853, 858 ["There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial."].)

California too has long recognized defendant's constitutional right to give closing argument. (*People v. Green* (1893) 99 Cal. 564; See also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1185; *People v. Bonin* (1988) 46 Cal. 3d 659, 705; and *People v. Marshall* (1996) 13 Cal. 4th 799, 854.)[3]

Denying a defendant the right to present ***any*** argument is prejudicial, requiring reversal per se. Our Supreme Court explained: "The rule presuming prejudice particularly requires application in the instant case; it would be futile for us to attempt to measure prejudice on the basis of an argument which [defendant's] counsel never had the opportunity to present." (*In re William F., supra,* 11 Cal. 3d at 256; Accord *In re William G.* (1980) 107 Cal. App. 3d at 210, 216; and *Herring v. New York, supra,* 422 U.S. at 864 [Recognizing there was no way to know whether arguments counsel was not allowed to present might have affected the judgment].).

But these cases all address ***denial of the right of counsel to present argument***. That is not what happened here. Counsel presented full and unrestricted argument on behalf of Sydnor. Indeed, Sydnor had two

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[3] The right of counsel to present argument does not mean every limit on the time, scope or presentation of argument rises to structural error. (*Glebe v. Frost* (2014) 135 S. Ct. 429; *People v. Bonin, supra,* 46 Cal.3d at 695 and fn. 4; and *In re William F.* (1974) 11 Cal.3d 249, 256, fn. 6.)

Nor is every irregularity during argument structural error. (See, e.g. *People v. Marshall, supra,* 13 Cal. 4th at 852 [Bailiff snoring during defense argument

attorneys present separate closing arguments on his behalf: First Robert Blaiser challenged the DNA evidence presented against Sydnor (RT: 1463-1472.), followed by Kyle Knapp (RT: 1472-1490) who attacked the identification of Sydnor as "incredibly suggestive" (RT: 1478), explained the statements Sydnor gave authorities and challenged the circumstantial evidence of his phone records. Sydnor's counsel argued the investigators acted as advocates, focused on convicting him rather than finding the truth. Sydnor's counsel theme was "the fix was in." (RT: 1472.)

Sydnor thus had a full opportunity to present closing argument. What then of the jury's request for supplemental argument addressing Jacob's presence?

Sydnor does not assert his right to present supplemental argument in response to the jury's question was denied or impermissibly restricted. Though his supplemental argument was presented the next day, any detriment from not making a contemporaneous argument was offset in part by his counsel's ability to assess the transcript of the arguments by the People and co-defendant Jacob.

The California Supreme Court's discussion in *People v. Bonin, supra,* 46 Cal. 3d at 695 is instructive, finding failure to allow both defense counsel in a death penalty case to give arguments was harmless error. While it was error not to allow both defense counsel to argue (Pen. Code § 1095), the Court rejected defendant's claim he was thereby denied his right to have counsel present argument under *Herring v. New York* , supra, 422 U.S.at 858. The Court explained defendant's counsel had presented full argument on his behalf. There is no constitutional violation as long as the opportunity of the defense to "participate fully and fairly in the

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not structural error.]; and *Luu v. Colorado* (1992) 841 P.2d 271 [1992 Col. LEXIS 1033] [Lack of interpreter during argument.].)

adversary factfinding process is not significantly limited." (*Bonin* at 695; See also *Glebe v. Frost, supra,* 135 S. Ct. at 430 [Improper restriction of closing argument has never been recognized as structural error.].)

Sydnor was not denied his constitutional right to present a closing or supplemental argument. His opportunity to participate fully and fairly in the adversary factfinding process was not limited.

ii) Sydnor was not denied the right to counsel at a critical stage

Alternatively, Sydnor's motion for new trial raises the claim his counsel's absence during supplemental argument by the People and co-defendant Jacob denied his constitutional right to counsel at a critical stage of the proceedings. It did not.

It is indeed structural error, requiring reversal without any showing of prejudice, when counsel is either totally absent or prevented from assisting defendant during a "critical stage" of the trial. (*United States v. Cronic* (1984) 466 U.S. 648 [counsel unprepared]; *Holloway v. Arkansas* (1978) 435 U.S. 475, 489 [denial of separate counsel].) A defendant need only show counsel was absent from a critical stage of the proceedings to establish a constitutional violation. (*Green v. Arn* (6th Cir. 809 F2d 1257, 1263 ["Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost."].)

However, absence of counsel at other than a critical stage is subject to the harmless-error analysis. (*Rushen v. Spain* (1983) 464 U.S. 114, 118-119; *People v. Lightsey* (2012) 54 Cal.4th 668, 699; *Green v. Arn, supra,* 809 F.2d at 1263.) What is a "critical stage"?

There is no definitive list. The United States Supreme Court looks to three factors for determining what constitutes a critical stage where

substantial rights of the accused may be affected: Whether (1) failure to pursue strategies or remedies results in a loss of significant rights; (2) skilled counsel would be useful in helping the accused understand the legal confrontation; and (3) the proceeding tests the merits of defendant's case. (*Hovey v. Ayers* (9th Cir. 2006) 458 F3d 892, 901 [Citing *Mempa v. Rhay* (1967) 389 U.S. 128 and *United States v. Ash* (1973) 413 U.S. 300.].)

The California Supreme Court explains, "In limited situations … where the denial of counsel was for a discrete time or hearing only, the high court has recognized that the rule of automatic reversal is inappropriate. In such circumstances, the denial of the right to counsel, even during a critical stage in a capital case, does not require automatic reversal but is instead subject to harmless error review." (*People v. Lightsey, supra,* 54 Cal.4th at 700.) The Court distinguished between violations of the right to counsel that "pervade the entire proceeding" and those having a more limited effect, such as the admission of erroneous evidence. (*Ibid.*)

This court has found no case involving the facts here: Absence of counsel during supplemental argument at a jury's request regarding a co-defendant. Was it structural error requiring reversal per se? The court concludes it was not.

The absence of Sydnor's counsel during the supplemental argument on Jacob's presence did not "test the merits" of Sydnor's case or "pervade the entire proceeding" of Sydnor's trial. The motion for new trial fails to articulate what Sydnor's counsel would have done had he been present. As discussed above, the objections he stated he would have raised would have been overruled; the jury was instructed the supplemental arguments were solely in response to its request regarding Jacob and thus were not to be considered in the jury's deliberation as to Sydnor; and the jury was reminded the statements of counsel were not evidence.

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The court finds instructive *People v. El* (2002) 102 Cal.App. 4th 1047, where the court erroneously removed an obstreperous defendant acting in pro per for a portion of the People's argument, leaving the defendant without legal representation. Because defendant was left unrepresented "for only a brief time," the Court held the error did not require reversal per se, but was subject to the harmless-error analysis. (*Id.* at 1050.) The Court then found the error harmless, explaining:

> Appellant missed only the prosecutor's unadorned summary of the elements of the charged offenses and the evidence proving those elements …. Nothing in the prosecutor's assertions was objectionable and her workmanlike argument scored against appellant no more damage than that already inflicted by the state of the evidence. We can therefore say beyond a reasonable doubt that appellant's temporary absence during the prosecutor's opening argument did not affect the jury's verdicts.

(*Id.* at 1051; Compare with *People v. Ramos* (2016) 5 Cal.App. 5th 897, 912 [Pro per defendant's exclusion during presentation of evidence not subject to harmless error analysis.].)

The same analysis applies here. Given the limited scope of the supplemental argument, the instructions to the jury and the absence of any contention the presences of Sydnor's counsel would have affected arguments addressing Jacob's presence, the absence of Sydnor's counsel was simply not structural error requiring reversal per se.

C. Sydnor fails to demonstrate prejudice from his absence at the supplemental argument

Sydnor does not allege he was denied his separate right to be personally present for the supplemental argument. The court has

nevertheless considered this potential argument, and again concludes there was no structural error.

The defendant's right to be present is rooted in the confrontation clause of the Sixth Amendment, and also protected by the Due Process Clause even when the defendant is not confronting witnesses or evidence against him. (*United States v. Gagnon* (1985) 470 U.S. 522, 526; *United States v. Cazares* (9th Cir. 2015) 788 F.3d 956, 967.)

The Supreme Court explains: "… due process clearly requires that a defendant be allowed to be present to the extent that a full and just hearing would be thwarted by his absence. [Citation.] Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745.) California guarantees a similar right to be personally present. (Cal. Const., art. I, § 15; and Pen. Code § 977; See *People v. Bradford* (1997) 15 Cal.4th 1229, 1357.)

But the United States Supreme Court has never held exclusion of defendant from the proceedings is structural error per se. (*United States v. Cazares, supra*, 788 F.3d at 970.) It is trial error, requiring reversal only upon a showing of prejudice. (*Rushen v. Spain, supra*, 464 U.S. at 118-119; *People v. Perry* (2006) 38 Cal.4th 302, 311.)

The defendant's right to be present depends upon two conditions: (1) the proceeding is critical to the outcome of the case, and (2) the defendant's presence would have contributed to the fairness of the proceeding. (*Perry* at 312.) The Ninth Circuit explains:

> Thus, *Fulminante* and *Rushen* require us to consider the nature of a 'presence error' in the context of the specific proceeding

> from which the defendant was excluded. In the usual case, such error will be susceptible to the harmless error analysis, but a defendant's absence from certain stages of a criminal proceeding may so ***undermine the integrity of the trial process*** that the error will necessarily fall within the category of cases requiring automatic reversal.

(*Hegler v. Borg* (9th Cir. 1995) 50 F3d. 1472, 1476 [Emphasis added.])

Defendant has the burden to demonstrate his absence at the supplemental argument denied him a fair trial. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1254; *People v. Delgado* (2017) 2 Cal 5th 544, 569.) The motion for new trial offers no showing how Sydnor's presence would have changed the supplemental arguments presented as to Jacob. (See, e.g., *United States v. Cazares, supra*, 788 F.3d at 970 [No showing defendant's presence would have changed the composition of the jury panel.].)

D. There was no structural error

Whether analyzed as denial of counsel's presence, preventing argument by counsel or denial of defendant's own presence, the presentation of supplemental argument by the People and Jacob on the question of Jacob's presence in the absence of Sydnor and his attorney was not structural error.

As discussed above, the brief nature of the supplemental argument, the limiting instruction given the jury, Sydnor's response the following day and the absence in the motion for new trial of demonstrated harm each support a finding there was no structural error.

Structural errors requiring reversal per se "are the exception and not the rule." (*Rose v. Clark, supra*, 478 U.S. at 578; *Neder v. United States, supra*, 527 U.S. at 8.) The United States Supreme Court explains, "Most

constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness. [Citation.] Only the rare type of error - in general, one that 'infects the entire trial process' and 'necessarily renders it fundamentally unfair' - requires automatic reversal. [Citation]." (*Glebe v. Frost, supra*, 135 S. Ct. at 430.) Structural errors deprive the defendant of the "basic protections" without which the trial "cannot reliably serve its function as a vehicle for determination of guilt or innocence … and no criminal punishment may be regarded as fundamentally fair." (*Neder* at 9.)

Our California Supreme Court cautions structural errors apply "only in a very limited class of cases." (*People v. Merritt* (2017) 2 Cal.5th 819, 826.) If the defendant had counsel and was tried by an impartial adjudicator, there is a "strong presumption" any constitutional error that may have occurred is subject to the harmless-error analysis. (*Id.* at 826 [citing *Neder, supra*, 527 0-5 at 8-9.) For an error to be structural, it must affect the "entire framework" within which the trial proceeds. (*People v. Reese* (2017 2 Cal 5th 666, 668.)

The error here simply does not rise to this level.

Reversal of defendant's conviction without a showing of actual prejudice would result in an unjustified "windfall." (See *People v.* Scott, *supra*, 10 Cal.App.5th at 532.) For this reason, the United States Supreme Court has been called "parsimonious" in adding to the list of structural errors (*Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141.) The Fourth Circuit explains:

> Given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and the Constitution does

> not require one. [Citation.] This focus on fairness, rather than on perfection, protects society from individuals who have been duly and fairly convicted of crimes, thereby promoting 'public respect for the criminal process'. [Citation.][¶.]
>
> Correctly applied, the harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can also be a dangerous endeavor. There is always the risk that a sometimes harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk judges should be very wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of errors (and thereby requires the reversal of every criminal conviction in which the error occurs), the court must be certain that the error's presence would render *every such trial unfair.* [Citation.] … [¶.]
>
> After all, our criminal justice system represents a balance between the rights of accused persons and the need for public safety. This balance is best expressed in the notion of a fair, but not a perfect, criminal trial. When an error is misclassified as one requiring automatic reversal, the balance is upset, and proceedings that in reality are perfectly fair are discarded in the name of an elusive systemic perfection.

(*Sherman v. Smith* (4th Cir. 1996) 89 F3d 1134, 1137 - 1139 [Emphasis original].)

In the absence of controlling precedent, this court will not add to the list of errors deemed structural so as to require reversal per se here.

E. The error here was harmless beyond a reasonable doubt

It was error for the People and Jacob's counsel to refer to Sydnor's involvement in the absence of Sydnor and his attorney. But was the error harmless in light of the entire trial and evidence? It was.

In conducting a harmless-error assessment, the court must determine beyond a reasonable doubt the error did not "influence the verdict." (*Rushen v. Spain, supra*, 464 U.S. at 119.) Our California Supreme Court describes the harmless error inquiry: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*People v. Merritt, supra*, at 827.)

Justice Scalia put it slightly differently, explaining the court does not consider what effect the error might generally be expected to have upon reasonable jury, "but rather the effect it had upon the guilty verdict in the case at hand." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) "The inquiry … is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Ibid.* [Emphasis original.])

But even the harmless error analysis "involves some level of indeterminacy." (*Sherman v. Smith, supra*, 89 F.3d at 1140.) Chief Justice Rehnquist observed, "… any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict." (*Sullivan v. Louisiana, supra*, 508 U.S. at 284 [Rehnquist, C.J., concurring].)

With these principles in mind, upon review of the evidence here the court finds the absence of Sydnor and his attorney from the supplemental

arguments addressing Jacob's presence was harmless beyond a reasonable doubt.

As discussed above, the evidence against Sydnor was extensive: His DNA was found on the tape binding Darbonne; he was identified on videotape driving a van following Darbonne before the shooting and leaving the scene after the shooting; he was identified by an eyewitness as "similar" to the man seen running from Darbonne's house to the van; his phone records place him in the vicinity of the shooting at the time; following the shooting Jacob told his girlfriend he needed to get Sydnor out of town; and Sydnor changed his flight back to Philadelphia to leave soon after the shooting.

Sydnor points to argument by Jacob's counsel that Sydnor could have decided to commit the robbery entirely on his own. But Sydnor's own supplemental argument addressed this, the jury was instructed it was not to consider the supplemental argument regarding Jacob in determining Sydnor's guilt, and the jury was re-instructed that comments of counsel were not evidence. In the end, whether the jury concluded Sydnor devised the robbery with Jacob, or in concert with unknown others as argued by Jacob, could have had no impact upon the jury's verdict of Sydnor's guilt.

Thus, Sydnor's short absence from the limited proceeding where that argument was made to the jury could not have harmfully influenced the jury's verdict as to him. It could not as a matter of law, and apparently did not as a matter of fact in light of the jury's verdict of guilt as to Jacob. Beyond this, defendant's motion for new trial articulates no specific prejudice from the supplemental argument, conceding an analysis of prejudice here is "impossible." (Motion, 6:18.)

Based upon its review of the entire record, the court finds the error was harmless beyond a reasonable doubt - the jury's verdict finding Sydnor

guilty of murdering Darbonne was "surely unattributable" to the supplemental argument presented on whether Jacob was present at the scene.

Conclusion

Defendant's motion for a new trial is denied.

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Superior Court of California,
County of Sacramento

BY: M. GARCIA,
Deputy Clerk